



CNA HealthPro

FAQs – Responsibility of Associates

Q. A dentist who formerly worked in my office as an independent contractor did a bridge for a patient last year. He left to start his own practice four months ago. The patient recently returned to my practice, complaining about the bridge and wanting it remade. I examined her and found an open margin on one of the abutments. Since I had not made the bridge myself, I suggested she see my former associate. Later, I received a phone call from the patient, informing me that my former associate told her to pursue the matter with me, since the payment check was made out to my practice. What can I do to make my former associate accept responsibility for his work?

A. The scenario you describe is fairly common among dentists who had or currently have associates, as well as among the current or former associates.

State legislatures do not enact laws that address who has primary liability in this type of case. Therefore, who is accountable depends at whom the patient points her finger and pursues responsibility. The patient could pursue correction and/or reimbursement from the clinician who actually provided the care (who now is gone), or the business entity to whom she paid her money, which is owned by you. Or she could pursue both. Therefore, a shared responsibility exists for the two of you, both for clinical outcomes and the financial costs. Both of you have potential liability, and it is in each of your best interest to try to address the patient's needs.

Some dentists mistakenly believe they can insulate themselves from liability in such cases by paying the associate as an independent contractor (IC) rather than as an employee. However, vicarious liability is not limited to liability resulting from the actions of employees. It also may arise from the actions of anyone with whom the dentist has, or *appears to have*, a supervisory relationship, such as the independently contracted dentist. This less direct application of vicarious liability involves the legal theory of apparent agency, also called ostensible agency.

Regardless of Internal Revenue Service or other accounting tests for independence, an important liability consideration is whether the patient had a clear understanding of the independent status of the independent contractor. If a patient held a *reasonable belief* that the other practitioner was associated with your practice, or that you were in some way a supervisor or manager of the IC, that practitioner may be considered your "apparent agent." Thus, it would become difficult for you to fully extricate yourself from responsibility.

The closer the apparent connection between the dentists, the more reasonable the patient's belief and the greater the degree of vicarious liability. For example, the fact that the fees were paid to your practice, rather than directly to the IC, would be one aspect of apparent agency on your part. The fee payment to your office would lead a reasonable person to believe the IC worked for your practice. In addition, was there signage on the wall or an information sheet given to patients that explained the separate nature of your practices? If not, a reasonable patient may have believed the IC worked for your practice.

By identifying the independent status of the dentist in question, you may be able to reduce the risk of liability under the theory of apparent agency. A clear disclaimer of responsibility may reduce your risk in such circumstances. Some additional strategies to diminish the risk of apparent agency liability include:

- Place independent practitioners' names in a separate location on the building marquee. The more obvious the separation, the more likely a reasonable person would question whether the two practices were somehow "connected."
- Include a demarcation between the primary dentists' names and the independent dentist's name on entry and exit doors. Again, a reasonable person should notice there is an apparent separation between the practices.
- Produce a brochure that lists the practice hours, the services performed, and the names of the dentists in your practice. This would inform readers of the brochure that the independent dentist is not associated with your practice. The independent dentist also could produce a brochure for his or her patients with corresponding information.
- Add a clause to the agreement between you and the independent dentist requiring the independent dentist to inform each patient of the separate nature of the practices. This procedure would limit the potential for a vicarious liability claim.
- Ensure that brochures and other information concerning the independent dentist's practice are not available to your patients, and vice versa.
- Specifically tell patients at the time of any referral to the independent dentist that his or her practice is independent of yours, even though that dentist rents your office space.

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