



CNA HealthPro

Vicarious Liability

Vicarious liability is based in part on the legal concept of *respondeat superior*, which holds the “master” (employer) responsible for the acts or omissions of its “servant” (employee). When a person employs another for his or her own profit, fairness demands that the person also take responsibility for managing the risks and paying for the damages associated with the employee’s work. Dentists, as employers, are vicariously liable for the negligent actions of staff members acting within the scope of their employment.

Vicarious liability is an important concept in both risk management and patient management. Even when the services provided by the dentist meet the standard of care, there is the possibility that an employee in the office will do or not do, say or not say something that will negligently cause a patient injury. This significantly expands the risk to both the patient and to the dentist.

Vicarious liability for the actions of others is not limited to employees. In general, patients can reasonably expect all of the personnel they see in your office to be supervised by you. The fact that a dentist or a hygienist is an independent contractor may have tax and benefit consequences distinguishing them from employees. However, their independent contractor status may be irrelevant in terms of vicarious liability. For example, a dentist who enters into a contract with an independently contracted hygienist will have vicarious liability exposure for the conduct of the contracted individual. Once you have assumed a certain degree of authority over your personnel, employed or contracted, you also share their risk.

Is this just? The courts and legislatures agree that it is just, even if it seems unfair to the dentist employer. The law in all states is clear that an employer is responsible for the negligent actions of his or her employees within the scope of their employment. Courts have stated that if the law was not structured in this manner, employers would be more likely to delegate responsibility for making important health care decisions to unqualified employees — without any recourse or redress available to injured patients. Vicarious liability is intended to provide the consequences necessary to motivate most employers to delegate only to responsible employees, to appropriately train employees, to hire skilled employees and to replace those who will not follow established policies and procedures.

If vicarious liability did not exist, patients who suffered identical injuries under slightly different circumstances would not receive comparable compensation. The patient who received bad advice directly from the dentist would receive compensation under such a tort system, but the patient who suffered an identical injury from the same advice given by the dentist’s employee would have no cause of action.

Claims based on vicarious liability are far more likely to be brought against the dentist who does not establish office policies and procedures to control all personnel. At highest risk are dentists who cannot find the time or money to train employees, who are willing to hire unqualified staff, who fail to supervise and evaluate, who delegate authority irresponsibly, and who keep staff members employed when they do not perform in the best interest of the practice and its patients.

Reducing Vicarious Liability Risks

Vicarious liability can be a significant area of vulnerability for dentists. The techniques used to reduce vicarious liability risks also provide a higher quality of patient care. The following suggestions can help you minimize vicarious liability risks:

- Think of your employees' professional actions as extensions of your own — and make sure that your staff also views their actions this way. The dentist must set the practice's tone, control work procedures and supervise all staff members.
- Foster a positive attitude and open communication in your practice.
- Hire staff members with good communication, interpersonal, and technical skills.
- Establish written, well thought out policies and protocols that give direction to your staff.
- Clearly document in writing each job description's duties and responsibilities.
- Verify current licensure of all employees whose jobs require licensure.
- Review your state's dental practice act – you and your employees must practice within the limitations imposed by this statute. Do not assign to auxiliaries any duties that violate it.
- Be certain your professional liability insurance policy includes vicarious liability coverage. (For example, the CNA Professional Protector Plan® for Dentists issues a policy that includes this coverage.)
- Examine the job and employment credentials of all your staff members — both salaried employees and independent contractors. Check the references listed on resumes.
- Conduct performance reviews at least annually.
- Provide adequate training for staff members.
- Encourage and financially support staff attendance at continuing education courses that update their knowledge and skill.
- Certify your staff in CPR (cardiopulmonary resuscitation).
- Supervise each employee from the outset of employment to assure the employee has adequate knowledge and skill to perform assigned duties.
- Hold regular staff meetings to strengthen office policy and improve staff communication.
- Respect and show confidence in your staff, especially when patients are present.

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