

The conduct of others

In this, the second part of a two-part series, the author explores “vicarious liability” as it relates to dental partnerships.

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Part I of this series explored lawsuits that name the practice owner as a defendant, even though the allegedly improper conduct that spawned the suit was committed by the owner's associate—a development known in the law as “vicarious liability.”

Part I also reviewed ways den-

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tists could guard against such suits. Part II of this series addresses the liability arising from the actions of a dentist's partner.

A basic tenet of partnership law holds that each partner is individually liable for the actions of all other partners. For dentists, this means that if the legal entity that owns the practice is a partnership, you, as a partner, proba-

bly are vicariously liable for the actions of your colleagues. For example, if one partner is accused of malpractice, his or her partners will be vicariously liable to the patient even though the other partners never treated that patient.

That may seem unfair, but vicarious liability is a fundamental legal concept, one that is unlikely to change in the foreseeable future.

So how can dentists protect themselves against this kind of

liability? There's only one way: avoid the partnership form of ownership for a dental practice. You can, as an alternative, use a solo group arrangement, in which you join with one or more individual practitioners who have separate patient bases, and all of you merely share expenses.

Another option is to form a dental corporation. If you are incorporated, the corporation and the treating dentist will be named as defendants in a lawsuit, but other shareholder dentists could not be brought into the lawsuit as individuals.

Even if you merely share office expenses with another dentist, however, you may be liable for

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the actions of your office mate. Dentists in "solo group" practice who share the services of employees or cover patients for one another can be held liable for the actions of their colleagues in the practice.

Consider these three problem areas:

Lack of workers' compensation insurance: If an employee of one dentist is injured on the job, and that employee's boss does not have workers' compensation insurance, the employee may pursue a claim against the office-sharing dentist who has used the employee's services in the past, even though no salary was paid.

You can protect yourself from this kind of liability if you require that all dentists who share expenses or office space with you obtain and maintain workers' compensation insurance. These other dentists should provide you with written confirmation of this coverage at least once a year. (You must, of course, provide them with a similar confirmation.)

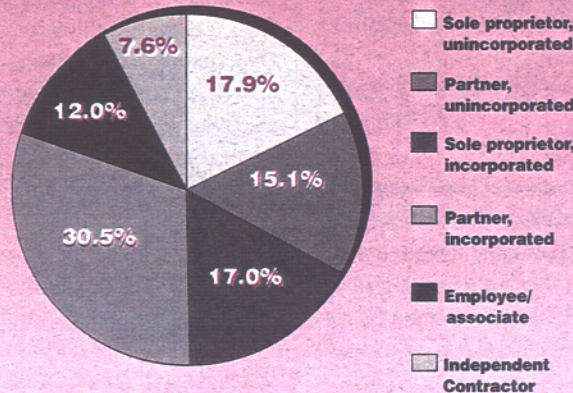
Also, you can require, in a written agreement, that all expense/office-sharing dentists provide workers' compensation insurance to their employees, and that if any dentist breaches that provision, he or she must defend, indemnify and hold you harmless for any claim pursued by an employee.

Lack of malpractice liability insurance: Even in a solo group practice, you run the risk of being brought into a lawsuit filed by a patient against another dentist in the group.

Suppose a patient filing a malpractice claim against another dentist in the group discovers that the other dentist has no malpractice coverage. The patient may decide then to bring you, as an insured dentist, into the law-

Practice modes—Nonsolo dentists

In 1994 about 45 percent of U.S. nonsolo dentists were engaged in a partnership, either incorporated or unincorporated.



Source: 1995 Survey of Dental Practice, ADA Survey Center

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suit in order to reach the "deep pocket" provided by the malpractice policy.

The legal basis for this maneuver may be that the dentists in the solo group are really operating as partners, or the dentists have covered for one another.

You can protect yourself against this liability, first, by requiring that all members of your solo group carry malpractice insurance and exchange written information of this coverage every year (just as you do with the workers' compensation insurance discussed above).

Second, you also can require that the written agreement among dentists in the solo group state that malpractice insurance

is required, using the same kind of language as that described above (that is, that a dentist who breaches this agreement will defend, indemnify and hold other group members harmless for claims brought against the breaching dentist).

Third, make sure that the written agreement specifically states that the solo group is not a partnership, and otherwise maintain a distinct and separate identity in the practice. For example, use separate business cards, separate letterhead and separate billing statements so that there is no basis for a plaintiff's claim that you are partners.

Lack of premises liability insurance: Another problem area is premises liability. Suppose a patient of record of one dentist in the solo group trips on the carpet on the way to the operator. If that patient's dentist has no premises liability or "office package" insurance that covers the claim, the patient may pursue a claim against the space-sharing dentists who have such coverage.

You can protect yourself against this kind of liability much as you protect yourself

from the two other kinds of liability described above.

First, every member of the solo group should be required to have premises liability or office package insurance. As an alternative, the group can purchase one policy that covers all the dentists against such claims. This requirement should be included in the written agreement between the solo group members, with the same indemnification language set out above.

Finally, if each solo group member purchases not only premises liability coverage but also insurance for the loss of personal property (that of the other members as well as their own), insurance will provide additional coverage in case of a fire or flood.

All of the dental equipment and other personal property in the office will be covered under these policies. The group members will then have no need to pursue claims against one another in an attempt to pin the blame on whoever caused the casualty.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE:

- Dentists can protect themselves against vicarious liability by avoiding the partnership form of ownership for a dental practice.

- Dentists in a solo group practice can protect themselves from vicarious liability by requiring all group members to carry insurance covering workers' compensation, malpractice and premises liability—and by requiring written agreements and an exchange of written information to ensure that coverage has been purchased and maintained.