The conduct of others

It's called "vicarious liability," and it can cost you plenty. It's about your being held liable for the conduct of your partners or associates. So what can you do to protect yourself?

BY RONALD P. GOLDMAN, J.D.
The Goldman Law Firm
San Francisco, Calif.

FIRST OF TWO PARTS

Though you practice dentistry according to the highest standards of the profession, you may worry about liability arising from the conduct of others in your office.

How can you minimize the chance that you will be held liable for the conduct of others? There are two fundamental theories of liability you should understand: "direct liability" and "vicarious liability."

Direct liability results from the dentist's own conduct, like the dental treatment he or she provides directly to a patient. Vicarious liability is imposed on a dentist through the improper conduct of another, such as an associate dentist. The dentist is considered liable because of a responsibility imposed on him or her by the law.

Vicarious liability is more easily understood by looking at some common examples from dental practice.

When Is a Practice Owner Liable for Acts of an Associate?

The law generally holds a practice owner liable for the actions of his or her associate when that associate is acting for the financial benefit of the practice owner. This is true whether the associate dentist is viewed as an "employee" or an "independent contractor."

Consider two possible problems: malpractice and sexual harassment.

Malpractice action: Suppose a patient not only sues the associate dentist who treated him or her, but also sues the practice owner who never treated the patient, basing that claim on the theory of vicarious liability.

The practice owner is less likely to be included in a malpractice claim if the associate dentist carries his or her own malpractice insurance. When a treating associate has his own "deep pocket," the patient's attorney has a greatly reduced incentive to include the practice owner in the lawsuit. But if that associate does not have malpractice coverage, then the practice owner is far more likely to be included as a defendant in the lawsuit. The owner then would be the deep pocket the patient seeks to pay any damages awarded.

If both the owner and the associate are insured, however, there is little incentive to include the owner in a suit because the patient can collect for only one injury; the value of the patient's claim does not increase even though more than one dentist is sued.

In such a case, the patient's attorney actually has an incentive to leave the owner out of the suit because suing two insured dentists would likely result in two sets of defense attorneys and experts, creating more work for the patient's attorney. For this reason, a practice owner should require that an associate obtain his or her own malpractice insurance.

There are two other ways a practice owner can limit exposure to a malpractice claim resulting from an associate's treatment. First, the owner should have a written agreement with the associate clearly stating that the associate is liable for his or her own malpractice and will defend, indemnify and hold harmless the practice owner for such claims. (This is called "indemnification" language.)

Second, the owner should require that the associate name the owner as an additional insured on the associate's malpractice policy so that if the practice is named in a lawsuit, the claim will be against the associate's policy instead of the practice owner's policy.

Sexual harassment: In the past few years, sexual harassment claims against alleged harassers—and against those who might have a vicarious responsibility to the victim—have increased dramatically. If a patient or an employee of a practice owner brings suit alleging sexual harassment by an associate dentist, the practice owner is likely to be included as a defendant.

Practice owners can do several things to protect themselves from this kind of liability. First, they should maintain a consistent office policy against sexual harassment of patients and employees. This policy should be issued in writing by the practice owner, and it should apply to every associate dentist, employee and independent contractor who works in the office.

Further, sexual harassment should not be tolerated in the office; if the practice owner suspects or observes any questionable behavior, the owner should immediately caution the associate involved. In addition, owners should check with their local insurance brokers to inquire whether insurance coverage is available for a sexual harassment claim.

This kind of policy typically covers only attorneys' fees and court costs, but those expenses can be substantial. If such coverage is available, an owner should require that the associate obtain a policy and name the practice owner as a coinsured under the policy. The owner should also include the requirement to maintain this kind of coverage as part of the associate agreement, along with the indemnification language discussed earlier.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE

- Under the theory of vicarious liability, dental practice owners can be held liable for the misconduct of an associate or an employee, even when the practice owner never acted improperly.
- To avoid malpractice liability, practice owners should require that associate dentists obtain and maintain their own malpractice insurance, and that they sign a written agreement stating that the practice owner will not be liable for the associate's malpractice.
- To avoid liability for alleged sexual harassment by an associate dentist, the practice owner should have a written office policy against harassment and take other steps to place responsibility for such conduct on an offending associate.