The Wager-Smith Law Firm

California

DENTAL LAW ADVISOR

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in this issue

Introducing e-stat

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WHAT'S IN A NAME?
Independent Contractor vs. Employee

So you're just beginning your career and are looking for the perfect first "associate" position. Or, you have an established practice and want to increase production by hiring an associate dentist. Should you structure your new relationship as that of an independent contractor or regular employee? And what are the legal implications for both? Here, we briefly describe the factors used to determine the status of such working relationships and some of the consequences of each.

- **It's All About Control:** Under California law, determining whether a relationship is properly classified as one of an independent contractor or employee is largely dependent on control. Specifically, whether the practice has the right to control the manner and means by which the associate accomplishes the result desired. That is, the more control a dental practice exerts over the who, what, why, how, and when of treatment, the more likely it is that the associate will be found to be a regular employee. Importantly, the label placed on the relationship by the parties is not dispositive. Merely signing an "Independent Contractor Agreement" does not guarantee that the relationship will be interpreted as such by courts, the IRS, or administrative bodies if it is called into question.

- **Other Factors:** In addition to control, other factors that are considered include: 1) whether the associate is engaged in a distinct occupation or business; 2) whether the work being performed is usually done under the direction of the practice; 3) the skill required in the work; 4) whether the practice provides the supplies and instruments to the associate; 5) the method of payment; 6) whether the work being performed is part of the regular business of the practice;

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What Not to Do When Sued by a Patient

So, you've been served with a Complaint by a patient who is suing for malpractice — now what? Here are some things you should never do:

1) Don't Panic:

You pay professional liability insurance premiums for a reason. In 99.99% of cases, your policy will cover the worst of outcomes, your personal assets are almost never in jeopardy, and there is rarely any lasting impact on your professional reputation or insurability. Take comfort in knowing that most dentists get sued at some point in their careers and that your malpractice carrier has assembled an experienced team of adjusters, attorneys, and experts who are dedicated to protecting your interests.

2) Don't Alter the Chart:

Poor charting is defensible, an altered chart never is. Never amend a chart after receiving notice of a lawsuit. Altered charts always command higher settlement values and result in higher jury verdicts. Also, altering a chart is grounds for professional discipline by the Dental Board and can result in the loss of insurance coverage for the claim.

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Name:

7) the length of time the work is to be performed, and; 8) whether the parties believe they are creating an independent contractor relationship. Thus, in order to maximize the chances that the associate will be properly deemed an independent contractor, attention should be devoted to the following:

- A well-crafted written agreement should be used to confirm the intent of the parties to create an independent contractor relationship. The agreement should specify that the associate will exercise their own independent professional judgment in the treatment of patients;
- The associate should be paid a percentage of collections on their production and be issued a 1099 annually;
- The associate should maintain control over their own schedule and, if possible, work at multiple offices as an independent contractor;
- the associate should maintain their own professional liability insurance;
- the associate should pay their own professional licensing, association memberships, and continuing education fees;
- the associate should be expressly permitted to use their own instruments and tools.

- **What Difference Does it Make?:** Whether the relationship is deemed to be that of an independent contractor or employee can have significant liability and tax implications for both the associate and the practice. Indeed, as an independent contractor, the associate is legally liable for their own malpractice, while the malpractice of an employee is imputed to their employer. Moreover, courts have held that the employer of a dentist has no duty to obtain the employee dentist's consent before settling a malpractice claim on their behalf. Therefore, a legitimate independent contractor relationship can minimize malpractice exposure for a practice, while vesting associates with greater control over how litigation against them is managed and ultimately resolved. In addition, the owner of a practice is generally immune from discipline by the Dental Board for the actions of an independent contractor associate. Similarly, the independent contractor associate is generally not subject to professional discipline for the actions of regular employees or other independent contractor dentists employed by the practice.

Of course, independent contractors receive none of the benefits of employment, including disability or unemployment insurance, workers' compensation insurance, medical insurance, sick leave, vacation pay, family leave, or overtime pay.

- **Federal Tax Implications:** Obviously, an employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to regular employees, while independent contractors are responsible for their own withholding and tax obligations. The IRS weighs a number of factors, including those of control, in determining the correct status of working individuals. Of note, the IRS has specifically opined that dentists "are generally independent contractors." However, if the IRS determines

an associate has been misclassified as an independent contractor, the practice may be made to pay for back employment taxes. An employer may be relieved of this obligation if it is determined that the employer had a "reasonable basis" to believe the relationship was in fact that of an independent contractor. Therefore, we recommend seeking the advice of legal counsel when considering the formation of an independent contractor relationship as it may provide the "reasonable basis" cover to shield the practice from liability for back employment taxes should the IRS come calling. •

Recent Results:

The Worth of a Tooth: Patient sued dentist for mistakenly extracting lower 2nd molars instead of lower 3rd molars. Patient's attorney sought punitive damages (not covered by insurance) and demanded that we begin our settlement discussions with an offer of $50,000. Although we admitted negligence, we argued that the patient had suffered no real harm as the 3rd molars had moved into the position of the 2nd molars and were nearly anatomically identical to the extracted 2nd molars. We made a pre-trial settlement offer of $10,000. On the eve of trial, the patient made a final demand of $99,000. We successfully defeated the punitive damages claim and, after a brief trial, the jury returned a verdict for $15,000.

These results are illustrative only and are not intended to constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.

Patient's Words Used Against Him: Patient sued general dentist more than two years after extraction of a lower wisdom tooth that left him with a lingual nerve injury. The patient alleged the one year statute of limitations had not expired because he was not aware of his injury until a subsequent treater advised him that his injury was permanent. At deposition, we were able to get the patient to admit that he began to suspect the dentist had done something wrong, which had caused his injury, within days of the subject extraction. Based on this testimony, we filed a motion for summary judgment arguing that the patient had failed to bring his action within the one year statute. While the motion was pending, the patient agreed to dismiss the case and take nothing. •

Employment Law Update

Limits on E-Verify: (AB 622)

Makes it an unlawful employment practice to use E-Verify, when not required to do so by federal law, to check the employment status of an existing employee or applicant for employment. Also mandates that employers provide to affected employees any notification issued by the Social Security Administration or US Department of Homeland Security which contains information specific to the employee's E-Verify case or any tentative non-confirmation notice "as soon as practicable." Provides for civil penalties of $10,000.00 per violation. Effective 1/1/16.

Anti-Retaliation: (AB 1509)

Prohibits employers from retaliating against an employee who is a family member of an employee who made a protected "whistleblower" complaint. Effective 1/1/16.

Judgment Collection:(SB 588)

Gives Labor Commissioner enhanced power to collect on judgments entered against employers for unpaid wages. Among other things, gives employers 30 days after the time to appeal the judgment to pay, or to obtain a bond, in order to continue doing business in California. Effective 1/1/16. •

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Don'ts:

3) Don't Call The Patient: Although your first instinct may be to try to work things out with the patient, this is always a bad idea. Instead, notify your malpractice carrier immediately and let them begin to handle the situation.

4) Don't Talk: Discussions with subsequent or co-treaters are discoverable and attempts to contact treaters, like calls to the patient, no matter how well intentioned, are always argued by the patient's attorneys as attempts to cover tracks. Simply put, the less said the better. •

REPORTING LIMITS: why should you care?

California Business and Professions Code, section 801(c), sets forth the reporting requirements applicable to dentists. This statute mandates that your malpractice insurer must report to the Dental Board any claim for malpractice that results in a judgment or settlement of over $10,000. However, even judgments and settlements of less than $10,000 are reported — so why should you care?

First, all judgment and settlement amounts, even if for only $1, get reported to the National Practitioner Data Bank, of which the Dental Board has access and receives notices of Data Bank reporting. However, a report to the Data Bank does not trigger the investigative obligations of the Board like a direct report form your malpractice insurer does. Also, Data Bank information is not accessible to the general public and will not appear in response to online searches by prospective patients. Data Bank information is primarily used by insurance companies and health care institutions in making underwriting and employment decisions. Therefore, those who have hospital privileges may have more interest in what is reported to the Data Bank. Generally speaking, however, most dentists are not adversely affected by information reported to the Data Bank on their behalf.

As for mandated reports to the Board by malpractice insurers, they too generally have little adverse impact on dentists. The Board is charged with investigating and disciplining those who engage in "gross" negligence or repeated acts of negligence. A report to the Board of a judgment or settlement in excess of $10,000, even if for $100,000, is not likely to elicit anything more than a perfunctory Board request for records, unless the case involves gross or repeated acts of negligence. •