The National Society of Dental Practitioners
RISK MANAGEMENT Newsletter
Volume 37 | No. 1

Reducing risks in independent contracting

One of the benefits of working in dentistry is that dentists have the opportunity to work in many settings, including clinics, offices, and hospitals. This may mean working for an organization as an employee, or as an independent contractor (IC). Working as an IC can allow dentists to start building their own practice while limiting the financial overhead required to start a new dental practice. Engaging with an IC can also allow dental practices to enhance the range of services available at the practice location while saving on labor costs.

When considering working as, or with, an IC, it is important to be aware of the associated risks and benefits of an IC versus as an employee. Knowing the differences between an employee and an IC, some basic contract terminology, and tax considerations will help keep risks to a minimum.

Employee vs. IC

In general, someone is considered an IC if the business they are providing services for has control over the *result* of the work, but not *what* will be done or *how* it will be done. ICs perform specified work for a business in exchange for payment but receive no benefits such as vacation or sick time. Whether a dentist works as an employee or an IC affects how their taxes are paid and the applicability of labor laws. Two key points for ICs are:

- The business does not withhold tax, Social Security, or Medicare taxes from payment.
- Employment and labor laws do not apply.

It can sometimes be unclear as to whether someone is an IC as opposed to an employee. There is no "checklist" that can be used to make a distinction between an employee and an independent contractor, since the determination must be made on a case-by-case basis. Depending on the particular facts and circumstances, there are factors that are commonly analyzed to determine the nature of the relationship between parties. The U.S. Department of Health & Human Services provides the following questions to help in making the distinction:

- Does the business control or have the right to control what the worker does and how the worker does the job? As noted earlier, when the business can control the result of work but not how the work is done, the worker usually is an IC.
- Does the business control the business aspects of the worker's job? These include how the worker is paid, whether expenses are reimbursed, and who provides tools and supplies. The business has greater control in the case of an employee.
- Is there a written contract or employee benefits such as a pension plan, health insurance, or vacation pay? Although both employees and ICs may have contacts, ICs do not receive benefits.
- Will the relationship continue and is the work a key aspect of the business? An IC contract specifies the length of time that work will be provided.

Any engagement between a worker and an employer should be formalized in writing, especially because of the tax implications. Li v KC Dental Pty Ltd & Ors provides an example of the legal issues that can arise when workplace arrangements are not formalized in writing.

Contract components

A contract between an IC and the dental practice or organization they work with helps ensure there is a mutual understanding of factors such as services provided and payment. It also can protect the IC from negative effects, including unexpected termination and extended work hours.

The contract will usually be between the IC and the business or organization. The first part of the contract will state that the dentist is an IC so that it's clear there is no employee-employer relationship. This may be further emphasized by a statement that the IC will not receive any benefits and that the business will not withhold any taxes. Some of the elements typically included in contracts include the following:

Duration. The start and end date for the work should be stated. If the work continues beyond the planned end time, the IC should be asked to sign an addendum for the new time frame.

Scope of work. This is similar to the responsibilities in a job description. This section should provide sufficient detail so both parties are clear about expectations. The contract may specify measures the IC must meet to receive payment. For instance, the IC may need to treat a certain number of patients each week. An appendix may be used to provide more information.

Equipment. Depending on the work, the business may provide the IC with equipment or give them access to equipment on site. The IC may be responsible for paying for certain supplies, lab fees, or administrative costs. More information may be outlined in an appendix.

Patient records. Generally, employee-dentists do not own patient records, whereas an IC dentist may have their own patient pool and thus have ownership over their own patients' records, unless otherwise stipulated in the contract. If the dentist does not own the rights to patients' records as an IC, they should secure the right to photocopy the records of treated patients to defend themself in case of a malpractice lawsuit, peer review, or dental licensing board action.

Compensation. Employees are paid at an hourly or annual rate, but ICs may be paid based on an amount of time worked, or when specific contracted work is completed. The IC will need to submit an invoice for payment. ICs should be sure the due date (30 or 60 days are the most common options) is stated in the contract and on the invoice. Normally the IC pays any expenses, but if the business will cover something, it is included here.

Warranties and professional capacity. This section states that the IC has the capacity and methods that "warrant" they will complete the work.

Confidentiality. This clause forbids ICs from discussing the work or the business's business details with another party; doing so will result in a breach of contract.

Early termination. This section notes that the contract can be terminated if either party fails to meet expectations. Those expectations should be clearly stated within the contract.

continued, pg 2 ...

Disputes. The contract will name which state's regulations govern the agreement and outline the process to follow if a dispute occurs. This may include the use of arbitration or mediation.

To ensure that the professional relationship is properly classified for legal and tax purposes, it is helpful for each party to have an attorney review the contract before signing. After the contract is signed, both parties have to agree to any future changes.

Tax time

As an IC, you can operate as a sole proprietor, a ICs can operate as a sole proprietor, a limited liability company (LLC), or an S-corporation. A sole proprietorship is an unincorporated business owned and run by one person (the IC) with no distinction between the business and the person. Many ICs choose to be sole proprietors, but a significant drawback is that the risk for liability extends to both the IC's work and to the individual, personally. Therefore, LLC or S-corporation may be better options. (Learn more about these options at https://proxy.www.sba.gov/starting-business/choose-your-business-structure.)

No matter how they choose to operate, ICs should know that the IRS considers ICs to be self-employed. That means ICs will need to pay self-employment tax, which covers Social Security and Medicare. (For employees, their employer would withhold these types of taxes.) The IRS website provides additional details about taxes for self-employed individuals and lists the current self-employed tax rate. ICs are able to deduct half of this from your income, according to Erica Gellerman, a CPA.

Employees complete IRS form W-2 for their employers, but ICs need to submit a W-9 form to the business they are contracting with. The business is required to report payments of $600 or more in a calendar year on Form 1099-NEC. ICs need to file the 1099-NEC, a Schedule C, which relates to their work as an IC, and a Schedule SE, which relates to the self-employment taxes, with their personal tax return. They will also need to meet state filing requirements.

ICs may be able to deduct expenses that they did not receive payment for from their taxes. These might include the cost of work-related expenses, health insurance, and continuing education.

Tax rules can be confusing, so it's wise for ICs to consult a tax professional. This expense can pay off in the long run by helping to avoid penalties as a result of incorrect or inaccurate claims. In addition, ICs will need to pay estimated taxes quarterly, and the tax professional can help determine the amounts.

Professional liability insurance coverage

As an independent contractor, you will be responsible for your own insurance, which includes obtaining your own professional liability insurance, otherwise known as malpractice insurance. Professional liability provides coverage for licensed healthcare professionals from allegations that their negligent acts during the performance of their professional duties caused harm. Malpractice insurance is required by law in many states, and failure to have coverage may violate state stattutes and lead to professional discipline. Additionally, insufficient coverage can potentially be financially ruinous for dentists if a malpractice claim occurs. Therefore, it is important for dentists to consult a qualified insurance agent to ensure they have the appropriate type and amount of coverage for their needs.

Vicarious liability and apparent agency

If a patient holds a reasonable belief that the business/owner dentist appears to have a supervisory relationship to the IC, then it is more likely that the patient may hold one dentist responsible for the actions or omissions of the other. Both the IC and the owner dentist should develop and agree to patient communication methods that explicitly clarify the contractor relationship in order to mitigate the risk of vicarious liability. For more information regarding vicarious liability and strategies to diminish the risk of apparent agency liability, refer to the CNA & Dentist's Advantage Risk Management Manual section, Legal Concepts.

New opportunities

As an IC, you have greater flexibility as to where and when you work. It can also help you forge new and varied connections that bring value to your professional world. By understanding the implications of working as an IC, you can enjoy these benefits with peace of mind.

Article by: Georgia Reiner, MS, CPHRM, Risk Analyst, Dentist's Advantage

This newsletter is prepared by the staff of the National Society of Dental Practitioners, Inc.

Senior Editor:
Jennifer L Flynn, CPHRM and President of the Society.

Associate Editor:
Margaret Surowka Rossi, J.D.

The NSDP
1100 Virginia Drive
Suite 250
Fort Washington, PA 19034
800.237.9429

RESOURCES

American Dental Association. Dentist employment agreements: A guide to key legal provisions. 2020. https://www.ada.org/-/media/project/ada-organization/ada/ada-org/files/resources/coronavirus/covid-19-frequently-asked-questions/dentist_employment_agreements.pdf

CNA & Dentist's Advantaqge. Risk Management Manual. 2019. https://www.dentists-advantage.com/Prevention-Education/Risk-Management-Manual/Risk-Management-Manual

Gellerman S. The complete guide to independent contractor taxes. Nerdwallet. October 15, 2020. https://www.nerdwallet.com/article/small-business/independent-contractor-tax-guide

IRS. Independent contractor (self-employed) or employee? IRS. 2021. https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

Ruskin, N & McIntosh, J. Dentists: Employee vs. independent contractor? May 8, 2019. https://www.natlawreview.com/article/dentists-employee-vs-independent-contractor

Simic A. What is an independent contractor agreement: A complete guide. Deel. August 16, 2021. https://www.letsdeel.com/blog/independent-contractor-agreement-a-step-by-step-guide

Stahl A. 5 must-haves in your independent contractor agreement. Forbes. January 18, 2022. https://www.forbes.com/sites/ashleystahl/2022/01/18/5-must-haves-in-your-independent-contractor-agreement/?sh=1d0665e15fb7

U.S. Department of Health & Human Services. What's the difference between an independent contactor and an employee? Office of Child Support Enforcement. 2020. https://www.acf.hhs.gov/css/training-technical-assistance/whats-difference-between-independent-contractor-and-employee

U.S. Small Business Administration. Sole proprietorship. n. d. https://www.sba.gov/content/sole-proprietorship

Dental Expressions® – From the CNA Claim Files

Alleged Vicarious Liability — Endodontic Failure (Separated File)

The legal theory of vicarious liability holds employers responsible for the acts and omissions of their employees. 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 business owner or corporation has, or appears to have, a supervisory relationship, known as apparent (ostensible) agency. This issue of *Dental Expressions*® presents a case example involving an independent contractor endodontist.

CLAIM CASE STUDY

Practitioner: General dentist —practice owner (insured PLLC); endodontist—independent contractor for the insured dental practice

Claimant: Female, aged 42 years, smoker

Risk management topics: business practices; referrals and referral communication; disclosure of adverse events; documentation

Facts: The patient had been treating with the general dentist/practice owner for several years. However, she sought care on a sporadic basis, and, in most cases, her visits were scheduled to address a complaint rather than for preventive care. After missing two scheduled appointments for dental prophylaxis and a periodic examination, it had been about 18 months since the patient's last visit.

The patient came to the office complaining of pain with a lower tooth and requested to be seen that day. After reviewing and updating the medical history and listening to the patient's concerns, the dentist proceeded to examine the patient. This led to a diagnosis of recurrent decay on tooth 28. Further assessment and a periapical radiograph of the area indicated probable pulp pathology and the need for root canal therapy (RCT) on tooth 28.

After a brief discussion of treatment options, the patient stated that she preferred to have RCT and save tooth 28, rather than extraction. Since the dentist no longer performed RCT, he recommended the patient see an endodontist. The dentist advised that he could refer the patient to a specialist at another location or, if she preferred, the patient could return to the office the following morning. For the convenience of his patients, the dentist arranged for an endodontist to deliver endodontic services in his office. The patient agreed and returned the following day.

After the endodontist confirmed the diagnosis, discussed treatment options, and explained the benefits and risks of RCT, the patient agreed to proceed. The RCT was challenging, due to partial calcification and dilaceration of the root tip. Unfortunately, a small segment of a file separated while instrumenting the apical section of the canal. The endodontist advised the patient and recommended that the RCT be completed, judging the risks of trying to remove the segment to be greater than leaving it in place.

Although the patient was to return for a crown restoration and other restorative work, she missed the scheduled visit with the general dentist. Approximately two years elapsed with several rescheduled visits and cancellations. At this point, the tooth became symptomatic, and the patient decided to seek a second opinion. The new endodontist advised the patient that a piece of an endodontic file was retained in the root canal. Her symptoms indicated the presence of infection and the delay in restorative care had resulted in the loss of tooth structure. The endodontist advised that extraction would be the best course of action.

Extraction of tooth 28 proved to be difficult. Fracture of the tooth required flap elevation and bone removal. After deciding to begin treatment at a new dental office for an implant and other treatment to restore the full lower arch, the patient experienced further problems at the tooth 28 position. An implant was placed and failed to integrate, as did the second implant. Related procedures included guided tissue regeneration and bone grafting. With an unknown prognosis for a third implant, and facing many other restorative expenses, the patient sought legal counsel and filed suit against the first endodontist and the general dental practice.

Key Allegations: Endodontist—failure to meet the standard of care for endodontics, inadequate consent, and failure to disclose.

Dental practice—vicarious liability, failure to disclose and properly monitor.

Alleged Injury/Damages: Loss of tooth; current medical/dental expenses; future implant and restorative care expenses; pain and suffering; with a demand slightly more than 6 figures.

Analysis: The lawsuit alleged that the endodontist did not obtain informed consent. Although the patient (plaintiff) received a copy of a consent form, it was not signed, and she did not recall discussion about the possibility of a broken file. The patient also denied that the endodontist disclosed the broken file when it occurred during the RCT procedure.
The endodontist stated that his custom and practice was to always disclose when a file separates, unless it is immediately retrieved and does not affect the treatment plan or prognosis. However, the patient's healthcare record did not document a discussion about the separated file. The patient was scheduled for a follow-up visit with the practice owner (later cancelled), but the record did not include a referral report or a detailed treatment summary to the practice owner. Therefore, the general dentist was not aware of the retained file until the lawsuit was filed.

The insured dental practice was named in the lawsuit under the theory of vicarious liability, but other allegations also were asserted. As a patient of record, the lawsuit alleged that the practice failed to properly follow-up and monitor the patient's oral health and did not disclose the separated file. The practice owner strongly refuted these allegations. Moreover, he had clearly explained to the patient that the endodontist was an independent contractor who established his own schedule in the office. The general dentist's defense attorney agreed that, based upon the documented discussion and information

provided to the patient (practice brochure), a reasonable person would conclude that no supervisory or employee relationship with the endodontist existed.

The endodontist believed that the standard of care was met for the RCT. Leaving the separated file was the right decision in this case, even though it eventually resulted in RCT failure and loss of tooth 28. However, the endodontist understood that documentation oversights would be challenging to overcome if the case proceeded to trial, and he, therefore, consented to settle the case.

Both the plaintiff's counsel and the endodontist's defense attorney believed that the practice owner should participate in the settlement. However, the owner refused to consent. Existing documentation and the fact that the patient cancelled several appointments for follow-up care supported this position. Had the patient returned as recommended, the practice owner may have been able to intervene, perhaps preventing the loss of tooth 28.

After several months, the case proceeded to mediation. Defense counsel for the practice owner communicated to the mediator that his client would not contribute to a settlement. The case did not settle at mediation, but, just before depositions were to be taken, the endodontist agreed to settle the case for the full amount proposed at mediation.

Key points in this case include:

- The practice owner's business practices, patient communication, and supporting documentation regarding the nature of the relationship with the endodontist.
- The patient's failure to comply with recommended follow-up care and her history of canceled and rescheduled appointments.
- Inadequate documentation by the endodontist to 1) support his custom and practice regarding disclosure of an adverse event and 2) advise the referring dentist about the treatment, any complications or concerns, and the prognosis.

This case study describes an example of potential vicarious liability, underscoring the importance of both doctor-patient communication and documentation of the discussions. The case also identifies inadequate referral communications. Both referring and referral practitioners are obligated to ensure that communications are accurate and comprehensive in order to support patient safety and quality of care. Although the endodontist was responsible for the RCT and communications associated with the separated file, the referring general dentist may have helped to prevent the negative outcome by establishing expectations with the endodontist in advance regarding post-treatment communication.

Outcome:

The case settled for $75,000 with no participation by the general dentist practice owner.

Article by: Ronald Zentz, RPh, DDS, FAGD, CPHRM
CNA Dental Risk Control

New Dental Claim Report Released!

You have invested your life in your career, all of which can be threatened by a single malpractice lawsuit or state licensing board complaint. Dentist's Advantage, in collaboration with CNA, has released their newly updated claim report: Dental Professional Liability Claim Report: 2nd Edition. Included within the report are in-depth analysis and risk management recommendations designed to help dental professionals avoid claims and improve patient outcomes.

Key findings from the 5-year study include:

- **$134,497:** Average cost of a malpractice lawsuit against a dental professional, including legal defense costs
- **30.5%:** The increase in the average cost for a malpractice claim against a general practitioner since the 2016 claim report
- **Inadequate precautions to prevent injury:** Most common malpractice allegation against dental professionals
- **Corrective Treatment:** Procedure resulting in the highest percentage of injury claims (25.5%)
- **$4,428:** Average legal cost to defend a dental professional from a licensing board complaint – an increase of 18.7% from the previous dataset

Click here to get your free copy of the report.

N-14372-0322