EMPLOYEE OR INDEPENDENT CONTRACTOR?
POTENTIAL RAMIFICATIONS OF ADDING ANOTHER DENTIST TO YOUR PRACTICE

Adding another dentist to your practice can have many benefits in delivering care to your patients and possibly broadening treatment options. For example, if you are a general dentist and bring in a specialist as an employee or independent contractor to work in your office, this can allow for efficient referrals and greater convenience for your patients. However, if you decide to bring in another dentist for your practice, it is important to be mindful of the implications of hiring the other practitioner as an employee or as an independent contractor. These implications include issues relating to taxes, insurance, and potential exposure to liability for malpractice by the hired dentist. This article will focus primarily upon some of the distinctions between employees and independent contractors, as well as potential consequences of these categories if a patient later asserts a claim for malpractice against the hired dentist.

In Massachusetts, an employer is subject to “vicarious liability” for an employee’s negligence if the employee was acting within the scope of his or her employment. This is not so if the negligent party was an independent contractor rather than an employee. Where a court needs to determine whether an employer–employee relationship actually exists, it will consider a number of factors. These factors may include, but are not limited to, the method of payment (e.g., whether the alleged employee receives a Form W-2 from the employer rather than a Form 1099) and whether the parties themselves believe they have created an employer–employee relationship. Additional factors include:

- The extent of control which, by agreement, the master may exercise over the details of the work;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tools, and place of work for the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the parties believe they are creating the relation of master and servant (i.e., employer and employee).

To prove vicarious liability, the plaintiff will need to establish that: (1) the treating dentist was liable (i.e., that there was a breach of the standard of care, causation, and resulting damages); (2) at the time of the alleged negligence, the treating dentist had been hired as an employee rather than as an independent contractor; and (3) the alleged negligent treatment occurred within the scope of the hired dentist’s employment.

Therefore, a Massachusetts dental practitioner intending to add another dentist to his or her practice should consider the potential for vicarious liability when deciding whether to hire the dentist as an employee or independent contractor. Table 1 outlines some of the considerations for hiring an employee versus retaining an independent contractor.
Should you decide to hire a dentist as an independent contractor, it is highly advisable to clearly define the nature of the relationship at the outset, in a written agreement. Such an agreement should at least state the intended relationship and attempt to address as many of the above-cited factors as is practical. The agreement should contain express language to the effect that "nothing contained in this agreement shall be construed to create the relationship of employer and employee, principal and agent, partnership or joint venture, or any other fiduciary relationship." It would also be worthwhile to consider including a requirement that the retained dentist purchase his or her own malpractice policy. By entering into a written agreement spelling out the independent contractor relationship, a practitioner retaining an independent contractor can help to reduce the potential that the retained dentist is later deemed to be an employee by a court in the event of a claim.

In sum, if you decide that retaining another dentist makes sense for your practice, you should carefully weigh the pros and cons of hiring him or her as an employee versus an independent contractor, and document the nature of the relationship accordingly.

References
2. See Restatement (Second) of Agency § 220(2) (1958).