

# Overview of Legal and Practice Issues

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## Introduction—Dentistry has Historically had Associates

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This publication will explore the pertinent legal and practice issues of classification of associate dentists as independent contractors.

Dentistry has always had the associate dentist.<sup>1</sup> In recent years, however, the number of associate dentists and those continuing their education into a specialty or GPR program has grown significantly.<sup>2</sup> This growth can be attributed to the debt most dental school graduates have upon graduating, the costs of setting up a practice, and the questionable demand for dental services that a new practice would experience currently and for the foreseeable future in many desirable geographical areas of the country.<sup>3</sup>

## Recent Congressional and IRS Interest

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Dentists have had an attraction for a significant number of years for hiring an associate dentist as an associate independent contractor<sup>4</sup> and not as an employee. The number of articles in the dental literature on the subject of whether and how to hire an associate and whether it should be an

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<sup>1</sup> "An associate in dentistry is a term that applies to a dentist working at or in the practice of another dentist as either an employee or independent contractor, preferably under the terms of a written contract. However, it is well understood that in dentistry there can be many variations of associate. These include the new graduate associate, the clinic/capitation associate, the independent contractor, the space-sharing associate, the veteran associate and the kinship associate." George Layman, DDS & Pat Muchmore, *How To Hire An Associate* 29 (1982).

<sup>2</sup> See the *2000 Survey of Dental Practice, Characteristics of Dentists in Private Practice and Their Patients*, American Dental Association, with a chart showing distribution of dentists solo proprietors, partners, independent contractors and non-owner dentists; See also *Dentists in Non-Solo and Solo Practice*, American Dental Association, (1997). Dentistry has always had at least a limited number of associate dentists practicing in the office of an owner dentist, for a limited discussion see the Introduction to the course manual for American Dental Association 1987-89 National Seminar Series, *Do's and Don'ts of Associateship and Practice Valuation*, presented by Larry R. Domer and Randall K. Berning.

<sup>3</sup> In addition to the growth there are also new forms of associateship. Traditionally, there was only the associate employee or associate independent contractor. Today, in addition to the former there is the solo group and time share associateship which from a traditional view may not be associateships. The scope of this publication will not include a discussion of the solo group and time share associateships.

<sup>4</sup> The use of independent contractor dentists in the practice of dentistry has been a common arrangement in the dental profession for many years. See Richard Berry, "Employment Relationships", 115 J. Am. Dental Assn. 114 (July 1987); Phillip Bonner & Randall K. Berning, 4:9 *The DDS' Alert* (Sept. 28, 1987).

independent contractor arrangement is significant.<sup>5</sup> There is concurrent attention being given to the issue at the federal level. Many dentists are aware that the Internal Revenue Service (Service) is reviewing suspect classification worker arrangements. From dental profession trade journals to the Wall Street Journal to tax magazines the issue is very much on center stage.<sup>6</sup> Congressional interest continues in the area<sup>7</sup>, and a significant case from the 9th Circuit made its way to the federal Court of Appeals (*see later discussion of Microsoft III at page 15*).

## A Controversial Issue for the Dental Profession

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The issue of the associate dentist as an independent contractor has generated controversy as a result of both public and professional examination.<sup>8</sup> Aside from the public spotlight, the controversy stems from the tension inherent in practice owners who hire associates as independent contractors instead of employees for financial and liability exposure reasons. On the financial side the practice owners wish to save payment or reporting as required of federal

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<sup>5</sup> Readers Guide of Dental Periodical Literature has a comprehensive list of topical headings relating to the area of associateship.

<sup>6</sup> See "See Sharper Line Is Sought Between Employee, Contractor, *The Wall Street Journal*, May 25, 1999 B2 relating how Congress may take action to make the distinction more readily apparent. Regarding classification issues and disputes, Congress did provide for immediate appeals of IRS classification determinations pursuant to the Taxpayer Relief Act of 1997. See also earlier and on-going efforts, "IRS To Expand Withholding Tax Compliance Initiative", *Tax News*, Mar. 7, 1988, in pertinent part states:

"The initiative is designed to reduce misclassification of employees as independent contractors for tax purposes and to improve employer reporting of wages paid to these individuals on the mandated information return ..." According to the article, the Service is attempting to deal with the problem on three levels. The third level being an attempt by the Service to determine if employers are misclassifying their workers as independent contractors or paying them without reporting their wages. "Currently IRS has nearly 400 collection officers working nationwide to investigate employers who misclassify workers. So far, the investigations have yielded an average of \$4000 of additional tax assessed per return. The biggest source of leads in this area has been through tips from IRS collection officers and referrals from various states. The Service has attempted to tap into existing state compliance efforts because of the tendency of states to more closely monitor this area. Through the auspices of the National Association of Tax Administrators (NATA), IRS has cooperative agreements with over 25 states."

See also, *Tax Report*—"Workers misclassified as independent contractors are sought by IRS", *Wall Street Journal*, Nov. 16, 1988 at 1, col.5.

<sup>7</sup> In the Summary of *H.R. 4333, The Miscellaneous Revenue Act of 1988*, as reported to the House Committee on Ways and Means, dated July 15, 1988, the following statement was found:

"The Committee agreed to require that the Treasury Department conduct a study of §1706 of the Tax Reform Act of 1986, relating to the status of independent contractors who provide services through third parties, and report to the House Committee on Way and Means and the Senate Committee on Finance no later than September 1, 1989."

<sup>8</sup> Paul C. Gerber, "Facts You Should Know About Independent Contractor Status", *Dental Management*, Dec. 1987, at 38-42; John K. McGill and Bud Schulman, "IRS Issues Independent Contractor Guidelines", *Dental Economics*, Nov. 1987, at 77-80.

income tax, employer FICA, and FUTA (unemployment tax). At the state level owners want to save income tax, if the state has an income tax, disability insurance, if the state has a disability insurance program, and unemployment insurance (related to FUTA). On the liability side the law clearly treats the true associate independent contractor as a separate business contractor. Such treatment may be beneficial as it relates to insulating the practice owner from the independent contractor's professional negligence; indeed, the concept of the independent contractor arose from tort law.

Yet pitted against the above is a desire often equally strong. It is the desire of the practice owner in many cases to control the associates' methods and means of practicing. As will be discussed in this publication the controlling of the associate independent contractor can place the practice owner in a tenuous legal position. It is that legal position that is the subject of this publication.