**California Dental Association**
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# Legal Reference Guide For California Dentists

## Chapter 2 — Practice Considerations

## Business Structure

### 6. What business structure options do I have legally?

A California licensed dentist may practice under one of the following individual or entity structures:

- sole proprietorship;
- professional "C" or "S" corporation; or
- general partnership.

The business structure a dentist chooses for the operation of his or her practice has certain advantages and disadvantages, which are set forth below.

**LLCs and LLPs.** Limited liability companies have no authority to perform professional services in California, pursuant to Corporations Code §17375. Limited liability partnerships¬ are general partnerships that elect to be treated as an LLP by registering with the Secretary of State. Only accountants, architects and attorneys are allowed to operate their practices as LLPs (Corporations Code §16101).

### 7. What are the advantages and disadvantages of a sole propietorship?

A sole proprietorship consists of an individual not forming a separate entity, such as a professional corporation or general partnership, for his or her practice of dentistry but merely operating as an individual whether in the capacity of an associate dentist or owner of a dental practice. A sole proprietorship does not require any formal documentation to commence an associateship or ownership of a dental practice as it is the most simple form of business structure. However, with its simplicity there are liability risks that accompany a sole proprietorship.

If a dentist does not establish a separate entity, such as a professional corporation or general partnership, an individual dentist and its business are not distinct and apart from one another. The same Internal Revenue Service Form 1040, which is the tax form on which individual income is reported, is used in conjunction with a Schedule C to report the income and losses of a dentist earning wages as an associate or a dental practice owner. All of the income and losses from an associateship or dental practice are attributable to the individual dentist.

Operating as a sole proprietor may deprive a dentist of certain tax benefits, if such benefits are applicable, which are dependent on a dentist's financial circumstances. In order to determine if the tax benefits of an entity other than a sole proprietorship are beneficial in particular circumstances, a dentist should consult with his or her certified public accountant.

One of largest liabilities to operating as a sole proprietor is that since there is no distinction between the individual dentist and the business, the individual will be held personally liable for all obligations of the dental practice, including debts, claims, demands and judgments. Although a dentist will be personally liable for errors or omissions (malpractice) claims even if a dentist has a corporation in place, the corporation may provide protection against other types of third party claims, such as employee claims or claims by vendors doing business with the dental practice. In order for a dentist to shield himself or herself from personal liability in a claim for errors or omissions, a dentist must have adequate malpractice insurance in place.

Although a corporation will protect a dentist's personal assets against non-malpractice claims, the corporation's assets, namely the assets of the dental practice, can be affected by a legal judgment against a dental corporation. In addition to errors and omissions (malpractice) insurance, other types of insurance, including without limitation general commercial liability and employment practices liability insurance, are important to obtain to protect the corporation's assets. Generally, insurance policies have limitations, deductibles and co-payments that a dentist should fully understand prior to the purchase of the policy.

The greatest risk for incurring liability is the presence of employees or independent contractors providing services for the practice. While employment liability insurance can be purchased, it normally has low coverage limits that may be exceeded in a substantial lawsuit. Therefore, the more employees you have, the greater the risk to your personal assets if you practice as a sole proprietorship. Hiring another dentist to perform treatment at your practice would be a strong incentive for incorporation.

**8. What are the pros and cons of a partnership?**

A partnership is an entity through which two or more dentists can operate a dental practice. Since California does not permit the operation of a dental practice under a limited liability partnership entity, this section only entails the advantages and disadvantages of a general partnership entity. While two or more individual dentists may be the partners of a general partnership, it is more advantageous for two or more s-corporations of which dentists are shareholders to be partners of a general partnership. Having two or more s-corporations as the partners of a general partnership provide protection for each dentist's personal assets should an intra-partnership dispute arise. Additionally, each dentist through his or her corporation may claim separate business expenses, such as continuing education course costs, without affecting the other partner.

One of the benefits of a partnership is the sharing of overhead expenses in a dental practice and coverage from one dentist for the other in times of illness or vacation. However, in order for a partnership to function effectively and without discord, an attorney drafted partnership agreement that accurately sets forth the relationship of the partners is necessary. The partnership agreement must entail the compensation structure between the partners, decisions that can only be made through unanimous agreement, such as the hiring and firing of employees, necessary steps if one partner becomes disabled, minimum number of days during which each partner must provide services at the dental practice, future buy-out provisions if a partner no longer wants to maintain a partnership, how expenses are shared, voting rights, management responsibilities and many other provisions that affect different facets of the partnership. The preceding list is not exhaustive of the significant provisions in a general partnership agreement for a dental practice. A general partnership can, through its general partnership agreement, set forth any compensation and decision-making structures to which the partners mutually agree.

As a result, while a partnership allows the partners flexibility to fashion an entity to share costs and risks to a certain extent, it is an arrangement that carries with it the risk of disagreement in the operation, finances and management of a dental practice. It is more difficult to sell your partnership interest or dissolve the partnership if and when desired. Another disadvantage of a partnership is that one partner is personally liable for the acts of another partner.

*Partnerships generally consist of the following two structures:*

1. A dentist owns a dental practice, either as a corporation or a sole proprietor, and wants to sell an interest in his or her dental practice to another dentist and simultaneously enter into a general partnership.
2. Two or more dentists either start a dental practice or acquire an existing practice together as individual partners in a general partnership or a general partnership of corporations.

In the first example, the selling dentist must ensure that he or she is able to transition to the buying dentist the percentage of goodwill correlated to the percentage of the dental practice interest that the buying dentist plans to acquire. The transition of goodwill entails the transfer of a percentage of patients or the right to provide treatment to existing patients for whom the selling dentist has historically provided treatment to the buying dentist. Without this transition of goodwill, the buying dentist will not reap the benefits of his or her purchase.

Production differentials between partners is also an important consideration in both the first and second examples of the structures above. If two dentists intend to have equal percentage ownership in a general partnership, the two dentists should have similar production abilities or production abilities correlated to their ownership percentages if the partners do not have equal ownership interests in the general partnership. Partnership agreements should be drafted which allow differential sharing of expenses and profits if the partners generate significantly different amount of revenue from treatment of patients. This is a frequent source of conflict and can lead to partnership dissolution if not addressed in a well-drafted partnership agreement.

An attorney well-versed in the formation of partnerships for dental practices and the drafting of a general partnership agreement can guide you in this process.

Under California law, a partnership is established by law if a business has more than one owner and the owners do not have an agreement establishing the terms and conditions of the ownership of that business. California law is not tailored toward dental practices and a well-drafted partnership agreement is highly recommended to directly address the individual issues of your practice. A partnership agreement should at a minimum include the issues of sharing profits and losses, establishing guidelines for management of the practice and provisions for the sale of partnership interests. Many potential disputes between partners can be avoided by a well-drafted partnership agreement.

### 9. Does a limited partnership have advantages over a general partnership?

California does not permit a limited liability company or limited partnership to operate a dental practice.
It is essential that the limited and general partners obtain legal advice to define the limits of management participation necessary to retain the limited partners' legal status. Substantial management participation by a limited partner may negate the benefits of being a limited partner.

### 10. What is there about a corporation that would make me want to incorporate my practice?

The main two reasons that dentists form professional corporations either as an associate dentist or as a dental practice owner are for tax benefits and some limitation of personal liability. A certified public accountant or attorney will be able to advise a dentist on the benefits and detriments of practicing in a corporate form, including current taxation issues and other formation legalities that may affect the practice upon its sale.

Generally, if an associate dentist who does not own a dental practice earns over a certain amount of income per year, then the tax benefits will outweigh the annual expenses of maintaining the professional corporation. A dentist who is acquiring the assets of an existing practice or who is building out a new dental practice will generally incorporate at the outset of the process as the tax benefits for dental practice ownership through a professional corporation will in most circumstances outweigh the annual maintenance costs of the professional corporation.

A main benefit of incorporation for a dental practice is that provision of fringe benefits, such as medical benefits, can be a corporate expense for the dental practice.

All dental corporations in California must be professional corporations and cannot be general corporations. All California corporations are initially "C" corporations, unless a dentist elects to have the corporation be an "S" corporation by filing a separate form with the Internal Revenue Service within 75 days of the formation of the corporation. Generally, an "S" corporation is the preferred entity from a tax perspective as a "C" corporation entails two separate levels of taxation both at the corporate and individual stockholder levels.

Formation of a corporation consists of the filing of articles of incorporation with the California Secretary of State as the initial step with a number of other legal documents and maintenance requirements once the corporation is established as an entity with the state of California.

A professional corporation may also provide limitation of personal liability for a dentist. However, a professional corporation does not provide limitation of personal liability in cases of fraud or errors or omissions (malpractice). A dentist will be held personally liable if a dentist has committed fraud without any shield of protection from the professional corporation for the dentist's personal assets. A dentist will also be held personally liable in the event of errors or omissions (malpractice). A corporation will not protect the dentist's personal assets against a malpractice judgment and a prevailing plaintiff can seek recovery of damages through the personal assets of a dentist. Protection of personal assets against malpractice judgments may be sought through adequate errors and omissions (malpractice) insurance policies.

However, a professional corporation can provide protection against personal liability against other types of claims, such as employee claims, if the professional corporation is the employer of the employees of a dental practice, vendor claims, if it is the corporation that has entered into a contract or engaged the services of a vendor, and other types of third party relationships not related to fraud and malpractice claims.

Once the decision has been made to incorporate, it is important for the dentist to undertake all actions under the corporate name and to maintain the separate identity of the corporation. In order for a professional corporation to shield a dentist from personal liability, the dentist must maintain the professional corporation as a complete separate entity. If a plaintiff can demonstrate that the professional corporation was not maintained as a separate entity distinct from the dentist personally then a court may allow piercing of the corporate veil, also known as "alter ego liability," whereby the dentist would be personally liable for the liabilities and debts of the corporation. The corporate veil can be pierced if, for example, personal funds and assets are not held separately from the corporation funds and assets, the dentist personally hires its employees, fails to keep corporate records and have required meetings, pays personal debts with corporate funds and vice versa, to name just a few.

For the procurement of a loan from a financial institution, such as a bank, or when entering into a lease agreement for dental office space, both lenders and landlords will generally require a personal guaranty in order to be able to collect any debt or other obligations of the borrower on a personal basis and not rely on the corporate assets, as there may be few to none remaining if a dentist defaults on a loan or lease agreement.

Since many dentists contract with dental insurance companies to be in-network providers for various insurance plans, having a corporation in place at the outset of practice ownership will enable a dentist to submit the tax identification number of the corporation, rather than the dentist's personal social security number, to be the entity that receives payment from the insurance company. If a dentist chooses to initially proceed as a sole proprietor for the ownership of his or her practice and then later forms a corporation, the dentist must then go through the process of changing his or her social security number to the corporation's tax identification number with each insurance plan. A dentist must also attempt to change the tenant on his or her lease, convert from an individual employer to a corporate employer with the California Employment Development Department and transfer any other individual obligations related to the dental practice to the corporation.

Be aware that the Dental Board requires a dental corporation name include the name of one or more shareholders and other limited designations. A dentist must apply for a fictitious name permit in order to use a different name for the business. The Dental Board website contains the rules governing fictitious names as well as a fictitious name permit application.

**11. Will it help me to be a limited liability company?**
Limited liability companies have no authority to perform professional services in California, pursuant to Corporations Code §17375.

**12. Can a non-dentist, such as a family member, have an ownership interest in the practice?**
Possibly. In general, dental corporations must be owned by dentists. Selected non-dental licensed professionals, including physicians and surgeons, dental assistants, registered dental assistants and hygienists, may own a minority interest in a dental corporation. The non-dentists can own no more than 49 percent of the corporation, and the number of non-dentist shareholders should not exceed the number of dentist shareholders. In general, only a licensed dentist may be a director, shareholder and officer of a dental corporation. If there is only one shareholder in a corporation, a non-dentist may be an officer but not president of that corporation.

In 2008, a change was made to the law with the addition of §§1625.3, 1625.4 and 1625.5 of the Business and Professions Code and amendments to §13407 of the Corporations Code. The changes allow non-dentists who are legal representatives, such as family members or an executor or administrator of an estate or trust, to take control of the dental practice of a dentist who has become incapacitated or is deceased, for the purpose of the orderly sale or transfer of the practice. The period of control is limited to 12 months, within which time the practice must be dissolved or sold.

## Licenses and Permits

**13. In addition to a dental license, what other licenses and permits does the Dental Board require?**

**Additional Office.** Required when a dentist has a proprietary interest of any nature or any right to participate in the maagement or control of more than one place of practice.
**Conscious Sedation.** Required when a dentist induces in a patient a minimally depressed level of consciousness that retains the patient's ability to maintain an airway independently and continuously and to respond appropriately to physical stimulation or verbal command. Conscious sedation does not include administration of oral medications or of a mixture of nitrous oxide and oxygen, whether administered alone or in combination.
**Extramural Dental Facility.** Dental schools are required to register any clinical facility used for instruction that exists outside or beyond the walls, boundaries or precincts of the primary campus of the school and in which dental services are rendered.
**Elective Facial Cosmetic Surgery.** Elective facial cosmetic surgery may be performed only by a dentist who has this permit.
Fictitious Name. Individual dentists who practice under assumed or fictitious names and any association, partnership, corporation or group of three or more dentists engaging in practice under any name not utilizing the names of the licensed owners must have this permit. A permit is not required for a dental corporation practicing under its own name. A dentist who plans to use a fictitious name should check the Dental Board of California website to view the rules, recommended formatting and application. Check the Department of Consumer Affairs BreEZe License Verification System, breeze.ca.gov, to determine if the fictitious business name is already being used by another dentist. After obtaining a fictitious name permit from the board, register the name with the county recorder's office and publish the required public notices.
**General Anesthesia.** Required to administer general anesthesia in a dental office.
**Mobile/Portable Dental Clinic.** Required to operate a mobile dental clinic utilizing a motorized vehicle. The use of portable dental equipment in a private home or other setting that is not a dental office will require a permit once regulations are adopted (expected in 2018).
**Oral Conscious Sedation.** Required when a dentist induces through administration of oral medication in a patient 13 or older a minimally depressed level of consciousness that retains the patient's ability to maintain an airway independently and continuously and to respond appropriately to physical stimulation or verbal command. "Oral conscious sedation" does not include dosages less than or equal to the single maximum recommended dose that can be prescribed for home use.

**Oral Conscious Sedation for Minor Patients.** Required when a dentist induces through administration of oral medication in a patient under the age of 13 a minimally depressed level of consciousness that retains the patient's ability to maintain an airway independently and continuously and to respond appropriately to physical stimulation or verbal command.
**Oral and Maxillofacial Surgery.** A California licensed physician who has been licensed as a dentist in another state and who is board-certified in oral and maxillofacial surgery or is a candidate for certification must obtain this permit in order to practice dentistry in California or obtain a California dental license via the licensure by credential process.
**Referral Services.** Any organization or group that runs a referral service for dentists must register with the Dental Board and adhere to Business and Professions Code §650 et seq.
**Special Permit.** This permit allows a dentist who is not otherwise eligible for state licensure to be employed as a full-time instructor at a California dental school.

*Detailed information on obtaining permits can be found on the Dental Board website: dbc.ca.gov/licensees/dds/permits_index.shtml.*

### 14. What other licenses and permits do I need to open a practice?

**Building and/or zoning permits.** If constructing a new building or significantly remodeling an existing one, obtain these permits from the city or county.
**Business license.** Contact the city or county in which the practice is located to determine what licenses and permits are required.
**Business property.** Some local communities have business property assessments.
**Corporation.** A corporation must be registered with the California Secretary of State's office and complete annual filings. Dental corporation name must utilize the family name of one or more of the dentist-shareholders.
**Fictitious business name.** Register fictitious name with county recorder's office and publish the required public notices. This is in addition to the fictitious name permit obtained from the Dental Board.
**Outdoor sign.** Some local communities require permits for outdoor signs.
**Air tank and compressor.** Contact the closest office of the Cal/OSHA Pressure Vessel Unit. For information, go to dir.ca.gov/dosh/pressure.html.
**Wastewater.** The city of Los Angeles, the San Francisco Bay area and many other communities in the state issue dental wastewater discharge permits. Contact the local sanitation department or agency for more information about area requirements. Use of amalgam separators is required for most dental practices.
**Waste, Medical.** Most dental offices generate medical waste and must register with the state. For information, go to cdph.ca.gov/Programs/CEH/DRSEM/Pages/EMB/MedicalWaste/Generators.aspx.
**Waste, Hazardous.** Dental offices that generate hazardous waste should obtain an EPA identification number and properly manage and dispose of the waste. Local household hazardous waste programs that accept waste from small quantity generators such as dental offices require the office to have an EPA ID number even if the waste can be managed as universal waste. To determine if one is necessary, read the state Department of Toxic Substances Control fact sheet at dtsc.ca.gov/HazardousWaste/upload/EPA-Identification-Numbers.pdf.
**DEA Number and CURES Database.** Prescribing, dispensing and administration of controlled substances requires registration with the U.S. Drug Enforcement Administration (DEA). Apply at deadiversion.usdoj.gov. Order secured prescription forms from one of the state-approved printers on this list: oag.ca.gov/security-printers/approved-list. Prescribers with DEA numbers must register to access the state's Controlled Substance Utilization Review and Evaluation System (CURES) database. Registration information is on the Department of Justice Prescription Drug Monitoring Program website, oag.ca.gov/cures-pdmp.
**CLIA.** A practice must register with the state Department of Public Health and obtain a federal Clinical Laboratory Improvement Amendments (CLIA) certificate if performing clinical or cytological testing. The CDPH website has additional information at cdph.ca.gov/Programs/OSPHLD/Pages/Home.aspx.

**NPI Number.** Every licensed dentist should have an individual (Type 1) NPI number. The Type 1 number can be preprinted on prescription forms (pharmacies require it). The Type 1 number also is entered on claim forms to identify the treating provider. A Type 2 NPI number should be obtained when a dentist forms an entity, such as a sole proprietorship or corporation, which will bill third-party payers for treatment. A dentist may have several Type 2 numbers in the course of his or her professional career, but only one Type 1 number. Application and more information are available at: nppes.cms.hhs.gov.

**Seller's Permit and Use Tax Registration.** If a dental practice sells tangible items to patients, such as toothbrushes or teeth-whitening kits, it must obtain a seller's permit. Any business that generates $100,000 in revenue annually is considered a "qualified purchaser" and required to register to pay use tax. Information and application forms can be found at the Department of Tax and Fee Administration: cdtfa.ca.gov/taxes-and-fees/sutprograms.htm. Also see the article on Sales and Use Tax on cda.org/practicesupport.

**Radiation Machines Registration.** Register X-ray units with the state Department of Public Health Radiologic Health Branch, cdph.ca.gov/Programs/CEH/DRSEM/Pages/RHB-X-ray/Registration.aspx. A dental practice in Los Angeles or San Diego counties must apply for a radiation shielding plan check with the respective county office.

**Employer.** Register as an employer with the state Employee Development Department using Form DE 1. Also refer to the current edition of the California Employer's Guide (DE 44). Both the form and guide can be found online at: edd.ca.gov/payroll_taxes/forms_and_publications.htm. Obtain an Employer Identification Number from the IRS at irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-(EIN)-Online.

**Employment of Independent Contractors.** All employers who file Federal Tax form 1099-misc and who pay an independent contractor more than $600 per year must file a DE-542 report with the state Employment Development Department either electronically or in paper form.

### 15. I purchased movie DVDs to show in my waiting room. I own the DVDs — why do I need a license to play them in my waiting room?

When someone purchases or rents a DVD, that individual is licensed to view the movie at home with family or a small circle of friends as long as no commercial activity is conducted in the home or no reimbursement is sought for rental fees or refreshments, etc.

This permitted use does not include showing or displaying the movie in the waiting room of a dental office. In order to show or display the movie at a dental office (a public place of business), the office needs to obtain a public performance license. This is the case even if a patient brings his or her own DVD to play on the dental office's equipment. Fees for these licenses are generally very small. The primary entities that handle such licenses include:

Motion Picture Licensing Corporation (MPLC)
mplc.com

Swank Motion Pictures Inc.
swank.com

Criterion Pictures
criterionpicusa.com

It is important to comply with the copyright law because infringement carries significant penalties. For example, if an infringement is considered "willful," a dental office could be subject to statutory damages as high as $150,000 for each infringed work. Moreover, even if the infringement is considered inadvertent, the office could be subject to statutory damages ranging from $750 to $30,000 for each infringed work. Other costs, including reasonable attorneys' fees to the prevailing party, may be assessed.

The MPLC now offers, in partnership with the American Dental Association (ADA), an umbrella license for dentists to show movies and television programming in their practices. The license is available to ADA members at a discounted rate. The annual license fee is $330 per location, and MPLC offers a discount for offices with multiple locations. The application forms may be downloaded from the ADA website.

**16. Do I need a license to stream movies and shows through a service, such as Netflix, in the waiting area?**
Yes, a license is required. Netflix's terms of service do not include a public performance license. Other streaming services such as Amazon Prime and Google Play likely have similar terms. However, a patient who uses his or her own streaming service account to watch a movie on his or her device probably can do so without the dental practice obtaining a performance license.

**17. We play music CDs over the office sound system — do we need a license to do this?**
Yes. Under the Copyright Act, the definition of public performance includes any transmission of a performance or display of the work to the public or to a place open to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. This would include, for example, playing music CDs over the office sound system.

*The primary entities that handle these types of licenses include:*

The American Society of Composers, Authors and Publishers
ascap.com

Broadcast Music Inc.
bmi.com

SESAC
sesac.com

Performing rights societies license facilities to play all songs (audio only) in their respective catalogs for relatively small annual fees. The performing rights societies take care of apportioning the fees among the owners of the songs; a licensee will not need to worry about the allocation. These societies cannot authorize performance of the musical numbers from a musical play or revue in the sequence in which they were performed. This precludes playing the original cast recording of a musical. A good rule of thumb is to play no more than four consecutive songs from a show or album.

**18. Does playing the radio over the office sound system require a public performance license?**
Maybe. Under the Copyright Act, there is an exemption for radio broadcasts if (1) the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or (2) the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and the audio performance is communicated over no more than six loudspeakers of which no more than four are located in any one room or adjoining outdoor space. This exemption does not apply to playing CDs.

Hence, if the physical layout of a dental office satisfies either the maximum 2,000 square footage requirement or the maximum speaker/room requirement, a public performance license to play the radio over the office sound system is not necessary. Otherwise, obtain a public performance license from one of the performing rights groups discussed in Question 17.

Music licensing fees are included in a business subscription to SiriusXM.

## Contracts and Common Dental Agreements

### 19. Should I sign this contract?

Each contract is a legally binding agreement and a dentist must provide very careful consideration to each provision before signing a contract. Initially, a dentist should determine whether the financial provisions of a contract meet the requirements of his or her dental practice and should consult with a financial advisor, such as a certified public accountant. If the financial terms do not meet the requirements of the practice, the dentist should not sign the agreement and at that point does not need to move on to assessment of the legal terms of that contract. You should also be aware that if you agree to do an act and receive some type of consideration (payment or other benefit) an oral contract may be formed. It is advisable to reduce any contract to writing as that avoids misunderstanding and disputes as to the precise terms of the agreement.

### 20. How do the legal considerations fit in?

If the financial terms of a contract appear to be in order, then a dentist should retain the services of an attorney to review the legal provisions of the agreement. Sometimes, the services that a party orally agreed to with a dentist are not fully or accurately set forth in the written contract. The vast majority of contracts have an integration clause whereby only the written terms of the contract are binding on the parties and any prior oral or written statements outside of the contract will be dismissed. Some contracts also have automatic renewal provisions whereby the contract will renew without any further action on the part of the dentist unless the dentist provides written notice that he or she is terminating the agreement within the notice timeline of the contract. Dentist should also fully understand the extent of their legal obligations and the limitation of liabilities for the other party set forth in the contract. For example, if the contract is for services for a specified period of time, can the dentist terminate the agreement if he or she is unsatisfied with the services before the expiration date of the contract? Also, if you are nearing the time at which you would like to sell the assets of your practice to another dentist, then careful consideration must be given to the types of contracts that will remain in place after the sale, whether the contract can be assigned and whether a prudent buyer would want to take on the financial and legal obligations of these contracts for the dental practice. Often, having an attorney review a contract before you sign it is less costly than requiring legal representation to terminate a contract with negative terms for a dentist, which may not even be possible once the contract is signed by both parties.

### 21. Do I (still) have to do what the contract says?

Written contracts are legally binding documents that require each side to comply with the terms. Therefore, you do have to do what a contract says unless a particular term of a contract is not in compliance with California law. However, even if one provision of a contract is not legally enforceable, most contracts have a severability clause that states that if a particular provision of a contract is not enforceable it will be stricken from the contract and the remaining provisions will remain binding and enforceable. Of course, a contract for an illegal purpose, such as receiving referral fees from a specialist, is not enforceable in its entirety and does not have to be complied with by a dentist.

### 22. What are some of the issues involved in a buy-sell agreement?

When a dentist wants to sell his or her dental practice it is normally the assets of the dental practice that a buyer will purchase. While the sale of the stock of a dental corporation may provide a seller of a dental practice with better tax benefits (but not the buyer), the sale of stock will also carry with it the transfer of all of the dental corporation's liability incurred before the sale to the buyer. As a result, a buyer should only purchase the assets of a dental practice and not the stock of a seller's dental corporation.

In addition to the purchase price for the assets of the dental practice, the asset purchase agreement should also include an allocation of the purchase price that will have tax consequences for both the buyer and seller. The asset purchase agreement will allocate the purchase price among goodwill, equipment, supplies and the non-competition covenants. A buyer and seller should receive tax advice from each of their certified public accountants regarding the allocation of the purchase price before signing the asset purchase agreement.

The assets will include the seller's goodwill (both personal and corporate if a dental corporation owns the assets), dental and office equipment, supplies, domain name (unless the domain name includes the seller's name whereby the buyer would use the domain name for a limited period of time after the sale for transition of goodwill), website, fictitious business name, transfer of telephone numbers and the transfer of patient records to custodianship of the buyer.

A seller, as an individual and corporation if the seller has a dental corporation, will also enter into non-competition terms within the asset purchase agreement whereby the seller will agree not to compete with the buyer for a certain number of years and within a certain geographic area, will not solicit patients of the dental practice, will not solicit employees of the dental practice, will not solicit referral sources of the dental practice and will not treat or derive income from the treatment of patients for a certain number of years after the closing date. Although non-competition agreements are not enforceable in employment or contractor agreements in California, they are enforceable in asset purchase agreements when the buyer pays the seller consideration for the seller's goodwill.

The buyer and seller will both agree to representations and warranties within the asset purchase agreement. These are enforceable promises that each side will make to each other. The buyer and seller will both also agree to indemnifications whereby buyer will hold harmless and protect seller against any claims against buyer that accrue after the sale of the assets and seller will hold harmless and protect buyer for any claims against seller that accrue before the sale of the assets.

A seller is generally responsible for the completion of his or her own dental treatment that the seller commenced prior to the sale of the assets, but which remains to be completed after the sale of the assets. The asset purchase agreement should include a provision that in the event the seller is unable to complete the treatment that buyer will complete the treatment if buyer agrees to in writing on a case by case basis with the amount of compensation the buyer will receive from seller for the completion of the treatment, if any.

The asset purchase agreement should include terms regarding the process if a patient on whom the seller provided dental treatment before the sale of the assets requires retreatment of that original treatment after the sale of the assets and presents to buyer at the dental practice. The buyer should provide notice to the seller and an opportunity for seller to evaluate whether retreatment is necessary as the liability for the original treatment remains with the seller. The seller should have the right and the obligation under the asset purchase agreement to provide the retreatment. If the seller is unable to provide the retreatment, then buyer may agree to provide the retreatment in writing on a case by case basis with compensation, if any, to buyer from seller to be set forth in the asset purchase agreement.

The accounts receivable (or contact receivables) for an orthodontic practice and orthodontic portion of a general dental practice are always included in the sale of the assets, but for general dental practices and other types of dental specialties the buyer and seller do not always include the accounts receivable in the sale of the assets. If the buyer decides to purchase the accounts receivable, the buyer must ensure that the accounts receivable report does reflect the usual, customary and reasonable (UCR) fees of the dental practice while the seller is contracted as an in-network provider with dental insurance plans and is subject to set lower reimbursement rates. The asset purchase agreement should also set forth that the seller shall remain responsible for refunds of patient credits for the period prior to the sale of the assets to buyer.

Other important provisions in a buy-sell agreement include obligations by the parties to maintain their own malpractice insurance. If a seller is retiring, he or she should have "tail insurance" coverage. Include dispute resolution provisions to set out how disputes concerning the buy-sell agreement will be handled, for example, including mandatory mediation provisions to try to resolve disputes before a lawsuit is filed is advisable.

Both the seller and buyer need to recognize their obligations under HIPAA and California law with regard to patient information privacy and security. Responsibility for proper storage and disposal of records as well as access to those records by the selling dentist should be established in the agreement. The new owner may agree to have custody of the patient record (the alternative is that the former owner retains the records), but under California law the new practice owner cannot use the information in the records until a patient has provided authorization. The custodian of the records is legally responsible for ensuring the contents are secure and, if the records are to be destroyed, ensuring the process renders the contents unreadable. If a selling dentist is retiring, California law requires the dentist to ensure that a procedure is set up to maintain records and provide them to patients who request them for at least seven years following the dentist's retirement.

### 23. How should I evaluate a contract with an insurance plan?

A contract with an insurance plan will generally set the fees that a dentist may receive for any particular dental treatment for a patient who is a subscriber to that insurance plan. Most insurance companies provide different tiers of insurance plans with various reimbursement rates. A dentist should carefully review the fee schedule of the plan that he or she wishes to participate in as an in-network provider before signing any insurance plan contract as the contract may have a significant financial impact on a dental practice. Entering into an insurance plan contract and becoming an in-network provider may result in a larger number of patients to the practice as most patients with a dental insurance plan prefer to obtain services from a dentist within their plan's network. If the dental practice is located within the vicinity of an employer that provides a certain dental insurance plan to its employees, becoming an in-network provider for that plan may result in additional patients for the dental practice. However, if the reimbursement rate is at the cost or below the cost of the treatment for the dentist, the practice may lose revenue for each procedure rather than increasing collections due to an increase in the volume of patients. However, if the financial terms of the insurance plan have been evaluated and if the dentist, possibly along with his or her financial advisor such as a certified public accountant, determines that the monetary aspects of the insurance plan contract are favorable for his or her practice, the legal terms of the contract will require careful analysis.

While both the California Dental Association (CDA) and the American Dental Association (ADA) have resources available for insurance plan contract evaluation (see CDA Dental Benefit Plans and Practice Support; see ADA Contract Analysis Service and Model Contract for Third-Party Dental Service Agreements), a dentist should retain the services of a qualified attorney to review the legal terms of any insurance plan contract.

*Appendix D also provides additional information related to insurance plan contract analysis, including:*

1. Parties to the agreement
2. The components of a contract
3. Term of contract
4. Reimbursement rates
5. Assignment of the agreement
6. Amendment of the agreement
7. Services not covered by the plan
8. Submission of claims
9. Copayments, coinsurance and deductibles
10. Review of treatment

11. Group practices
12. Malpractice insurance
13. Proprietary information
14. Indemnification and hold harmless clause
15. State specific provisions
16. Termination
17. Dispute resolution
18. Access to books and records
19. Liquidated damages
20. Integration clause

CDA has resources to help you decide whether and how to participate in a particular plan. On cda.org/practicesupport you will find a calculator to assist in evaluating the return on investment for dental benefit plans and a checklist to help assess a plan.

### 24. Do I need employment agreements with my staff?

When retaining a non-practice-owner dentist, associate agreements are highly recommended. Important decisions must be made before hiring an associate dentist, such as whether that dentist will be an employee or independent contractor, who will be responsible for the treatment the associate renders, whose patients the associate will treat, how the associate will be paid, and how the owner can prevent the associate from misusing proprietary information in the dental practice. A detailed written agreement defining the relationship with the associate can prevent expensive disagreements in the future. For a Sample Associate Agreement, see Appendix B. It is advisable that the associate agreement be specifically tailored to meet the practice's specific needs while satisfying state legal requirements, including tax reporting provisions and prohibitions against fee splitting.

While a written agreement with office staff is not required, what should be in place are an employee manual and current job descriptions that detail the employment expectations and essential functions and physical requirements of the job for each job position. Have staff sign a receipt stating that they have reviewed and they understand the employment arrangements. Do not refer to this as a contract, as in some cases it can change the employment status from at-will to for-cause.

### 25. How can I get the most mileage out of an associate agreement?

A written contract is the best means to ensure a successful associate agreement. Practice owners and prospective associates may share common goals, such as the eventual transfer of the practice, and as a result have the incentive to structure mutually beneficial contractual relationships. Still, their business interests are not identical. Negotiations are common over business issues such as compensation, whether the associate will be an independent contractor or employee, the formula for determining an eventual sales price and patient considerations should the agreement end. This is a relationship with great promise, but it is still a business relationship and an important one for all parties.

A written contract between the parties considering an associate relationship is valuable for a variety of practical and professional reasons. Written agreements enable both parties to discuss fully the fundamental components of the relationship. Putting the oral agreement in writing diminishes the chance of future misunderstandings and disagreements. While the parties may consider having one lawyer draft a contract for both of them in order to save money, each party should strongly consider retaining his or her own legal counsel. The differing aspects of a complex contract make it unlikely that one attorney can represent the interests of both parties.

*Some of the issues that should be addressed in a contractual agreement include:*

- Classification as employee or independent contractor;
- Compensation method and amount;
- Benefits such as sick pay (required in California), vacation, health coverage, retirement;
- Reimbursement for professional expenses, such as auto travel, continuing education, association dues;
- Expenses to be paid by employer or associate;
- General duties;
- Full-time or part-time status;
- Patient assignment and ownership of patient records;
- Nature and scope of treatment each party will be expected to render;
- Whether associate will be entitled to receive a portion of X-ray fees or dental hygiene revenue;
- Options or rights to first refusal to buy in/out;
- Termination requirements;
- Trade secrets in the office and how trade secret information can be used following termination of the agreement;
- Allocation of legal liability between the parties;
- Responsibilities, if any, of associate to supervise staff;
- Any other rights and/or obligations.

### 26. Should the associate be an independent contractor or employee?

While there is no set definition of the term "independent contractor," one must look to the interpretations of the courts and enforcement agencies to decide whether a worker in a particular situation is an employee or independent contractor. When determining an employee classification, an employer may want to consider that an independent contractor agreement is more reflective of a "vendor agreement." In handling a matter where employment status is an issue — that is, employee or independent contractor — the Division of Labor Standards Enforcement (DLSE) starts with the presumption that the worker is an employee. (Labor Code §3357) This is a rebuttable presumption, however, and the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors, all of which must be considered, and none of which is controlling by itself. Consequently, it is necessary to closely examine the facts of each service relationship and then apply the law to those facts. For most matters before the DLSE, depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S.G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341. In applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered, depending on the issue involved are:

- Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
- Whether the work is a part of the regular business of the principal or alleged employer;
- Whether the principal or the worker supplies the instrumentalities, tools and place for the person doing the work;
- The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
- Whether the service rendered requires a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
- The length of time for which the services are to be performed;

- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job;
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative, because this is a question of law based on objective tests.

Even where there is an absence of control over work details, an employer-employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker's duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary. (*Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288)

Other points to remember in determining whether a worker is an employee or independent contractor are that the existence of a written agreement purporting to establish an independent contractor relationship is not determinative (*Borello*, Id. at 349), and the fact that a worker is issued a 1099 form rather than a W-2 form is also not determinative with respect to independent contractor status. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 877)

The financial ramifications of a finding of improper classification of an employee as an independent contractor can be substantial and may include: (1) payment of back taxes with interest for the employment taxes that should have been paid; (2) penalties or fines for failure to obtain workers' compensation insurance; (3) ramifications for excluding the associate from employee benefits, including paid sick leave, pension or profit sharing plans and (4) substantial penalties up to $25,000 for willful misclassification pursuant to Labor Code §226.8. To avoid these issues, it is recommended that you seek legal counsel prior to classifying an associate as an employee or independent contractor.

### 27. Are restrictive covenants enforceable?

Most noncompetition agreements are unenforceable in California. The California Supreme Court has ruled that agreements that restrict an employee's ability to pursue similar employment after leaving a job are prohibited, even if they are narrowly written and leave a substantial portion of the available employment market open to the employee.

*However, a noncompetition agreement is enforceable if it clearly falls under one of the following exceptions:*

- Trade secrets protections, which can legally restrict an employee's ability to use confidential information or company-defined trade secrets;
- Sale of a business, including the seller's goodwill, which can legally restrict a seller's ability to compete with the buyer in the geographic location where the seller had conducted his or her business; or
- Dissolution of a partnership, which can legally define a geographic area within which one of the partners cannot conduct a similar business.

The court reiterated the law in California that noncompetition agreements violate public policy because they restrict an individual's ability to earn a living. Further, the court found that requiring a former employee to obtain a release of an invalid agreement constitutes unlawful interference with the employee's rights. The former employer violated the employee's rights by forcing him to sign a release relating to the noncompetition agreement because that agreement was not valid in California. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937)

In another case, relating to a noncompetition agreement after the sale of a business, the court clarified that noncompetition agreements are intended to protect the sold business. California law allows a seller of a business to agree not to compete with the buyer in the same geographic location where the seller had conducted business. But because the law protects the sold business, broad agreements restricting the seller from soliciting employees or customers (even if those persons were not employees or customers prior to the sale of the business) are unenforceable.

The agreement in this case prohibited the seller from soliciting the buyer's employees and customers for one year. In contrast, if the agreement had stated that the seller would not solicit employees and customers of the sold business, it would be enforceable. The difference is that the employees and customers of the business at the time of sale are part of the "goodwill" the buyer has purchased. If the buyer hires new employees or acquires new customers after the purchase, the seller cannot be restricted from pursuing business with whatever employees or customers she can attract. The court emphasized the limited scope of noncompetition agreements in order to protect the value or the goodwill of the business as purchased by the buyer at the time of sale. (*Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal. App. 4th 1068)

*To ensure that your valuable business interests in your practice are protected from misappropriation, you should:*

- Review all contracts and other employment agreements with legal counsel to verify that they are enforceable.
- Carefully define confidential information and trade secrets in all foundational documents — employee handbooks, employment agreements — to protect the property of your business.
- Remember the law in California — noncompetition agreements are unenforceable unless they clearly meet an exception — and use caution with agreements from out of state.

### 28. What should my office lease contain?

An office lease may be one of the largest and most important contracts a dentist will ever sign. It contains both assets and liabilities that will govern tenancy. A poorly negotiated lease can result in financial burdens, uncertainty and disruption to a practice. At worst, a dentist could be held captive by a lease if every aspect of occupancy has not been carefully considered.

Commercial leases are usually generic documents drafted by landlord trade associations. While it may seem that the agreement cannot be negotiated, most landlords will in fact negotiate at least some provisions within the contract. As one never knows what a landlord may agree to negotiate, a dentist should seek to negotiate issues important to him or her.

*While an attorney should review a lease agreement, the following are some steps a dentist can take when entering into such an agreement:*

- Know the provisions of the lease;
- Measure the premises;
- Ensure that rent begins on the day of occupancy;
- Don't allow automatic renewal;
- Understand limitations in the use of the leased premises, including the number of dentists who may use the premises;
- Request copies of expenses and property taxes;
- Question services and repairs that are agreed upon;
- Ensure that the default provision is reciprocal;
- Ensure that language exists allowing assignment and subleasing arrangements;
- Confirm that appropriate insurance requirements are met;
- Contact the insurance provider to discuss waiver of subrogation;
- Understand the hold harmless agreement;
- Confirm the landlord's obligation if there is a large casualty to the building;
- Be aware of the type of lease; i.e., fully serviced, base year or triple net lease, which affect obligations to pay the land lord's expenses, including property taxes and building operating expenses;
- Verify that there are options to renew the lease and that the option provisions establish a fair mechanism for determining the rent for the option term;
- Understand the allowable rent increases during the term of the lease; and

- Determine ownership of TIBs (tenant improvements and betterments) upon vacating the premises (i.e., whether a dentist can take certain fixtures, cabinets, etc., when he or she leaves). Commonly, how those fixtures are attached to the premises may affect a dentist's ability to take them.
- Allocate responsibility for repairs and maintenance of the premises and common areas.
- Allocate responsibility for legal compliance on the premises in the common area for compliance with the law including the Americans with Disability Act.

Also see "Leasing Commercial Property," an article on cda.org/practicesupport.

**29. I am considering sharing space with another dentist. Should I have a formal agreement with the dentist? What are the types of things I need to consider?**

A formal office-sharing agreement should be in place. Such arrangements typically call for the sharing of equipment, supplies, services and employees. The agreement should be reviewed by an attorney, include definition of terms, description and measurements of space leased, specification of shared equipment and services and address signage, insurance, indemnity, joint use of employees, need for signage and forms to avoid "ostensible agency," ownership of patients records and handling of emergencies. Additional details can include notice provisions and events for termination or "exit strategy." Identify the practices as separate on signs, business cards, billings, letterhead and answering the phone. Have patients sign an acknowledgement that the two doctors' practices are separate practices and each dentist is independently responsible for his or her own treatment.

Sharing employees is one aspect to give careful attention in a shared-office agreement. Both dentists can be liable if an issue arises. It is critical to have an employee manual in place and established policies for meals and breaks. Be clear on selection of joint employees and hiring and firing of joint employees and who will pay the employees including overtime, vacation and providing pay stubs. Employment Practices Liability Insurance is advised for both doctors in a shared-practice arrangement. Make sure your agreement contains indemnity language establishing each dentist's responsibility for his or her own actions. Ensure each dentist maintains his or her own insurance for professional liability and property liability and require proof of such insurance as part of the contract. Consider incorporation to limit liability for the actions of the other dentist. If one of the dentists contracts with the other dentist for administrative/front desk services (instead of being an employer) and is a HIPAA covered entity, that dentist must have a business associate agreement with the other dentist.

Before negotiating an agreement, check the other dentist's background to ensure licenses and permits are in order and that he or she is not currently under investigation by the Dental Board or being audited by a third-party payer.

**30. What are some tips I need to know when considering a contract with a service provider?**

Avoid getting stuck in a contract that is no longer working for you. Be sure to read the contract carefully, especially the small print, before signing. Initially it may sound like a great deal for a needed service, but be certain you won't have to pay more than what you have to. Look out for these items:

- Contract provisions that are not legal—for example, paying an individual a per-referral fee for bringing new patients to the practice;
- Detailed description of services—avoid vague or generalized descriptions;
- Termination rights—written notice and adequate time should be included; watch for fees;
- Payment schedule—refund rights if full payment is made before completion of service;
- Contract duration—know exactly when the contract terminates;
- Automatic renewals—if it is in the contract, know when you need to notify the service provider to stop automatic renewal;
- Ownership of product or services—know who owns what at the termination of a contract; and
- HIPAA compliance—business associate agreements may be necessary.

## Antitrust

### 31. Can I consult with other dentists when setting my fees?

Generally, any collusion among dentists with separate dental practices for each practice's fees for dental treatment may violate antitrust laws. There are laws in place that promote competition in the marketplace for the benefit of consumers, and price fixing among independent members of the same profession is illegal. An agreement to set fees in conjunction with other dentists need not be in writing to be in violation of antitrust laws.

Each dentist should establish his or her own fees for dental treatment without discussion or implementation of fees that match those of other dentists as such collusion could lead to both criminal and civil liabilities. The exception would be for dentists in group practice who can set fees with one another as they are considered one entity.

*Resource:* U.S. Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors

### 32. What can CDA do to protect the interests of dentists within the structure of managed care dental plan networks?

It is not the purpose of the ADA and CDA to restrict or oppose the business of insurance companies — indeed, to do so could create substantial antitrust risk for the associations and those involved. Whether and how to participate in insurance plans, including managed care or any particular plan, is an individual decision each dentist must make.

CDA offers members information about practice options, including the management of patients' dental benefit coverage and resolution of payment disputes with dental benefit plans. In addition, CDA is at the forefront of advocacy efforts to address problematic payment practices of plans so that dentists will be able to best serve their patients by maximizing their benefits.

Both the California Health and Safety Code (§1371.1), affecting Knox-Keene plans, and the Insurance Code (§10123.145), affecting preferred provider organizations and indemnity insurance, require health plans to have in place a process for resolving disputes with payers. While most disputes involve payment decisions by a plan, the structure of the law allows providers to appeal disputes they may have with a health plan. This ability to challenge plans' specific payment decisions and policies is relatively recent. Prior to enactment of these appeal rights, providers largely had to abide by the unilateral decisions made by payers. The ability to challenge disputes with payers through the plans' dispute resolution process grants health care providers greater leverage in such conflicts. CDA assists member dentists in determining whether to use a plan's formal dispute resolution process and helps the dentist file the appeal. Beyond the plan's dispute resolution procedure, a health care provider may also file a complaint with either the State Department of Managed Health Care or the Insurance Commissioner, should a plan not resolve a provider's dispute in a way that satisfies the provider.

CDA monitors dental benefit plan issues brought to its attention by members. It analyzes these issues for potential legal or legislative intervention on behalf of its membership.

### 33. Do the antitrust laws prevent me from promoting direct reimbursement?

Direct Reimbursement (DR®) is a self-funded plan that provides a percentage of reimbursement for employees' dental treatment based on the amount spent on treatment and not the type of treatment with patients being able to choose any dentist for dental care. DR®, if structured and marketed in compliance with laws, does not violate antitrust laws. DR® that is set in place without counsel from a qualified attorney may violate antitrust laws, as well as a number of defamation and tort laws, as well.

A DR® plan should generally avoid promotion for a patient to not engage in certain arrangements, such as encouragement of boycotting participation in an insurance plan, but should encourage patients to be able to choose their own dentist and receive reimbursement based on their treatment costs rather than type of procedure.

### 34. Do the antitrust laws prevent insurance companies from setting low reimbursement rates? From imposing burdensome contractual provisions?

A single insurance company that sets its own reimbursement rates without collusion with another insurance company is not in violation of antitrust laws, regardless of how low the reimbursement rate may be for dentists in that particular geographic area. If two or more insurance companies agree with one another to both fix reimbursement rates at a certain amount, this action would result in a violation of antitrust laws.

A greater issue is not whether two or more insurance companies set prices with one another in violation of antitrust laws, but whether one insurance company has such a significant prevalence in a geographic area that there is no competition to that insurance company by other insurance companies thereby resulting in such prevalent company having a monopoly in that particular area. Historically, courts have been reluctant to impose legal restrictions on particular companies that have a significant market share in an area thereby leading to monopoly power because courts do not wish to quell appropriate business activities that do not per se violate antitrust laws. However, more recently courts have struck down mergers and acquisitions between health insurance companies that would lead to greater monopolies as patients and providers would have limited or no choices for the purchase of or participation in insurance plans, respectively.

Burdensome contractual provisions are generally not viewed as violations of antitrust laws because a dentist is not under any legal obligation to agree to the terms of a burdensome contract and can decide not to enter into such an agreement with an insurance company.

### 35. Is there anything that a group of dentists can do to address threats to our practice?

Dentists may collectively pursue appropriate legislative lobbying to promote protection of their interests and the interests of their patients. Antitrust laws do not prohibit appropriate lobbying that has the goal of the provision of enhanced patient care. Lobbying efforts that are based on higher insurance plan fees for dentists or boycotts of insurance company plans may violate antitrust laws. If the lobbying is conducted in good faith, dentists can as a group lobby any branch of the federal and state government pursuant to the Noerr-Pennington Doctrine, which provides immunity to private entities, such as dentists, attempting to impact legislation that may have anticompetitive results.

## Lawsuits and Malpractice Claims

### 36. I've been sued for malpractice — what do I do?

The likelihood of a dentist experiencing a malpractice claim at some point in his or her career is real. When a notice of a claim or intent to file a lawsuit is received, it is essential to immediately contact your professional liability carrier and discuss the situation with a claims representative. These individuals are well informed about dental practices, legal issues and insurance principles. When the situation warrants, an attorney will be assigned as legal representative. Failure to contact your professional liability carrier in a timely manner may adversely affect insurance coverage. Failure to respond to a lawsuit in a timely manner may result in the waiver of your right to defend the lawsuit.

### 37. Should I settle? On what terms?

Most insurance policies have an unconditional consent-to-settlement provision, which makes you, the policyholder, a partner in deciding the case development and outcome.

Before deciding to settle your claim, you should consult with trained experts who can provide guidance through every step of the process. A claims representative and/or attorney will discuss alternatives, evaluate the impact of settling the case versus going to trial and then make a mutual decision with you at the appropriate time. Expert consultants in the areas of dentistry that are at issue will also be called upon to determine whether the standard of care is met.

Prior to settlement negotiations, you and your attorney will weigh the option of pursuing the case through litigation, including the risk of liability and the potential damages, versus the time and expense of being away from your practice. In some instances, the settlement demand is within a range that is considered acceptable given all the variables in the case.

Regardless of the reasons you may consider a settlement, professional liability matters can never be settled without your written consent.

Certain settlements must be reported to the National Practitioner Data Bank and/or the Dental Board of California. For more information, refer to question 40 below.

### 38. How does the Peer Review process work? If I prevail in a Peer Review case, can the patient still sue me?

The CDA has a statewide Peer Review system whose purpose is to resolve disputes that may arise in the delivery of dental services to the public; specifically, disputes regarding the quality of dental treatment. This benefit is available to dentists who are members of the CDA and their patients at no cost to either party. A committee of dentists reviews the complaint and determines whether the treatment in question is acceptable or unacceptable. If the committee determines that the treatment is unacceptable, it will instruct the dentist under review either to refund the fees paid for the treatment or to pay for corrective treatment if it is determined that further harm was caused. If the Peer Review committee determines that the treatment was acceptable, no refund is awarded to the patient. Upon receipt of the committee's decision, either party may appeal the decision to the CDA Council on Peer Review Appeals Panel.

Requests for reimbursement for time lost from work, pain and suffering, mileage and medical expenses cannot be accepted in the Peer Review system, as it is not a punitive system but rather an evaluative one. It is also not within the purview of Peer Review to evaluate complaints regarding fees, communication issues, office procedures, disputes between buyers and sellers of a dental practice, etc., nor is it within the purview of Peer Review to provide second opinions.

The Peer Review system includes a time limitation policy for accepting a request for review. The inquiry must be received within three years from the date the treatment was completed or within one year from the date the initiator of review became aware of the alleged problem, whichever occurs first.

If the dentist under review intends to assert the right to arbitrate the case pursuant to an arbitration agreement with the patient, the dentist must notify CDA of this fact in writing within 10 working days of receiving a letter from CDA notifying the dentist that the Peer Review committee has received an inquiry from the patient. If the dentist fails to notify CDA of the right to arbitration, the dentist waives the right to challenge the Peer Review process or any decision it makes on the basis of the arbitration agreement.

A patient can file a lawsuit against a dentist at any time during a Peer Review case or after a case has settled, regardless of the outcome of the case. A lawsuit must be filed within three years from the date the treatment was completed or within one year from the date the patient became aware of the injury and believed that the injury was caused by the dentist's wrongdoing, whichever comes first. Filing a Peer Review case does not toll the statute of limitations for filing suit. If a lawsuit is filed regarding the treatment under review in the Peer Review system, the case will be closed.

Although Peer Review is designed to be an alternative to litigation, Peer Review decisions are not legally binding. All parties are expected to abide by the decision of the Peer Review committee. However, in the event a member elects not to comply with the final decision in a Peer Review case, the CDA Council on Peer Review will refer the matter to the CDA Judicial Council, which will investigate whether a violation of Section 3 of the CDA Code of Ethics has occurred. Section 3 states that member dentists are obligated to "comply with the reasonable requests of a duly constituted committee, council or other body…of this association…" If the Judicial Council determines that the member has violated the CDA Code of Ethics, it may revoke membership, suspend membership or place the member on probation. In any of these cases, the Judicial Council is obligated to report the decision to the Dental Board of California and the National Practitioner Data Bank.

### 39. How do I know if I commit malpractice?

Dental malpractice is negligence by a dental professional that causes injury to a patient. Negligence in dental malpractice cases is defined as any breach of the standard of care. The standard of care is violated if the treatment provided was inconsistent with what a reasonable dentist would do in a similar situation. If a general dentist performs a procedure that is normally performed by a dental specialist, the general dentist's treatment must be consistent with the treatment that a dental specialist would have rendered. If the substandard dental treatment causes injury to the patient, the dentist may be liable for that negligence and may be required to compensate the patient for all damages caused by the negligence. The standard of care is determined in a lawsuit by expert witnesses hired by each of the parties.

### 40. Must a malpractice claim settlement be reported to the National Practitioner Data Bank and the Dental Board?

There is often confusion about the specific reporting requirements for dentists whose liability carrier has issued a payment under their professional liability policy resulting from a written demand or malpractice claim, or for dentists who have received adverse Peer Review decisions. While settlement of a malpractice claim can occur for many reasons — which are not always related to the competency or conduct of a practitioner — a malpractice carrier is obliged to report any payment made on behalf of its insured to the National Practitioner Data Bank when a patient has made a written claim against the dentist. The public does not have access to this information, but hospitals, insurance companies, and the Dental Board of California do have access. A copy of the National Practitioner Data Bank report is sent to the Dental Board of California. A separate report of a settlement is sent to the Dental Board of California whenever a settlement or arbitration award exceeds $10,000. This report must be sent within 30 days after execution of the written settlement agreement or service of the arbitration awards on the parties. Payment of a professional liability claim does not always indicate that malpractice actually occurred.

If you choose to settle the lawsuit yourself, your obligation to report that settlement to the National Practitioner Data Bank depends on whether the payment is made by an entity or individual. Individual subjects are not required to report to the National Practitioner Data Bank payments they make for their own benefit (i.e., payments made out of personal funds). However, a professional corporation or other business entity composed of a sole practitioner who makes a payment for the benefit of a named practitioner must report that payment to the National Practitioner Data Bank. You must file a separate report of a settlement to the Dental Board of California whenever you pay a settlement or arbitration award that is over $3,000. This report must be sent within 30 days after execution of the written settlement agreement or service of the arbitration awards on the parties.

### 41. Will CDA represent me or file a brief on my behalf?

Because CDA and its affiliate and subsidiary companies are the sole clients of CDA's attorneys, CDA's attorneys cannot represent individual members in legal matters. The CDA legal department will do its best to help individual members find appropriate sources to help resolve their legal questions.

It is appropriate, however, for CDA's attorneys to intervene in legal matters that affect the dental profession as a whole. In the past, CDA's attorneys have taken part in lawsuits and filed amicus (friend of the court) briefs in support of cases related to amalgam, unlawful practice of dentistry and third-party payer issues.

## Business and Practice-Related Insurance

### 42. Do I need other liability insurance other than malpractice?

Business or general liability insurance provides coverage for injuries unrelated to dental treatment that occur on your premises. It also includes premises liability, which covers damage to other people's property, for example, if water pipes leak and damage the office below. For these premises liability insurance policies you should check your lease to see if you are required to name your landlord as an additional named insured party under that lease.

### 43. What other types of insurance coverage should I have?

State law requires workers' compensation coverage if there are employees. An employee health care plan is an optional benefit.

It is highly recommended that a dentist carry property coverage to protect the office and its contents in the event of a variety of casualties, including severe water damage. Lenders will likely require property coverage and general liability coverage when a dentist applies for a loan to purchase a practice or equipment. Also consider coverage to help pay business overhead expenses in case of an unplanned disruption to practice operations and data loss coverage to help pay expenses related to the theft or loss of patient and business information maintained electronically.

For a dentist's personal needs, consider life, disability and long-term care insurance and a hospital indemnity plan.

### 44. What is Employment Practices Liability coverage? Is it necessary?

Employment Practices Liability (EPL) coverage pays for defense costs, settlements and civil damages that might be incurred and the dentist is legally obliged to pay as a result of an actual or alleged wrongful employment act claimed by an employee or applicant for employment. Since employment practices are an increasingly common reason for lawsuits, coverage is recommended. Be aware of what the EPL policy covers and doesn't cover and the liability limits of the policy, as legal fees and potential liability may exceed coverage limits.

## Tax Issues

### 45. Is it okay for me to stay on cash basis accounting or must I use accrual basis accounting?

Accrual basis and cash basis are two methods of accounting that the Internal Revenue Service permits small business to utilize for tax purposes. Therefore, a dental practice can utilize either method for its accounting purpose. Each method entails a different manner by which income and expenses of a practice are reported to the Internal Revenue Service.

Accrual basis accounting counts revenue when it is earned and not when it is received. Accrual basis accounting counts expenses when the expense is incurred and not when it the expense is paid. Accrual accounting results in income statements that measure the profitability of a business.

Cash basis accounting counts revenue when it is received by the practice and counts expenses when they are paid. Since cash basis accounting does not count accounts receivable as income before they are received the practice does not pay taxes on accounts receivable.

While the majority of business use cash basis accounting, a certified public accountant can advise a dental practice owner on the best method of accounting. Most businesses use a cash basis method of accounting. Once you use a certain method of accounting, you cannot alter the method without the express consent of the Internal Revenue Service.

### 46. Can I claim the American with Disabilities Act tax credit for purchases of intraoral cameras, panorex machines, new chairs, etc?

Generally, the Americans with Disabilities Act ("ADA") tax credit does not apply to equipment expenses incurred by a dental practice when a dentist incurred such expenses in order to increase practice revenue and not to provide access under the ADA. If the majority of patients who benefit from the dental equipment are not disabled, it is less likely that the Internal Revenue Service would apply the ADA tax credit to dental equipment expenses. Claiming an ADA tax credit may lead to greater likelihood of an audit. A certified public account can provide advice on the applicability of ADA tax credits for a particular dental practice.

### 47. What are my requirements regarding payroll taxes?

The Internal Revenue Service and the California Employment Development Department (EDD) require that all employers correctly withhold and make appropriate tax payments. Both the Internal Revenue Service and the California Employment Development Department have online resources available for employers.

The social security tax rate is 6.2 percent for employers and 6.2 percent for employees in 2017. Social security has a wage base limit whereby social security taxes only apply to wages earned up to the wage base limit, which in 2017 is $127,200.

The Medicare tax rate for employers is 1.45 percent and for employees is 1.45 percent in 2017. Medicare tax is not subject to a wage base limit as all income is subject to the Medicare tax. Furthermore, individuals earning more than $200,000 per year and filing as single are subject to the Additional Medicare Tax at 0.9 percent. There are also additional federal and state unemployment taxes.

If an employer does not appropriately and accurately withhold and pay payroll taxes, there are significant penalties that the Internal Revenue Service will wage against the employer.

California employers are responsible for reporting wages paid to employees and for paying Unemployment Insurance (UI) and Employment Training Tax (ETT) on those wages, as well as withholding and remitting State Disability Insurance (SDI), Paid Family Leave (PFL) and Personal Income Tax (PIT) due on wages paid to workers.

A business that pays wages over $100 in a calendar quarter to one or more employees must register with the (EDD). Wages consist of compensation for services performed, including cash payments, commissions, bonuses and the reasonable cash value of noncash payments such as meals and lodging. Find registration forms, withholding schedules and detailed information at the EDD website: edd.ca.gov/payroll_taxes/forms_and_publications.htm. EDD also offers free classroom seminars on state and federal payroll taxes for employers throughout the state.

A business that pays an independent contractor more than $600 in any year must inform the EDD of such payments by filing Form DE-542.

Beginning Jan. 1, 2017, employers with 10 or more employees will be required to register with the Employment Development Department's e-Services for Business and to file all wage reports and employment tax returns and pay all contributions for unemployment insurance premiums electronically. All employers will be required to register and file under this new law beginning Jan. 1, 2018.

Employers who are unable to submit reports and remit contributions electronically should complete and submit an E-File and E-Pay Mandate Waiver Request (DE 1245W). For assistance in obtaining and submitting the waiver, employers can also contact the Taxpayer Assistance Center at 888.745.3886 or visit the nearest employment tax office to obtain a copy of the waiver.

Waiver requests can be submitted by mail or fax:

Employment Development Department
Document and Information Management Center
P.O. Box 989779
West Sacramento, CA 95798-9779
Fax: 916.255.1181

Employers will be notified by mail if their waiver was approved or denied and the waiver will remain valid for one year. Once the annual waiver expires, employers will be required to remit reports and contributions electronically or apply for the waiver again to avoid noncompliance penalties.

Penalties of failure to pay and noncompliance with the mandate can include $50 per unpaid return, $20 per unpaid wage item and 15 percent of the payroll tax deposit due.

### 48. Do I have to collect and pay sales tax? What is use tax?

Dental treatment and medicines are exempt from sales tax. The regulatory definition of "medicines" encompasses permanently implanted articles such as dental implant systems, including dental bone screws and abutments. Orthodontic appliances are specifically excluded from the definition of medicines, as are auditory, ophthalmic, ocular or some prosthetic devices or appliances. Services that may include an incidental transfer of property are not subject to sales tax; an example is in-office teeth whitening in which a tray is fabricated and given to the patient.

If a practice sells toothbrushes, bleaching kits or other non-medicines to patients, sales tax may have to be collected. Generally, the following guidelines apply:

- If you sell a product for which you did not pay sales tax to the supplier, you must collect and pay sales tax on the full sale price.
- If you sell a product for an amount higher than you paid the supplier and the amount you paid included sales tax, you must collect and pay sales tax on the difference between the purchase price and the selling price.
- If you sell a product for the same amount you paid, including sales tax, you do not have to collect sales tax. Be sure to retain necessary sales receipts.

Selling products from the dental office may create adverse tax consequences upon the sale of the dental practice. Such product sales may require payment of sales tax on a portion of the assets sold in a typical dental practice sale. Consult with an accountant about these tax considerations.

Dental laboratories are the retailers of the plates, inlays and other products they manufacture for dentists or other consumers. Tax applies to their entire charges for such products, regardless of whether a separate charge or billing is made for materials and manufacturing services.

Use tax is similar to sales tax except that it is the purchaser, not the seller, who pays the tax directly to the state. Use tax applies to purchases from out-of-state vendors when the items are to be used or consumed primarily in California and the seller has not collected California sales tax. Use tax rates are the same as sales tax rates, and products and services that are exempt from state sales tax are also exempt from use tax. Since 2009, service businesses that generate at least $100,000 annually from business operations are considered "qualified purchasers" and are required to register with the Department of Tax and Fee Administration if not already required to register. Registration helps the CDTFA collect a tax that has existed since the 1930s but is not well known among businesses and individuals.

### 49. What other business-related taxes do I have to pay?

Some California communities collect business-related taxes. A dentist can inquire about such taxes with the office where the business license is obtained.

## Office Design

### 50. What laws affect office design?

Local and state building codes and local building inspectors' interpretation of those codes have the greatest impact on dental office design. Elements of the federal Americans with Disabilities Act (AwDA) that deal with access for the disabled and California's own accessibility standards are incorporated into local codes. Office designers and building inspectors should be familiar with these requirements.

State codes affecting office design include electrical, fire, mechanical, building, plumbing, energy and historical building codes. Many state building codes are based on standards established by national and international industry groups. The state plumbing code, for example, is based on the Uniform Plumbing Code and the state fire code is based on the International Fire Code. Some of these codes have health care facility-specific standards. The ADA monitors the various standard-setting organizations and comments on proposals as needed.

**51. What does the American with Disabilities Act require me to do about office design?**
The Americans with Disabilities Act requires that businesses that provide goods and services to the public, including medical and dental offices, be accessible by individuals with disabilities. Accessibility standards include removing certain barriers outside of the office, widening doorways and hallways for wheelchair accessibility and providing accessible parking lots and spaces. The specific requirements are different for existing facilities built before 1993 than those built after early 1993 or modified after early 1992. Many communities also have local and state requirements that must be adhered to along with the AwDA requirements. More information on AwDA, as well as the specific Standards for Accessible Design, can be found at ada.gov/index.html. Information on California-specific laws can be found at dor.ca.gov/disabilityaccessinfo.

It is advisable to consult with knowledgeable architects, contractors and, if necessary, a California Certified Access Specialist (CASp) when undertaking physical improvements to the dental facility to determine whether the proposed improvements will require compliance with accessibility laws. Make this determination before entering into contracts for the improvements, so that the scope and cost of the job, including AwDA compliance, are known before beginning the project.

The Division of the State Architect provides a reference manual outlining compliance with physical accessibility standards, available at dgs.ca.gov/dsa/programs/progaccess/accessmanual.aspx. Local building departments have the authority to interpret and enforce state building codes to best fit community needs.

**52. In my community, a disabled individual is suing several local small businesses for failing to provide reasonable access. Am I in jeopardy of being sued?**
Possibly. California's disability access guidelines were in place before the AwDA access regulations were adopted. Trying to comply with both sets of detailed standards has been difficult for many businesses. It is not unusual for a building to meet local building code standards but still leave the building owner or operator vulnerable to disabled access lawsuits. Additionally, California law allows private enforcement of accessibility regulations; that is, private parties may sue entities to force compliance with regulations, to recover costs of litigation and to have punitive damages assessed.

Take a close look at the most commonly used public areas: the parking lot, walkway, entrance, lobby and bathrooms. Appropriate signage is important. If you have concerns about the accessibility of your office, experts recommend that you hire a consultant who specializes in both state and federal disability access laws and regulations to inspect your office. A list of Certified Access Specialists (CASps) who are certified by the Division of the State Architect and frequently asked questions on hiring CASps can be found at the state Department of General Services Division of the State Architect, dgs.ca.gov/dsa/Programs/programCert/casp.aspx. State law provides some protection from lawsuits for businesses that follow through on CASps' recommendations to make their site accessible.

**53. I rent my office space. Isn't AwDA compliance the building owner's responsibility?**
Not necessarily. It's fairly common that both the owner and the tenant have shared responsibility for accessibility compliance. The responsibilities should be outlined in the lease agreement, and if they are not, chat with the landlord about which party is responsible for which elements. That can be added as an addendum to the lease or can be a separate stand-alone contract. In any event, both landlords and tenants can be held accountable for non-compliance under the AwDA and state law. Due to this joint responsibility for compliance with the AwDA and state law, it is advisable to obtain an analysis of your office's compliance with such laws when entering into a lease that requires you to comply with the AwDA or state laws.

**54. What are the AwDA requirements for existing facilities?**

The Americans with Disabilities Act requires that businesses that provide goods and services to the public, including medical and dental offices, be accessible by individuals with disabilities. Accessibility standards include removing certain barriers outside of the office, widening doorways and hallways for wheelchair accessibility and providing accessible parking lots and spaces. The specific requirements are different for existing facilities built before 1993 than those built after early 1993 or modified after early 1992. Many communities also have local and state requirements that must be adhered to along with the AwDA requirements. More information on AwDA, as well as the specific Standards for Accessible Design, can be found at ada.gov/index.html. Information on California-specific laws can be found at dor.ca.gov/disabilityaccessinfo.

**55. What are the AwDA rules for renovation and new construction?**

Newly constructed places of public accommodation must meet or exceed the minimum requirements of the ADA Standards for Accessible Design. Alteration and renovations made on or after Jan. 26, 1992, must also meet or exceed the standards. Be sure to consult the Standards for Accessible Design if you are doing the renovation or alterations yourself; and if using a contractor to build a new building or to handle renovations or alterations, be sure that the contractor will meet or exceed the standards and bind them contractually. Many communities also have local and state requirements that must be adhered to along with the AwDA requirements. More information on AwDA as well as the Standards for Accessible Design can be found at ada.gov/index.html. Information on California-specific laws can be found at dor.ca.gov/disabilityaccessinfo.

The Division of the State Architect provides a reference manual outlining compliance with physical accessibility standards available at dgs.ca.gov/dsa/programs/progaccess/accessmanual.aspx. Local building departments have the authority to interpret and enforce state building codes to best fit community needs.

**56. How do I get more specific information about the AwDA and California accessibility requirements?**

The state maintains a California Disability Access Information website at disabilityaccessinfo.ca.gov. You will find links to federal and state laws and to resources that help answer your questions. The California Access Compliance Reference Manual, compiled by the Office of the State Architect, Department of General Services, provides interpretations of regulations and checklists and is available at dgs.ca.gov/dsa/programs/progaccess/accessmanual.aspx.

**57. Does HIPAA require office design changes?**

HIPAA does not specifically mandate office design changes. That said, compliance considerations with respect to HIPAA privacy and security rules may sway design trends over time. For example, offices with open operatories may incorporate curtains or sliding doors. Additionally, design may shift to avoid patient access to protected health information. This could include minimizing the opportunities for patients to congregate in a common area where they might see or overhear protected health information, such as at the front desk or near computers. The marketing of products designed to safeguard and secure protected health information (e.g., easily locking cabinets) may become more prevalent, but HIPAA does not require specific office design implementations. It allows the individual practitioner the flexibility to decide which safeguards are appropriate given an office's size and layout.

**58. What other regulatory issues affect office design?**

California has an ergonomics regulation to prevent repetitive motion injuries. It is good risk management to proactively address this issue in your office design. You should consider adequacy of space, equipment placement and work processes.

California limits exposure to air contaminants such as glutaraldehyde, formaldehyde and nitrous oxide. Ensure that the rooms where these chemicals are used are properly ventilated.

Consider waste management in office design. Some communities require installation of amalgam separators. A comprehensive recycling program that separates different types of waste such as batteries, paper, plastic, fixer and amalgam may be desirable or required in some communities. Other communities are starting to implement mandatory composting programs.

Controlled substances must be stored in a secure area.

Dental materials that require cold storage should be kept in a refrigerator separate from the refrigerator used for personal and employee food items.

**59. Should I rely on design professionals and what should their contracts include?**

Design professionals are a great resource, but they should be informed prior to their services being engaged that a dental practice is considered a place of public accommodation under the AwDA and state and local laws and regulations. Ensure that they are familiar with the Standards for Accessible Design and be sure to bind them to AwDA compliance contractually.

Whenever a major renovation or office buildout is performed, it is advisable to assemble a team to help with the process. The team should include architects, contractors and possibly AwDA consultants or Certified Access Specialists to ensure that the office design meets stringent building codes and regulatory requirements. An attorney may assist with contracts that provide liability protection for the acts of the design professionals and contractors and that impose penalties on contractors who do not complete the work in a timely fashion.

## Marketing and Websites

**60. What are the laws I need to consider when advertising my practice?**

Every marketing effort must take into account various state and federal laws that focus on consumer protection, truth-in-advertising and information privacy. Here are some examples:

- **Anti-kickback**. A kickback is an illegal payment for rendering a service at the expense of or which deceives a third party. Both federal and state laws have anti-kickback rules. For example, a dental practice may not pay an individual for each patient referred by the individual.
- **Truth in advertising.** The Dental Board of California and the Federal Trade Commission (FTC) enforce "truth in advertising" rules. The Dental Practice Act sets rules on representations concerning standing as recognized dental specialists, potentially deceptive advertising practices, naming your business, how to advertise fees and discounts and more. Fictitious names must be registered with both the Dental Board and the county recorder's office. A dental plan may set limits on the marketing of a dental practice's affiliation with the plan.
- **Outdoor Signs**. City and county sign ordinances can dictate size, location and look of outdoor business signage. If the dental practice sign will be next to a state highway, the state Department of Transportation also has to approve the sign.
- **Use of Patient Information.** State and federal laws overlap in the regulation of a dental practice's use of patient information for marketing purposes. The federal HIPAA Privacy Rule and the state Confidentiality of Medical Information Act (CMIA) require a dental practice to obtain a patient's authorization prior to using patient health information to communicate about a product or service that encourages a recipient of the communication to purchase or use the product or service. Patient authorization is also needed prior to giving patient information to another entity to market its product or service. Sample patient photo and testimonial authorization forms are available on cda.org/practicesupport.
- **Endorsements.** Any endorsement must comply with the FTC's rules covering reviews, social media and traditional advertisements. The FTC rules exist in part to ensure consumers know the nature of the relationship between an endorser and the advertiser so that consumers can properly determine the value of any particular endorsement. For example, if a dental practice gives incentives to patients who provide testimonials, the practice must disclose the incentives.

- **Website.** The state Online Privacy Protection Act requires a commercial website operator to post online and to comply with its privacy policy if the operator collects personal information on California residents through the website. The privacy policy must contain certain elements. HIPAA and the Dental Practice Act require posting of specific information on a dental practice website. Copyright and trademark laws apply to websites. A website must be accessible to the visually-impaired.
- **Email.** The federal CAN-SPAM Act and California law apply to all email messages, including business-to-business communications that are advertisements or promotions of a commercial product or service or that promote content on commercial websites. Unsolicited commercial email may not be sent to California email addresses or from California email addresses. Appointment reminders are not commercial communications. It is recommended to obtain an individual's consent prior to sending him or her email, even if the email is not a commercial message.
- **Telemarketing.** Both the Federal Communications Commission and the FTC regulate telemarketing. The FCC enforces the Do Not Call Registry rules, and the FTC enforces the Telemarketing Sales Rule. Even if a dental practice does not use telemarketing and instead uses direct mail or general media (radio, print or internet) advertisements, how a dental practice responds to the calls resulting from those ads can be subject to the rule.
- **Contests, Referrals and Endorsements.** Contests have become popular marketing tools for dental practices. Using contests to obtain patient referrals or endorsements requires the dental practice to be adept at navigating the laws prohibiting compensation for referrals and FTC truth-in-advertising rules. An example of such a situation is the dental practice that puts the name of a patient in a monthly drawing (technically a "sweepstake" under California law) for a dinner certificate for "liking" the practice's Facebook page or a post. The practice would be required to disclose all the rules of the drawing and also to post a disclosure on the Facebook page that an incentive was offered to solicit the "likes."

### 61. How does the California Dental Practice Act regulate advertising and marketing activities of dental practices?

The California Dental Practice Act:

- Defines "advertising" or "advertisement" and states what dental practice advertising may include;
- Prohibits the use of false, misleading or deceptive statements, images or claims;
- Prohibits advertisement of a guarantee of any dental service;
- Prohibits compensation (including thank-you gifts) and inducements for patient referrals;
- Requires a permit if the dental practice uses a name other than the name under which a dentist is licensed to practice (fictitious business name);
- Establishes rules for group advertising and referral services;
- Prohibits advertising that your services are superior to other dentists; and
- Establishes rules for advertising fees, discounts, dentures and specialty.

### 62. I'm very upset about the negative review a patient posted online. What options do I have to get it removed?

The best defenses against negative online reviews are effective communication with patients and documentation. When treating individuals or advising parents and guardians about a treatment plan, listen attentively to their comments, concerns and questions and repeat them back in your own words. This will help avoid miscommunications that could lead to unhappy patients. Discussion, documentation and a clear outline of treatment goals and expected outcomes are excellent defenses against defamatory statements. Charting should be chronological, factual and objective and should provide anyone who reviews the patient record a clear insight into how staff responded to that person's concerns. If dentist and staff strive for good communication and documentation and a patient still chooses to post negative comments online, apply the following guidelines:

- Do not attempt to publicly respond or refute the claim on the website. There is a common misconception that once patients have divulged private information, that disclosure protects you from violating their privacy rights if or when you reply. That is not the case. You may inadvertently breach patient confidentiality or make a libelous statement in response.
- Check to see if the website has a written policy or protocol for removal of potentially libelous postings. Follow the process to request removal of the information.
- Ascertain who posted the negative comments and then review chart documentation for information that may corroborate your position or contradict the poster's claim.
- Seek legal advice to determine what recourse may be available.

### 63. What legal concerns do I need to consider when using a social couponing program?

Recent changes to state law have established conditions for appropriate advertising using social couponing sites such as Groupon and Living Social. If a dentist offers or sells services through a third-party website, the third-party does not itself recommend, endorse or otherwise select the dentist and the fee paid by the dentist to the third-party is commensurate with the service provided, this type of marketing may not be considered "referral of patients" that is prohibited in Business & Professions Code section 650. Other conditions apply:

- The dentist must disclose in the advertisement that a consultation is required and that the purchaser will receive a refund if not eligible to receive the advertised service.
- Any discount price advertising must include the regular, nondiscounted price for that service.
- The law does to apply to the provision of "basic healthcare services" or "essential health benefits," which include medically necessary dental anesthesia and pediatric oral care.
- The purchaser is entitled to a refund of the full purchase price (as determined in the agreement between the dentist and third-party), if the purchaser elects not to receive the service for any reason and requests a refund or if the dentist determines, after consultation with the purchaser, that the service is not appropriate for the purchaser.
- The third-party must be able to demonstrate that the dentist consented in writing to the above requirements.
- The third-party must make available to prospective dentist-advertisers all advertisements on its website by other dentists located in the same geographic region.

### 64. We are considering using a contest to generate referrals—what rules apply?

Contests have become popular marketing tools for dental practices. A dental practice that utilizes them must comply with state and federal law. Using contests to obtain patient referrals or endorsements requires the dental practice to be adept at navigating the laws prohibiting compensation for referrals and FTC truth-in-advertising rules. An example of such a situation is the dental practice that puts the name of a patient in a monthly drawing (technically a "sweepstake" under California law) for a dinner certificate for "liking" the practice's Facebook page or a post. The practice would be required to disclose all the rules of the drawing and also to post a disclosure on the Facebook page that an incentive was offered to solicit the "likes." California rules for operating contests and sweepstakes can be found on the website of the state Department of Consumer Affairs.

### 65. What are the rules on marketing by telephone and email?

Both the Federal Communications Commission and the FTC regulate telemarketing. The FCC enforces the Do Not Call Registry rules, and the FTC enforces the Telemarketing Sales Rule. Even if a dental practice does not use telemarketing and instead uses direct mail or general media (radio, print or internet) advertisements, how a dental practice responds to the calls resulting from those ads can be subject to the rule. Any "upselling" done in the course of a call will make that call subject to the rule. For more information, refer to the FTC website.

The federal CAN-SPAM Act and California law apply to all email messages, including business-to-business communications that are advertisements or promotions of a commercial product or service or that promote content on commercial websites. Unsolicited commercial email may not be sent to California email addresses or from California email addresses. An example of a marketing email is a promotion for teeth whitening sent to a dental practice's patients of record. Appointment reminders are not commercial communications. It is a good idea to obtain an individual's consent prior to sending him or her email even if the email is not a commercial message. Verbal consent to receive emails is allowed but the consent should be documented.

### 66. What advertising rules apply to dental specialists?

Legislation passed in 2011 removed limitations on specialty advertising, but other advertising rules still apply. For more information, refer to "Dental Practice Marketing and Advertising 101" on cda.org/practicesupport.

### 67. Can I use the CDA and ADA logos on my marketing materials?

CDA encourages its members to incorporate the CDA logo into their business systems and advertising, and it provides guidelines for proper logo usage. Consistent use of the logo by CDA and its members reinforces this visual image as the symbol of quality dental care.

A dentist may apply for permission to use the CDA logo on certain materials and advertisements. Log on to the CDA website and read the CDA Logo Usage Policy. Obtain permission by downloading the online application at cda.org and submitting it to CDA by fax or mail or by requesting an application through the CDA Member Resource Center at 800.CDA.SMILE (232.7645). Most applications are reviewed within five business days from date of receipt. Members with approved applications will receive the CDA logo by email.

The ADA has a member logo that may be used to identify an individual on professional websites, signage, stationery, brochures, business cards and other publicity or display materials. It may not be used to identify a practice. The ADA also has a graphic button that can be added to a member's website to link to the ADA's MouthHealthy.org materials. Visit ada.org to review the usage agreement and to download the logo and button.

### 68. Is it true I cannot give thank-you gifts or other incentives to my patients or other dentists for referrals they make to my practice?

The rule that generates the greatest number of questions from dental practices is the prohibition of compensation or inducements for patient referrals. For example, you may not provide someone with a gift certificate as thanks for referring a new patient, nor can you engage in prize drawings or other reward systems for those who refer patients to your practice. Similarly, you may not pay an employee or other third party for a referral nor can you provide a discounted fee to a patient for referring a patient. Some practice management consultants recommend inducement programs, but these programs violate the state Dental Practice Act. The law is explicit that you cannot provide anyone, including a referring doctor, staff member or patient, any remuneration in any form for the referral of a patient. Violation of this prohibition is a crime punishable by a substantial fine or imprisonment and is also a violation of the CDA Code of Ethics. The use of thank-you cards for referrals is acceptable, and there is no prohibition on giving gifts to professional colleagues or patients to mark special occasions such as birthdays or holidays.

### 69. What are some of the liability issues with practice websites?

A dental practice website can serve as an excellent marketing tool and provide access to information for patients. However, a dental practice website can also create legal liability for a dental practice if certain measures are not taken with regard to the website. Written and photographic content that is copyrighted cannot be used on a dental practice website without written consent from the original publisher that holds the copyright. A dental practice website must also comply with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in addition to California privacy laws.

A dental practice website must also conform to the legal requirements of the Dental Practice Act as it pertains to advertising and representations.

A dentist should be the legal owner of the domain name of its website and its website content, unless the dentist has contracted with a website development company that does not create custom websites, but plugs in specific practice information into a template that the dental practice can use as a website so long as the dental practice pays a monthly subscription fee. However, if a dentist pays the website development company to create custom content for such dentist's dental practice, then the dentist should be the owner of the content even if the content is plugged into a website template.

Another liability issue that could arise with a dental practice website is the provision of a professional opinion online. If a dentist renders a professional opinion on a practice website, a claim of malpractice could arise as the dentist may not have conducted a dental examination of a patient. If a dental practice website enables interactive communication through chat options, the website could be in violation of copyright laws even if a third party posts information that has copyright protection.

In addition to a dental practice website, online social media accounts can also create liability issues for a dental practice.

Although a dental practice website may create additional legal liability for a dental practice, certain measures can alleviate such liability. It would be a good idea to find out from your carrier the extent to which your liability policy covers your website and social media activity.

### 70. What protective measure can I build into the design of my website to avoid liability? What about site content?

Website use of copyrighted content without the express written consent of the owner of the copyright will result in copyright infringement. As a result, a dentist who hires a website developer to create and build his or her dental practice website must ensure that the written agreement with the dentist and website developer has a representation on the part of the developer that the developer has consent for use of all copyrighted content. Additionally, the website development agreement should also state that the website developer has full rights to use all of the photographs on the practice website as the developer should purchase the license to use all of the photographs on a website. Furthermore, a dental practice website should not utilize data from any studies or research without the website citing the study or research. The website developer should also represent that the website meets the requirements of the Americans with Disabilities Act. Since a dentist can be held liable for the content of a dental practice website even if a website developer posted the content, an agreement with a website developer should include an indemnification provision whereby the developer will be responsible to the dentist for any damages and attorneys' fees the dentist suffers from a third-party claim as a result of the website developer's breach of the terms of the website development agreement.

A dental practice website that uses photographs of patients of the practice, whether full face photos or just photos of the oral cavity, such as before and after photos of smiles demonstrating the results of dental treatment, must conform with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in addition to California privacy laws. A dental practice must procure written consent from the patient before posting any pictures of the patient or a portion of the patient's face on a practice website. Please consult with an attorney on the content of a written consent as it must be drafted in a manner that will shield a dentist from liability for disclosure of patient identity in violation of privacy laws.

Certain types of advertising and claims on a practice website can also result in violations of the California Dental Practice. The use of a false name on a website, such as a fictitious business name or "doing business as" name, without a valid permit from the Dental Board of California is a violation of California Business and Professions Code section 1680 ("BPC § 1680"). The use of a dentist's own name, if the dentist owns the practice as a sole proprietor, or the use of the name of a dentist's professional corporation on the practice website will be in compliance with the California Dental Practice Act. A practice website that uses any form of advertising statements that are deceiving or that mislead the public is in violation of BPC § 1680. For example, a claim that a dental whitening treatment will lighten the shade of teeth to a specific degree could result in a claim of false advertising. An alternative to statements of very specific results from dental treatments could be to qualify any types of potential results with content that not all individuals may have similar results and that the statements are not a guarantee of results from treatment. Additionally, statements on a practice website that advertise superiority in professional services or the ability to perform painless dentistry are also in violation of BPC § 1680. Any content on a practice website that even resembles the provision of professional opinion can create liability for a dental practice in terms of malpractice, as well as practicing dentistry without a license in states other than California as anyone in any other state can access a website. As a result, dentists should steer clear of providing professional opinions on the scope and necessity of dental treatment without having examined in person the viewer of their website.

A website can include disclaimers that are generally within the Terms of Use section and which can lessen legal exposure for a dental practice. The terms of use will impose a legal obligation on the viewer to agree to the limitations of the website, including without limitation statements that the content of the website does not result in the rendition of professional advice, that each viewer should consult in person with a dental professional for each of their specific dental health requirements and that the viewing and use of the website do not result in a patient-dentist relationship.

Generally, all of the legal exposure that can result from a practice website can also occur through online social media accounts. Any statements a dentist makes on a social media account may also lead to violations of the Dental Practice Act, copyright infringement and the rendition of a professional opinion resulting in potential malpractice. The response to an online review, whether positive or negative, can also be a violation of HIPAA and California privacy laws.

### 71. Is there anything I need to do to make my website accessible?

Complaints regarding website accessibility are becoming more common. There are a few steps that dental practices with websites can take to decrease the risk of a monetary demand or lawsuit. One strategy is to add an accessibility link to the website. This is language that tells individuals with disabilities how to seek help if they are unable to access something on the practice website. The language can instruct individuals to phone the office to have staff read content, provide transcripts of videos or assist them with filling out online forms. It is important to train staff on the language in the link and how to appropriately respond to inquiries. Another approach is to contact the website designer and ask if the practice website is accessible - and if not - how they can make it accessible. The AwDA standards for website design are known as WCAG 2.0, levels A and AA. Be sure that the designer can speak to those standards. If you know the website is not accessible, take it down temporarily and replace it with a compliant site. Engage a qualified website designer who is familiar with the accessibility standards and be sure to address compliance with the accessibility standards contractually.

If the dental practice hired a certified access specialist to inspect your premises, that inspection did not necessarily include testing of your website's accessibility. It might be a good idea to check the inspection report. If you're considering hiring an access specialist, you should inquire whether the individual or firm will test your website for accessibility compliance.

### 72. What elements are required on my website?

California requires licensed health care providers with websites to list for each licensed individual, the name, the license type and the highest level of academic degree earned.

The state Online Privacy Protection Act requires a commercial website operator to post online and to comply with its privacy policy if the operator collects personal information on California residents through the website. The privacy policy must contain certain elements, be transparent about how your practice collects, uses and discloses any information provided by user. The policy should address California-specific privacy rights, as well as how the website responds to browsers' do-not-track signals.

A dental practice that is a HIPAA-covered entity must include its Notice of Privacy Practices.

A dental practice that is required to comply with the nondiscrimination rules of the Affordable Care Act Section 1557 must post its Notice of Nondiscrimination. The notice must include taglines in the top 15 non-English languages spoken in California.

### 73. Are there general rules for communicating online?

The rules are simple – keep to truthful statements and do not mislead. Keep in mind your obligations under professional codes of ethics. Include appropriate and required notices and disclosures. Protect patient information.