

# What Every Dentist Should Know Before Signing a Dental Provider Contract

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## **Stop, read and consider before you sign**

When you sign a contract, you make promises that will be legally binding on you. If you fail to do what you promise, the other party may be able to terminate the contract or may initiate legal action against you for breach of contract. It is, therefore, essential that you review any contract carefully before you sign it.

By signing the contract, what are you promising to do? Are you able and willing to do it? What promises is the other party making to you? What remedies will you have if something goes wrong?

The material below is designed to help you answer these questions. It is not intended, nor should it be regarded, as legal advice. You are strongly urged to consult your personal attorney before signing any contract.

The other party to the contract is referred to as “XYZ Company.”

## **I. Term and termination**

- A. What is the term of the contract?
  - 1. Is there a definite date on which the contract expires?
  - 2. Will the contract be renewed automatically?
- B. How can you get out of the contract?
  - 1. When can you terminate the contract? Any time? Once a year? Once every three years?
  - 2. How much advance notice must you give XYZ Company that you intend to terminate?
  - 3. Can you terminate the contract for any reason (“without cause”) or only for certain reasons (“with cause”)? What are these reasons?
- C. Under what circumstances can XYZ Company terminate the contract? Must Company give you advance notice?
- D. Do any of your contract rights or obligations remain in force after the contract is terminated?
  - 1. Will you be required to complete work in progress?
  - 2. How will you be paid for work you complete after the contract is terminated? Will you still be bound by the contract price?

## **II. Modification cause**

- A. How can the contract be changed once it is signed?
- B. Do you have the right to approve changes proposed by XYZ Company?

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### III. What documents make up the contract?

- A. Have you received and reviewed all exhibits and attachments referred to in the contract?
- B. Other documents
  - 1. Does the contract refer to other documents that have not been disclosed to you? These may be policies and procedures, standards, a provider handbook or contracts between XYZ Company and other parties, such as subscribers or a utilization review agent.

**For example:** *“XYZ Company has entered into an administrative agreement with utilization review company governing the manner in which Company will interact with Dentist.”*

*“Dentist agrees to abide by all the policies and procedures of XYZ Company.”*

*“Dentist promises to comply with all administrative rules and procedures formulated by XYZ Company.”*

*“Dentist promises to provide dental services according to the provisions of the contract between XYZ Company and subscriber.”*

- 2. How will these documents affect you? Do they, for example determine your compensation, identify covered services or describe how a grievance system works?
- 3. Are these documents subject to change later on, and how will you be told of any changes? Will you have the right to approve them?

**Rule:** Make sure you obtain and carefully review all attachments, exhibits, appendices and undisclosed documents before signing the contract.

### IV. Plans included under the contract

- A. What types of plans are included under the contract?
  - 1. Will you be expected to provide services to patients covered through preferred provider organizations, health maintenance organizations, or traditional indemnity plans?
  - 2. Will any self-insured plans be included in the contract?

**Note:** The Employee Retirement Income Security Act of 1974 (ERISA) governs self-insured benefit plans and may preempt state laws relating to such plans. You may wish to consult an attorney familiar with ERISA to make sure you fully understand your legal obligations and rights concerning “self-insured benefit plans.”

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- B. Will you be expected to treat patients covered under all plans offered by XYZ Company? If so, you should note that some states' laws restrict the ability of plans to include "all products" clauses in their provider contract. If there is such a provision in your contract, you may want to discuss it with your lawyer.
- C. If XYZ decides to add plans to the contract after you signed it, will you have the right to decide whether or not to participate in the new plan? Or, will you automatically be required to participate in the new plan?
- D. Will you be expected to treat patients covered under plans offered by XYZ Company's "affiliates" under the terms of this contract? If so, will you be paid according to the terms of this contract and XYZ Company's processing policies? Or, will the reimbursement terms and policies of the affiliate apply?

### V. Coverage Determinations

- A. Will you receive a list of services that are covered under the contract?
- B. Will covered services vary among different plans included under the contract?
- C. Will covered services have to meet certain criteria, such as being "medically necessary"? If so, who will decide whether the services meet the medical necessity or other criteria?
- D. Will XYZ Company be permitted to decide retroactively that services you already have provided are not covered? If XYZ Company does this, will you be allowed to bill the patient for those services?

### VI. Liability

- A. What, if anything, does the contract say about responsibility for liability that may arise out of the contract? In other words, if something goes wrong, who will pay?
- B. Is there a "HOLD HARMLESS" clause that shifts liability from XYZ Company to you?

**For example:** *"Dentist promises to defend, indemnify and hold XYZ Company harmless from any and all claims, demands, actions and lawsuits arising out of or related in any way to dental treatment provided by Dentist."*

This means that Dentist promises to hire an attorney for, and pay any losses incurred by XYZ Company if any claims or lawsuits are brought against Company because of dental treatment provided by dentist.

The problem with hold harmless clauses is two-fold:

First, they may create obligations that you would otherwise not be responsible for under the laws of your state. Normally you must pay for your own negligence, but a hold harmless clause may mean that you have to pay for someone else's negligence too.

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Second, they are “contractually assumed” obligations - i.e., obligations you did not have under the laws of your state before you signed the contract. Your professional liability insurance policy may not cover contractually assumed liabilities.

**Rule:** Never sign a contract with a hold harmless clause without first consulting your personal attorney and your professional liability insurance carrier about the legal and financial implications of the clause.

- C. Is there a “SOLE RESPONSIBILITY” clause that shifts liability from XYZ Company to you?

**For example:** *“Dentist is solely responsible for all dental treatment provided under this contract.”*

*“Dentist shall be the sole judge of the dental care and services required by a Participant.”*

Imagine a situation where XYZ Company is at fault. Maybe a prior authorization rule, treatment protocols or restrictions on referrals to specialists contributed to a situation that the patient thinks is malpractice. If the dentist is solely responsible, then the dentist pays all.

**Golden rule of contracting:** Contract obligations do not alter the standard of care that the dentist owes to all patients.

If you are sued for malpractice, you will not be able to defend yourself by saying, “The contract made me do it.” Be alert to contract terms that might create conflicts between your obligations under the contract and your duties to your patients.

### VII. Referrals

- A. Does the program use a closed panel of specialists?
1. Who are the specialists on the panel?
  2. What if you want to use a specialist who is not on the panel?
- B. Who decides whether a specialist can be used at all? How is the decision made?

**Rule:** You have an obligation to your patients to make sure that treatment is not compromised, regardless of any restrictions in the contract.

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### VIII. Utilization review

- A. Will you be subject to utilization review?
- B. If so, is the term “utilization review” (or “external audit procedures” or “utilization control” or “quality assurance”) defined?
- C. How will it be conducted?
- D. Who will do the review?
- E. What standards will be used? Who sets those standards?
- F. What is the purpose of the utilization review system?

The key question is, will the utilization review process influence or control the way in which you practice dentistry? Will it compromise your professional judgment?

### IX. Peer review

- A. Will you be required to participate in a peer review process?
- B. If so, who will evaluate your work?
- C. What standards and procedures will they use?
- D. What is the peer review used for?
- E. Will you have an obligation to review the work of other dentists? If so, does XYZ Company maintain liability insurance to protect you from lawsuits that might be filed against you because of this activity?
- F. Is the peer review system binding?
- G. Is there an appeal process?

### X. Grievance system

- A. Will you be required to participate in a grievance system? If so, most of the concerns raised about peer review apply.
- B. Who can use the grievance system? Could a patient use it to complain about the quality of your care? By submitting such disputes to grievance, you may waive the right to have them decided in a court of law.

### XI. Arbitration

Does the contract contain an agreement to arbitrate? It can be enforced in most states. By agreeing to arbitrate, you give up your right to have the dispute decided in a court of law. The arbitrator's decision is almost always final; there is no right to appeal. Arbitration is not cost-free. The parties are usually responsible for their own attorney's fees, and they share the arbitrator's fee.

Does the arbitration process cover claims of malpractice for treatment you provide under the contract? If so, will your professional liability insurance carrier defend you in the arbitration proceeding and pay any award?

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### XII. Insurance

How much insurance must you carry? A specific sum? A “reasonable and customary” amount? An amount to be determined by XYZ Company? Does Company have the right to approve your carrier?

**Rule:** Confirm exactly what your obligations are so you will know if you need to purchase additional insurance or change carriers.

### XIII. Compensation

- A. How much will you be paid?
- B. What will you be paid for?
- C. When will you be paid? What information will you have to include in a claim to ensure that you are paid as quickly as possible? Talk to your lawyer about whether there are any applicable prompt payment laws in your state.
- D. Who will pay you?
- E. Might compensation vary from plan to plan, e.g., fee for service under one plan and capitation under another?

**For example:** *“XYZ Company agrees to pay Dentist upon the basis of the fees established in contracts negotiated by Company. Company shall contract on the basis of UCR fees whenever feasible.”*

- F. Is payment made from a designated fund?

**For example:** *“Company will place 50% of all premium income received each month into a dentist compensation fund.”*

*“Claims submitted by Dentist will be paid out of the compensation fund.”*

What if there is no money in the compensation fund? Will you still be paid?

- G. Are there other unknown contingencies to payment?
- H. What will you be paid for noncovered services?
- I. Will XYZ Company be permitted to determine that it has overpaid you for certain services and seek to recoup that money? If so, will there be a procedure for you to challenge the Company's attempt to recover that amount? Or, does the contract permit XYZ Company to unilaterally conclude that they overpaid you and deduct that amount from future payments to you?

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### XIV. Most favored nation clause

Will you be required to give XYZ Company the benefit of any “better price” that you give to another dental benefit organization?

**For example:** *“Dentist agrees that he or she will not charge greater fees for patients covered under a program administered by XYZ Company than Dentist does for his or her other private patients.”*

*“In the event the fee specified in this contract for a particular service exceeds the fee Dentist would charge a nonmember for the same service, Dentist shall charge the Member the lesser fee.”*

### XV. Noncompetition clause

A. Does the contract have a “noncompetition” clause that will limit your ability to participate in other programs?

**For example:** *“Dentist will not participate in any competing prepaid dental plans for a period of six months after this contract is entered into, and thereafter will give six months’ notice before contracting with any other competing plan.”*

*“While this contract is in effect, Dentist agrees that he will not, directly or indirectly, negotiate or contract with any other non-XYZ prepaid dental capitation plan, or involve himself in the establishment of any other prepaid dental capitation plan, which contracts or seeks to contract with any group with which XYZ Company has contracted without express written permission of XYZ Company.”*

B. These clauses may be unenforceable because they unreasonably restrain competition. You should obtain the advice of your attorney before you agree to this kind of restriction.

### XVI. Assignment/Delegation

A. Can you delegate your duties under the contract to an associate?

B. Can XYZ Company transfer its rights and obligations under the contract to someone else? If so, you may find yourself in a contractual relationship with an unknown entity. Does Company need your consent to transfer the contract?

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### XVII. Liquidated Damages

**For example:** *“In the event that XYZ Company terminates this contract on account of a breach by Dentist, Dentist and XYZ Company hereby agree that it would be extremely difficult to ascertain damages suffered by XYZ as a result of such breach and Dentist hereby agrees to pay XYZ, as liquidated damages and not as a penalty, an amount equal to (fill in the blank – e.g., all of Dentist’s compensation for the last three months preceding termination). Such liquidated damages shall be in addition to and not in lieu of any other legal or equitable remedy available to XYZ Company.”*

In other words, these are predetermined damages that you will owe.

**Remember:** Most contract obligations belong to the dentist; it is not that difficult to breach the contract. This is a liability that could easily be imposed against you. It is probably not covered by your professional liability insurance.

**General Rule:** Never agree to liquidated damages without the advice of counsel.

### XVIII. Entire Understanding

**For example:** *“This agreement contains the entire understanding between the parties and supersedes all prior negotiations and agreements.*

This means you will not be able to enforce any comments XYZ Company has made to you unless they are written into the contract.

**Rule:** If it isn’t in writing, it probably is no good.

### XIX. Governing Law

**For example:** *“This contract will be governed by the law of the State of (fill in the blank – e.g., Illinois).*

This means that the contract will be interpreted and enforced according to the laws of the State named. You should consult your personal attorney about any potential advantages or disadvantages of this provision.

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*The ADA provides a Contract Analysis Service to ADA members free of charge through their state dental society. This service offers analysis of third-party contracts (i.e., from managed care companies) and informs members in clear language about the provisions of the contracts so they can make informed decisions about the implications of participation. For more information, contact your state dental society.*