

HRD Liability Update

Courtesy of Sample & Associatesã



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Liability and the Independent Consultant

By John Sample, Ph.D. SPHR

Independent consultants and consulting firms are increasingly susceptible to threats from the legal arena (Sample, 1995). The "deep pocket" theory of damages will apply more to the larger firm that has acquired financial assets that can be liquidated, than to the smaller firm or independent consultant. For example, multi-national accounting firms that provide consulting and training services have a greater probability of litigation than do independent consultants. Not only are the stakes higher in terms of complex systems for which expensive consulting and training is contracted, but the pockets of these mega-firms are much deeper, and therefore more attractive for plaintiffs attorneys. This is not to say that independent consultants are immune from litigation. They could still lose their business assets, and possibly personal assets, if successful litigation favors the plaintiff! Incorporation under Sub Chapter S or C Corporation status lessens some of the legal exposure.

The following issues may impact the practice of an independent consultant:

- **Insurance requirements.** Employers of consultants may require various forms of insurance - workers compensation, malpractice insurance, performance bonds. Failure to obtain, or lying about terms or limits of required insurance, may negate a contract. Most governmental agencies and larger private sector employers will expect consultants to make records available for an audit, and the audit might occur long after the contract was completed. Cost will vary depending on the type of insurance required, type of consulting performed, and number of people insured.
- **Negotiating consultant contracts.** Independent consultants should seek the advice of a competent attorney prior to signing a contract for professional services. Taking for granted contractual language may be problematic once the contract has been agreed upon and signed. Contract clauses that require non-competition with similar industries should be studied closely. Also make sure of your legal standing if the contract is ever litigated. Finally, do not hesitate to negotiate with employers

contractual requirements that put the consultant at a non-reciprocal disadvantage (i.e., the employer can terminate the contract, but the consultant cannot).

Malpractice of Independent Consultants

Case law relative to malpractice of independent consultants is in a state of evolution. While no specific cases have been located as of this issue, it is expected that attorneys for plaintiffs will be pressing for case law in the future. It is probable that statutes and case law governing malpractice litigation of professionals, such as accountants, engineers, attorneys, doctors, and other professionals, will become the model for litigating consultants.

The term "professional" is important in this context. Accountants and engineers, for example, have rigorous educational, examination, and licensure requirements, and in many states, both are defined by statutes as "professionals." For these reasons, "professional" accountants and engineers are held to a higher standard of conduct than are mere mortal citizens.

The question for independent consultants (and possibly legislatures and the courts) to consider is to what extent are they "professionals."

Any one can be an independent consultant! Although degree programs exist for consultants, professional licensure is usually not a requirement. A licensed psychologist, for example, may consult in a variety of organizational settings. Although his or her degrees and license may be for individual and group counseling, their consulting work in organizations may be outside the parameters of their training and license. Should licensed psychologists (or for that matter, any "licensed professional") who acts as an independent organization consultant be held to a higher standard than consultants without degree or license?

The answer may be that trained and licensed professionals of any type who act as independent consultants will be held to a higher standard. Another alternative could be that professional status is not the legal issue. Maybe the issue is one of opinion from experts knowledge, skill, or experience. Holding consultants accountable for their opinions based on expert knowledge or skills may be more logical. Being a professional may assume some level of expertness, but the same is not true in the reverse. Experts may exist independent of professional training and licensing requirements.

Employers who rely on opinions derived from expert knowledge or skill of independent consultants may have a reasonable claim against those who fail to perform as agreed (breach of contract), or who perform carelessly (negligence), or who misrepresent their knowledge, skill, or experience as a consultant (fraud). (Lieberman & Siedel, 1988)

Suggestions for Preventing or Reducing Litigation

The following suggestions may be useful for independent consultant who are concerned about liability:

1. Reduce mutual expectations between consultant and client to written agreements that are reviewed by an attorney for both parties. Be specific about expectations, critical processes, and results. Resist the temptation of time and stress pressures to forego formal agreements.
2. Consider providing clients with options instead of advice. Require the client to consider options; be careful about pressuring for a particular option. Advice from someone holding themselves out as an expert may take on higher standard of care.
3. For example, consultants who provide strategic planning or organization development interventions may advise a client to change their mission, market base, or the restructuring of personnel. The failure of a business based on such advice from an expert could lead to liability.
4. Consider a peer review process model as practiced by attorneys, accountants, consultants for long term care facilities, and the medical profession. (Donabedian, 1989).

References

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Note: This issue of the HRD Liability Update is adapted and modified from Sample (1995).

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