Zinsergram a/k/a Legal Update

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CONTRACTING PRACTICES TO AVOID

This column will review some practices that I have discovered at various newspapers while conducting independent contractor audits or preparing for litigation. These are practices that I recommend you *avoid*.

1. **Contracting Before Delivery** – In several situations, Circulation Management allowed a newspaper contractor to start delivery of a home delivery route *before* the contractor actually signed a written Independent Contractor Agreement. This is a major problem. You could be the victim of "Murphy's Law." Just imagine the confusion and finger pointing if the independent contractor newspaper carrier has a serious automobile accident while delivering without a contract.

2. **Separate Contracts for Separate Routes** – It is considered evidence of independent contractor status if a newspaper carrier has the right to contract for more than one delivery area. The best practice is for the independent contractor to sign a separate Independent Contractor Agreement for each individual route or delivery area. In my preparation, I discovered that Circulation Management was missing this opportunity by merely penciling in the number of the new route when the contractor agreed to deliver to a second area. The right of the contractor to contract for more than one delivery area is considered evidence of entrepreneurship and thus evidence of independent contractor status. A separate written contract better evidences this entrepreneurship.

3. **Contract Compliments Course of Dealing** – Judges and Hearing Officers will give the written agreement great respect if the day-to-day course of dealings and practices of the parties are consistent with the written agreement. One of things discovered in my preparation of one case is that the written agreement contained contract language that simply did not apply to the particular contractor. While I was able to explain this away and obtain an independent contractor ruling, it would have been more independent contractor-friendly if the written agreement reflected the reality of the relationship.

4. **Contractor Receives Copy of Contract** – From an independent contractor point of view, it is absolutely the best practice to give the independent contractor newspaper carrier a copy of the written agreement after it is negotiated and signed. While preparing one of my cases, we discovered a questionnaire completed by the independent contractor, claiming to be an employee. In that questionnaire, the

contractor checked a box that said he did not sign a written agreement. In preparation, when I asked my witness why the independent contractor would make such a statement, I learned that this particular Manager did not routinely give contractors copies of the agreement. That looks really bad when you are trying a case. Always give the contractor a copy of the final signed Agreement.

5. **Substitutes –** In my opinion, the greatest single distinguishing factor of independent contractor status is the contract right and obligation of the contracted carrier to utilize a substitute if the contracted carrier does not want to personally perform the services. Employees may not engage substitutes. Typically, the independent contractor may use substitutes without restriction. The sub can use whomever he/she wants to use; the contracted carrier directly pays the substitute. If, for any reason, the contracted carrier is unable or unwilling to deliver on a particular day, the contract obligates the contractor to find a substitute. What I discovered while preparing for one case is that the particular manager was not following the contract that obligated the contracted carrier to find a substitute. Rather, the Manager was maintaining "on-call" substitutes that were provided a 1099 from the Publishing Company at the end of the tax year. This was not an independent contractor-friendly practice and the newspaper has ceased it.

6. **Contract Termination Provision –** I recommend that a contract termination provision be bilateral, meaning that the provision applies with equal force to both the Publishing Company and the contractor. What I learned in preparation is that when a contractor terminated the agreement, the Publishing Company was not requiring the contractor to do so in writing with 30 days notice, as required by the Independent Contractor Agreement. Management was religious in writing letters when it terminated a contract. However, contractors were given a pass. The newspaper has cleaned up that bad practice.

7. **Recruitment Ads –** It is very common for a newspaper to run ads in its own publication, trying to recruit individuals to be independent contractor newspaper carriers. The text of this ad can be very helpful or hurtful. What I discovered in preparation is that a particular newspaper was discovering an extremely poorly drafted ad. It was also attempting to recruit substitutes. The newspaper has now changed its advertising practices. The ad refers to the contract as a "business opportunity" and has the "independent contractor" phraseology that will support the Company in future litigation.

   Do not use language stating that your Company is an "equal opportunity employer." This is **not** employment. It is an advertisement to establish an independent contractor relationship.

8. **Contractor Compensation –** The written agreement should reflect all of the compensation being paid to the contractor. That prevents misunderstandings and is independent contractor-friendly. In preparing one case, I discovered that the independent contractor was paid an additional contract fee if the contractor bagged the

newspapers with poly-bags, with an advertiser's imprint on them. However, the written agreement did not reflect that additional contract fee. While the fee was paid, the contract was silent. That has been fixed.

It is very important that the contract compensation evidence that it is based upon sales or output – and not hours worked. Avoid provisions labeled "subsidy" or "transportation allowance." Such provisions imply to a judge that your Company is subsidizing the expenses of the independent contractor. Independent contractors are responsible for all of their own expenses. If you can, build everything into the rate. Keep it simple!

9. **Start With a Blank Slate** – One of the key factors of independent contractor status is the right of the contractor to negotiate the agreement and the fees/rates contained therein. Often, a contractor will give testimony that he did not have the right to negotiate, stating that when he sat down with a Manager, all of the blank spaces were already typed in. The witness testifies that it looks like "take it or leave it." It looks like a "done deal." On all items that are negotiable, start the contract in process with those spaces blank. Then, in the negotiating process, you will put those numbers in your handwriting in ink on the agreement. That will more likely support Management's argument that the contract was negotiated.

   *Drafting Tip***:** In the written Agreement, where the contract compensation is reflected, make sure that the rates are identified as "negotiated rates." On the last page of the contract, where the contractor signs the Agreement, I recommend that you include, in bold type, language stating, "Contractor also acknowledges that this Agreement is negotiable, including the contract fees herein." Such a provision takes away from the contractor the argument that he/she had no idea that he/she had the right to negotiate.

10. **Party to Deception** – In preparing one case, the contractor was the party that terminated the Independent Contractor Agreement. I was inquiring of the Management witness the reason for the termination. The Manager then sheepishly said that the contracted carrier, who had a full-time job with a manufacturing company, had lost the full-time job. The contractor was planning to file for unemployment compensation. The contracted carrier wanted to be able to complete unemployment papers saying that he had no work of any kind. The contractor asked the Manager to have his spouse sign a new contract. The same individual is going to be delivering the route. This is a problem. The newspaper was complicit in deceiving the State Department of Unemployment. I recommended against this.

11. **Literacy of the Contractor –** It is important in litigation that we are able to prove that both parties entered into the Agreement with the intention of creating an independent contractor relationship. The intention of the parties is important. In one case I was preparing, we learned that the contractor could not read! Management was knowingly contracting with an individual who could not read. The contractor had signed a document he could not read. That contractor is a position to later argue that he had no idea he was creating an independent contractor relationship.

During the contracting meeting, ask the prospective contractor to read back to you paragraph one of the written Agreement. You will quickly learn whether he/she can read. If he/she cannot read, do not contract with that individual.

12. **Language Barrier –** A language barrier can also destroy the argument that the contractor entered into the Agreement with the intention to create an independent contractor relationship. If the prospective contractor cannot understand spoken English and cannot read an English language contract, then you will have a problem proving the contractor's intention to create an independent contractor relationship.

    If you are going to contract with individuals who do not understand the English language, then you should consider having your contract translated into that language. For example, the *Seattle Times* has translated their Independent Contractor Agreements into the Spanish, Vietnamese, and Russian languages. Find a professor at a local community college to do the translation so that a neutral party does it competently.

Conclusion

This writer recommends that you do a complete annual audit of your independent contractor practices. You may be surprised as to what you find out there lurking to jump up and bite you if you end up in litigation. Preventive legal medicine is the best legal medicine. I hope you will take this advice to heart.