

THE BENEFIT OF ASSOCIATE AGREEMENTS IN DENTAL PRACTICE SALES

As a child, there is nothing better than playing with friends on a warm summer day and running into the house for a cold soda. Ahhh! Refreshing, cold Coca-Cola! How do they make such a wonderful drink? The answer to that question is known by exactly 2 people who cannot be within 500 miles of each other at any given time. Why the secrecy? Part of the reason is marketing, which will not concern us here, but the other reason is Coca-Cola must protect its product otherwise it may lose the “secret” part of the term “trade secret”. Why should you as a dentist care about the secret recipe of Coca-Cola? If you have an associate working in your dental practice, your patient lists must be protected, otherwise you run the risk of losing them to your associate if he/she decides to leave.

Assume for a minute that you have built a successful dental practice that is collecting \$1,000,000 per year. You’ve had an associate with you for some time who is producing about \$425,000 of that sum, while you and the hygiene department produce about \$575,000 of your collections. You list the practice with a broker, and depending on how hot the dental practice market is in your part of the country, you expect to receive as much as \$850,000 for your practice. Once you receive an acceptable offer, you start giving the buyer and the buyer’s advisors various due diligence information so they can evaluate the practice. Unfortunately, when they ask you for a signed associate agreement, you, like the majority of doctors employing associates, have no written agreement, relying rather on a handshake and a pat on the back. Unfortunately, that decision could cost you as much as \$300,000 on the sale of your dental practice because there is nothing stopping your associate from moving next door and opening up a competing dental practice!

Like any good business, a dentist seeking to grow his or her practice by hiring associates needs a good plan, and part of that plan includes an employment agreement. It is the intent of this article to discuss ways to hire those associates in a manner that protects the owner’s interest and allows a successful sale based upon the volume of work generated by all of the practice employees. Depending on which state your dental practice is in, you should follow one of the following:

Covenants Not to Compete. In the vast majority of states, covenants not to compete in an employment agreement are enforceable against the associate. Although the radius and duration of the covenants may vary, most states recognize the right of the employer to restrict the associate from directly competing with them once they leave. However, the burden of proof is on the employer to show that there was an agreement not to compete, so special care must be taken when drafting the covenant so as to comply with the law in a particular state. These covenants must be clearly and precisely drafted and should be signed by the associate when they start working at the practice, as most associates will not sign a restrictive agreement just to help you complete your practice sale. This is why it is so important to work with an attorney who specializes in representing dentists, they have the unique subset of knowledge which should allow you to protect your patient

base. Most dental practice brokers can direct you to competent counsel in the states in which they do business. In jurisdictions which allow restrictive covenants, it may be wise to also include a trade secrets provision in order to further protect your patient base.

Trade Secrets. Some jurisdictions state that as a matter of public policy, covenants not to compete in employment agreements are unenforceable unless there is an ownership interest involved. In those states (e.g., California and Colorado), including such covenants may even invalidate the entire employment agreement! How is the owner doctor supposed to protect this valuable asset? The answer lies in drafting a comprehensive trade secret agreement and then following a few simple rules to protect your patient list from unscrupulous associates.

Almost every state has adopted the Uniform Trade Secret Act. This law contains provisions under which an employer may bar the misappropriation and misuse of trade secrets by employees and former employees. Trade secrets are defined as information that derives economic value which is not generally known to the public and is subject to reasonable efforts to maintain its secrecy. In the dental practice setting, patient lists clearly have independent economic value, are not generally known to the public or other persons and if the lists are maintained in a reasonably confidential manner, constitute protectable trade secrets.

Almost every dental office maintains a computer hard drive where patient lists are stored. All computers can restrict access through the use of passwords. Your associates have no business accessing patient lists on the computer, as this is generally a billing function carried out by clerical workers. The associate should never be given password access to the office computer. The associate must of course be given full access to a patient's chart so that they can make notes on their diagnosis and treatment. However, an employment agreement should state that their access is limited solely to patient treatment, that they cannot make copies of patient charts and that they cannot take charts or other information home with them. By making associates subject to enforceable trade secret provisions, you'll have a practice that can be sold for top dollar, rather than having to worry about an associate trying to compete with the prospective buyer. As mentioned above, the Uniform Trade Secret Act has been adopted in most states, and such trade secret provisions should be included in all employment agreements to prevent associates from copying patient lists and soliciting them. This is especially true in those few states that do not permit covenants not to compete in employment agreements.

Having an associate work in your practice has many positive aspects. It allows you to have more vacation time, flexible hours, the ability to see your daughter score the winning basket in her first high school basketball game, in short it allows you to have more "you" time without hurting your overall quality of life. If done properly, hiring associates to work in your practice will not only free up more of your time, it can also grow your practice and generate higher income for you. However, you must adequately protect yourself when bringing in an associate to work for your dental practice. Having enforceable employment agreements will allow you to enjoy your newfound freedom

without having to worry about competition from your own employees. Ahhh! Now isn't that refreshing!

Jason P. Wood, B.A., J.D. and Patrick J. Wood, B.A., J.D.,

Jason is a partner and Patrick is the founder and senior partner of Wood & Delgado, a law firm which specializes in representing dentists for their business transaction needs. Wood & Delgado provide practice transition, practice formation and practice management consulting throughout the country and can be reached at (800) 499-1474 or by email at jason@dentalattorneys.com or pat@dentalattorneys.com.