Non-compete & trade secret agreements

By Stuart J. Oberman, Esq.

Dentists are often concerned about how to best protect their patient base when an associate dentist leaves the practice. The owner of a dental practice must make sure that associates cannot take the practices’ patient base or employees with them when they leave.

There are two methods of preventing this type of devastation to a dental practice, which are non-compete agreements and trade secret agreements. Both of these types of agreements should be incorporated into an associate’s employment agreement. In order to ensure an employment agreement is properly drafted, you should consult with legal counsel who is familiar with dental employment agreements.

Non-compete agreements

Dentists may have been exposed to a wide variety of terms when contemplating the issue of protecting their patient base, such as non-compete agreements, non-competition clauses, covenants not to compete and restrictive covenants. These are all different terms used to essentially describe a non-compete agreement.

A non-compete provision is typically a section of an employment agreement, however, a non-compete agreement may also be a separate document that an associate may be required to sign as part of his or her employment.

A non-compete agreement allows the owner of a dental practice to limit a former associate from starting his or her own dental practice that competes with his or her former employer, and a non-compete agreement may also prohibit an associate from working for a competitor. Generally, non-compete agreements are enforceable; however, state laws may vary.

The owner of a dental practice should always consult with his or her attorney before entering into any type of non-compete agreement.

In order to ensure that a non-compete agreement is enforceable, there are some general requirements that must be complied with. First, the non-compete agreement must be reasonable in that it protects the legitimate interests of a dental practice.

The dentist’s interest in protecting the time he or she has put into training a new associate must be balanced by the associate’s freedom to work where he or she chooses, and the public’s interest in obtaining the services of a particular dentist.

The second requirement for an enforceable non-compete agreement is that it must have a specific time limit. The shorter the period of time, the more likely the agreement will be enforced. Typically, a non-compete agreement may have a duration less than three years will be enforceable.

The third requirement for an enforceable non-compete agreement is that it must contain a reasonable geographic limitation. If a former associate moves to a dental practice within a 10-mile radius of a previous employer, the former associate has a 10-mile non-compete agreement (depending on state law), the court would likely uphold the agreement as valid and issue an injunction against the former employee.

However, if a non-compete agreement attempts to restrict an associate from practicing within a 50-mile radius of the associates’ former practice, it may be considered too broad as to the geographic restriction and, as a result, the agreement may be considered unenforceable.

If a court determines that certain provisions of a non-compete agreement violate state law, the court may utilize the Blue Pencil Rule. This rule allows a judge to modify the terms of the non-compete agreement that may be too burdensome on one party and yet enforce the remainder of the agreement to make the agreement more reasonable.

For example, if the non-compete agreement reasonably protects the employer’s legitimate interests and has a reasonable geographic limitation but the agreement states that the non-compete is to be enforced for a period of five years, the court may strike the five-year time period and replace it with a two-year time period, and enforce the remainder of the contract.

However, some particular states prohibit the use of the Blue Pencil Rule, and as a result, the agreement will be either upheld or invalidated in its entirety. For this reason, it is extremely important that a non-compete agreement comply with state law.

Non-compete agreements are widely used in the purchase of a dental practice. If a dentist purchases a dental practice, the purchase price by way of special allocation typically includes the personal and corporate goodwill of the seller and patient accounts. However, without an effective non-compete, the seller of a dental practice may open another dental practice across the street.

A non-compete agreement would prevent the seller from competing with the buyer in a specified geographic location for a specified period of time once he/she sells the practice, which would in turn permit the purchaser of a practice to establish his or her new practice.

Additionally, when hiring a new employee, a dentist should always ensure that the new employee is not subject to a non-compete agreement with his or her previous employer. In some states, a new employer may be held liable for hiring an employee who violates a non-compete agreement with a former employer.

Trade secrets

Trade secret provisions in an employment contract will also help protect the patient base of a practice. A trade secret provision should provide that all patients and their confidential information are trade secrets of the practice and note that sanctions will be enforced against any associate or employee who attempts to use this confidential information for his or her own personal gain.

Generally, trade secrets law has three components, which are: any information that is not generally known to the public, that confers some type of economic benefit on the holder of the confidential information from not being publicly known and to which the beholder has taken reasonable efforts to maintain its secrecy.

In dental practices, patient lists are clearly not public knowledge and such patient information definitely confers economic benefit on the owner of a dental practice. As long as an owner of a dental practice takes reasonable steps to maintain the privacy of his or her patients, patient information is a deemed trade secret and shall be protected accordingly.

In a dental office, patient lists are probably the most important asset of a dental practice. In determining whether a patient list constitutes a trade secret, courts will generally look at whether the information on the patients — such as the status of their health, the dental procedures the patients have completed and those procedures still needed, the type of insurance the patients carry and amount of insurance the patients have — is not easily ascertained by a competitor.

Although information readily accessible through public records cannot be considered a trade secret, generally patient lists in a dental practice constitute trade secrets and may not be used by a former associate to solicit patients.

While it is true that patient names, telephone numbers and addresses may be a matter of public record, the health records of the patients, the dental treatments they require or the patients’ general health insurance information is not accessible to the public. This information would therefore con-
All associates should be required to sign a non-compete and a trade secret agreement at the beginning of their employment.

Stuart J. Oberman, Esq., has extensive experience in representing dentists during dental partnership agreements, partnership buy-ins, dental MSOs, commercial leasing, entity formation (professional corporations, limited liability companies), real estate transactions, employment law, dental board defense, estate planning and other business transactions that a dentist will face during his or her career.

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