

Non-Competes and Non-Solicits: Why They Are Vital...and Many Practices Don't Have Them!

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We often run into practice partnership and associate agreements which have inadequate non-compete and non-solicit provisions. While it is unfortunate, it is not altogether surprising.

Many dental partnerships are started like the whirlwind “Vegas Marriage”; somewhat emotionally and in haste. The partners grab another buddy, who is an attorney; but may have little knowledge of dentistry. The documents are drafted; but with inadequate provisions for separation of partners. When getting “married” we are not thinking about divorce.

Our job as transition consultant is to hope for the best; but plan for the worst.

Non-compete provisions are vital; so that after a partner exits the practice, amicably or not, that partner cannot simply go across the street and compete against his former partners. We would be fine with that person continuing to practice at a “safe” distance.

Proper non-compete provisions have a geographical radius (the non-compete zone) and that radius must be considered reasonable; in order for it to be enforced by a court of law. What is considered “reasonable” can vary dramatically, based on the demographics of the area. A non-compete zone of 20 miles may be considered unreasonable and hence unenforceable in, say, San Francisco; but be perfectly reasonable in Salina, Kansas.

The provision must also have a time radius. It must be limited to a period of months or years and cannot be indefinite. This temporal radius might be one, five, or more years; but, again, it must be deemed “reasonable”.

You may be thinking that you have heard of non-compete provisions being very strictly construed; or even unenforceable in some jurisdictions (e.g. California). This is true; but only in provisions drafted for employment agreements.

The provisions may be much more expansive in partnership agreements; because there is an actual purchase of the partnership interest by the remaining partners.

Since the bulk of the value of a partnership interest is “goodwill” (i.e. patients or referring doctors) the courts allow a much greater degree of protection for this valuable asset.

It is also important to understand that a properly drafted non-compete is GOOD for the ASSOCIATE!

I emphasize this because one of the things that we hear a lot from incoming associate doctors is that they don't want to be constrained by a non-compete and they "have been advised" that they should look out for this type of thing.

This is horribly bad "advice" and only an incompetent attorney (or other advisor) would give it.

No prudent professional would enter into an associate relationship without reasonable non-compete/solicit provisions. However, we are very sensitive to the fact that an associate candidate might find that the practice is not a fit for her after just a few months and she doesn't want to be frozen out of the whole dental market in her town. This is perfectly reasonable and can, understandably, create an obstacle to signing an otherwise terrific deal.

We avoid this pit-fall by using a *probation* period for three to six months; during which the non-compete provision is NOT enforced. This gives both the employer and employee the time they need to make sure there are no glaring problems; but it is still not long enough for the associate to have become a substantial competitive threat to employer doctor.

It is important to note here, that the *non-solicit* provisions are not subject to the probationary terms and are always in force.

Non-solicit provisions are vital to a well-drafted partnership or operating agreement. These provisions are intended to prevent a departing partner from soliciting patients, referring doctors, or team members.

Even if a departing doctor were to set up shop outside the non-compete zone; he may still be able to lure patients, or team members, to his new location. Naturally, if he has been fairly compensated for his interest, he should not be permitted to then solicit those patients, or staff.

These provisions will typically have "liquidated damages" attached; which means that for every patient or staff member solicited by the former partner there will a monetary sum paid to her former partners. These provisions can also be enforced, "in equity"; by a restraining order issued by a court and prohibiting the offending partner from continuing his solicitation.

It is natural that doctors trained in medicine or dentistry wouldn't be familiar with a lot of these issues; but we want you to have a passing familiarity with these provisions; because we never know when they will have to be enforced.

We never cease being amazed at how many defective documents are out there! Rest assured that when we are designing your transition and doing the drafting of the documents, we will fix all of the defects in your current documentation.