

DENTAL LEGAL UPDATE

Dentist Employment Contracts

by Jeanine Lehman, Attorney

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Dentists are key assets of a dental practice. Their legal roles in the practice may be varied, including owner, employee, independent contractor, landlord, or a combination of different roles at the same time, or over time. Often, with the demands of the practice, the relationship of the parties may be based on a handshake rather than a written contract. That can be a mistake.

A comprehensive written and signed employment contract that is prepared by a knowledgeable health law attorney, and understood by the parties to the contract, can protect against misunderstandings and help preserve value in the practice.

One Size Does not Fit All

Employment contracts are like dentures – one size does not fit all. For example, an employment contract drafted to protect the interests of the employer does not work the same way as an employment contract drafted to protect the interests of the employee. Using an employment contract found on the Internet or from a friend is very risky and more often unenforceable. Laws change. A contract that worked two years ago may no longer work today. Practice owners often modify contracts without legal advice. In

doing so, they may delete the very clause that is required to make the contract enforceable, damaging their practice and financial position.

Noncompete

A hardworking excellent associate dentist is of great value to a dental practice. If that same dentist quit and opened a practice across the street, and the patients followed the departing dentist, the dental practice's value would be greatly diminished. Even the threat of that occurring can drastically diminish the value of the practice and make it difficult to sell. For example, when the owner-dentist dies, the surviving spouse is left with little bargaining power. This loss of bargaining power can also occur to a living owner-dentist.

To protect the practice against these risks, noncompete covenants are often used. Key provisions are necessary. The Texas statute requires a covenant not to compete to be ancillary to or part of an otherwise enforceable contract at the time the contract is made. Further, the statute requires that the covenant not to compete must contain limitations as to time, geographical area, and scope of

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Employment contracts are like dentures – one size does not fit all.



Website Favorites

Law Offices of Jeanine
Lehman P.C.:
www.jeanine.com

Capital Area Dental
Society:
www.capitalareadental.org

Texas State Board of
Dental Examiners:
www.tsbde.state.tx.us

Texas Dental Association:
www.tda.org

Texas Academy of General
Dentistry: www.tagd.org

Texas Workforce
Commission:
<http://www.twc.state.tx.us/>

Dentist Employment Contracts (cont.) --

activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the person being protected. Additionally, Texas law requires noncompete covenants restricting physicians to have several additional clauses, including buyout provisions. These additional requirements affect contracts with dentists dually licensed as physicians, such as certain oral surgeons. This area of law is litigated and has been changed by the legislature and court decisions. Therefore, the advice of a health law attorney is critical.

Consideration and clear implementation of noncompete covenants for employed and independent contractor dentists, and co-owner dentists are often prudent.

Ownership of Dental Records

Under Texas State Board of Dental Examiners (Board) rules, dental records are the sole property of the dentist who performs the dental service. Therefore, if the dental practice wants to own the dental records, a provision to transfer the dental records needs to be included in the employment contract, in accordance with Board rules.

Confidentiality

Confidentiality provisions are often included in employment contracts and provide important protections.

Duties

A clear description of the duties of the employee should be included in the employment contract. The allowance or disallowance of moonlighting can be addressed. Call and emergency coverage responsibilities can be included.

Compensation & Benefits

Compensation and benefits should be covered in the employment agreement. Will compensation be on an hourly, salary, or other basis? Is there a base salary? Are there bonuses? If compensation will be performance based, for example, based on production or collections, the methodology for calculation should be clear. An issue to consider addressing is how the redo of dental work will be handled. What is the payroll period? What benefits are available? Is there health/dental insurance, for employee only or for employee and dependents? What is the vacation, illness, and leave policy? Are there benefits for continuing professional education? Who pays for malpractice insurance, including any "tail" coverage? Are there retirement plans? Who pays for professional licensure fees and professional association dues? Are there any other benefits?

Termination Provisions

Termination provisions in the employment contract are very important. Is employment "at will" or for a set term? Is notice

required prior to termination? Is the notice period long enough to obtain the services of another dentist? Can the contract be terminated "for cause" and if yes, what constitutes cause?

Ownership Opportunity

Is there an opportunity for the employee to become a co-owner in the dental practice? Is there a buy-in? What is the process to use such opportunity? Is the opportunity mandatory or discretionary?

Coordination of Responsibilities

The dentist employee may also be a dentist co-owner. In such event, a succession plan should be made for what will happen with the practice if one or more of the dentist co-owners leave employment by the practice, either voluntarily or by death or disability. For example, how will practice debt, personal guaranties, practice ownership buyout, dentist employment agreements, practice building/lease, and other issues be handled? Several of the contracts of the dental practice will need to be coordinated to provide an overall plan. This critical planning takes close collaboration with the dental practice's team, including the health law attorney, accountant, and practice management consultant.

Importance of Signatures and Legal Formation of Contract

The legal steps to form a valid contract should occur, including but not limited to, signatures and delivery of the contract. Not surprisingly, a Texas court refused to enforce a dental practice noncompete agreement that was never signed.

Prevention is Key

As in dentistry, in contract matters, prevention is key. The first visit to your lawyer should not be at the point of litigation, any more than the first visit to a dentist should be because of toothache. Instead, the services of the health law attorney should be sought at the outset to draft the dentist employment contract. Also, the health law attorney should be consulted before modifying

the contract, and periodically to check for changes in the law.

On the flipside, it is prudent for the employee dentist or independent contractor dentist to have his own health law attorney review the employment contract or independent contractor contract prior to signature, to advise him on the terms of such contract. ■

Jeanine Lehman is an Austin, TX health law attorney who practices dental, health, real estate, and business law.

TIP: UCC Lien Terminations. When you pay off your practice's equipment loans, be sure to get UCC lien terminations from the lender and have them filed with the State, to avoid delays in refinancing or selling your practice.

Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at (512) 918-3435.

Dental Legal Update issues at www.jeanine.com

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Texas Legislative Update: Dental Services Organizations

The Texas Legislature made significant changes to the Dental Practice Act in the 2013 regular session, including increased scrutiny of Dental Service Organizations (DSO's). For background, early in the session, Senator Nelson's Senate Bill 151 proposed a sweeping change to the law applicable to DSO's. That bill would have required registration of DSO's with the Texas State Board of Dental Examiners (Board) and filing of DSO agreements with the Board, and would have prohibited DSO's from interfering with clinical and quality of care matters. SB 151 failed to pass.

Instead of SB 151, the Legislature adopted Representative Kolkhorst's House Bill 3201 for reporting on DSO's and other matters. This legislative and Board scrutiny heightens the risk with DSO dental service agreements.

At the issuance and renewal of a dentist's license, the following information will be collected from the dentist and, subsequently, a report based on such information will be provided to the legislature:

1. Number and type of dentists employed by license holder
2. Practice name used and each location of practice
3. Whether license holder is a Medicaid or child health plan program participant
4. Whether license holder is employed by or contracts with a DSO and, if so, the name and address of the DSO
5. Whether license holder owns all or part of a DSO and, if

so, the name and address of the DSO and each dental office at which the DSO provides services to patients

6. Whether the license holder is a party to a dental service agreement and, if so, the name and address of the DSO
7. If the license holder owns all or part of a DSO, whether that practice is a party to a dental service agreement and, if so, the name and address of the DSO

The Board may also require a DSO to provide the Board with the address of the locations where the DSO provides dental services in Texas and the name of each dentist providing dental services at each location.

Dental service agreements are agreements between a dentist and a DSO in which the DSO will (i) provide services related to the nonclinical business aspects of a dental practice, including arranging or providing financing, performing billing or payroll tasks, processing patient insurance claims, scheduling or otherwise interacting with patients and performing other administrative tasks, (ii) supervise or manage the employees or contractors of the dentist, or (iii) employ or otherwise contract with a dentist in his capacity as a dentist. DSO's are entities, which are parties to dental service agreements. This new law does not abrogate legal issues associated with nondentists engaging in the "corporate practice of dentistry". DSO agreements should be carefully reviewed by an attorney knowledgeable in dental law prior to signing such agreements. Don't wait for a toothache, call your attorney now. ■

**Have you moved?
Please send us a
change of address
to receive future
issues. Thanks!**

**To receive this
newsletter by
email, call
(512) 918-3435.**

About Our Firm ... Call us at (512) 918-3435

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has been in private practice as the owner of her firm for over 25 years and has over 30 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at **(512) 918-3435**, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com. Suggestions for future newsletter topics and invitations to speak to professional groups are appreciated!