

# DENTAL LEGAL UPDATE

## Non-Competes: Major Changes Possible!

## Banking Crisis: FDIC Insurance Limits, Diversification, Banker’s Set-off, Credit Availability, Planning and More

by Jeanine Lehman, Attorney

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With the ongoing banking crisis, including the recent Silicon Valley Bank collapse, and ever-changing economic conditions, including inflation, dentists need to check their banking protections, relationships, and obligations.

**FDIC Insurance.** Now is a good time to check with your banker concerning the FDIC insurance coverage on the bank accounts of yourself, your business, and your family. The FDIC says: “The standard deposit insurance coverage limit is \$250,000 per depositor, per FDIC-insured bank, per ownership category. . . . Deposits held in different ownership categories are separately insured, up to at least \$250,000, even if held at the same bank. For example, a revocable trust account (including living trusts and informal revocable trusts commonly referred to as payable on death (POD) accounts) with one owner naming three unique beneficiaries can be insured up to \$750,000.”

See the FDIC link:  
[www.fdic.gov/resources/deposit-insurance/faq/index.html](http://www.fdic.gov/resources/deposit-insurance/faq/index.html)

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### Texas Dentist Non-competes Major Changes Possible!

Texas is considering legislation to make major changes to the law regarding covenants not to compete applicable to dentists, nurses, and physician assistants (“health care practitioners”) and physicians in a bill sponsored by Senator Schwertner (who is also a Georgetown physician). At the time that this article is written, the Texas Senate has passed Senator Schwertner’s bill, which proposes major changes to the law for covenants not to compete regarding dentists, other health care practitioners, and physicians, in proposed changes to the Texas Business & Commerce Code. Next steps are consideration by the Texas House of Representatives and the Texas Governor’s Office.

The changes, if adopted, will be significant. The last day of the regular session of the Texas legislature is May 29<sup>th</sup>.

Dentists should contact their attorneys to determine the impact of this legislation on their practices.

The following are proposed changes in the law that would apply to

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Dentists should select their bank with the goal of having a long term relationship.

**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 or [jeanine@jeanine.com](mailto:jeanine@jeanine.com)

**Website Favorites**

Law Offices of  
Jeanine Lehman P.C.  
[www.jeanine.com](http://www.jeanine.com)

Capital Area Dental Society  
[www.capitalareadental.org](http://www.capitalareadental.org)

Texas State Board of  
Dental Examiners  
[www.tsbde.state.tx.us](http://www.tsbde.state.tx.us)

Texas Dental Association  
[www.tda.org](http://www.tda.org)

Texas Academy of  
General Dentistry  
[www.tagd.org](http://www.tagd.org)

American Dental  
Association  
[www.ada.org](http://www.ada.org)

Federal Deposit Insurance  
Corporation  
[www.fdic.gov](http://www.fdic.gov)

**Banking Crisis (cont.) --**

**Banking Relationships.** Dentists should select their bank with the goal of having a long term relationship. For example, in the pandemic, those banks who came through with PPP loans for dentists made a tremendous difference for the survival and recovery of dental practices. When selecting a bank, dentists should perform due diligence, including the financial strength of the bank, the services of the bank (including having an ongoing relationship with a banker), deposits, credit card processing, future loans, and potentially, for help in the hard times. For example, some loan agreements require any future loans and financing to be with the bank holding existing loans. Therefore, determining availability of future loans is very helpful. The alternative is to refinance if additional financing is needed, which can be expensive from a transaction fee standpoint and also from an interest rate standpoint in times of inflation.

**Primary Bank Account.** A common term in many loan documents is the requirement for the borrower to keep its primary bank account at the bank which provided the loan. This serves several purposes for the bank. First, the bank can debit loan payments from the primary bank account. Second, the bank account serves as collateral for the loan. Then, if there is a loan default and the bank has the right to set-off, the bank can take funds from the bank account to cover the default,

without prior notice to the borrower. Third, the bank can monitor the financial results of the borrower more closely by being able to observe amounts and trends for deposits and withdrawals. A "bounced check" will certainly get a quick response.

There may come a time that your friendly credit union will offer you banking services at a much lower rate than the bank that made you the loan. If you are considering that option, consider: first, the bank that made you the loan provided a great service in financing your practice, second, your loan agreement with your bank may prohibit moving your account(s), including your primary account, and such moving of your account may result in a loan default or a much higher interest rate on your existing loan, and third, you should consult with a knowledgeable attorney before making any such moves.

**Bank Set-off – Borrowers and Guarantors.** A customary term in loan documents is the bank's right to set-off. What this means is that if there is a right to set-off and there is a loan default, the bank has the right to "set-off". This means the bank can take the money in the borrower's and, probably, the guarantor's bank accounts up to the amount of the default, without providing advance notice to the borrower or guarantor. If the bank were required to give advance notice, it is likely that the funds

would be withdrawn from the bank.

If there is no requirement for the guarantors, usually the owner dentists and sometimes, their spouses, to keep their personal bank accounts at the dental practice bank, then for their own financial security, they will probably want to have their personal bank accounts at a different bank or financial institution.

Diversification of Banks and Bank Accounts. Quite a few years ago, when I was a young associate in a Texas health and banking law firm, I asked my boss, "where I should bank?" He said "Jeanine, always bank with at least two banks. That way if one fails, you still have access to money." That is also prudent advice to dentists and dental practices (subject to the commitments they have made in their loan documents).

Generally, it is also a good idea for a spouse to have ready access to a bank account and funds, at all times, including the event of the death or disability of the other spouse.

Payroll Processor. Dentists should ask, "who else holds my money?" The Wall Street Journal, in a recent article illustrated the importance of that question. A business was using a payroll processor and had transferred its payroll funds to its processor to pay the business's employees. The payroll processor's bank collapsed. At that point, the business was not a "depositor" in the failed bank and instead, the payroll processor was the "depositor". Therefore, the business did not have FDIC insurance on its payroll funds. Fortunately for the business, the feds stepped in and bailed out depositors of the failed bank for the deposits above the \$250,000 normal depository insurance limit. Do not depend on the largesse of the feds in the future. Dentists should ask their payroll processors where the payroll funds are deposited. Then, the dentists should make a risk analysis of the probability of failure of that bank or banks. This same due diligence by

dentist's and dental practice's should be applied to "who else holds their money?"

Change to Practice Structure. There are many terms in loan agreements that limit changes to the structure of a borrower (including a dental practice), unless the bank consents to such changes or is notified of such changes (as governed by the exact terms of the loan agreements). These changes include, but are not limited to, changes in the dental practice ownership, changes in the entity structure of the dental practice entity, changes in the name of the dental practice, and changes in the location of the dental practice and loan collateral.

Loan Documents. Loan documents are lengthy and complex. When taking out a loan, the actual loan documents may be received by the dentist at the last minute, while in a whirlwind of activity to close the deal. Often, the loan documents are not read and are not provided to the dentist's attorney for review. It is prudent to have your loan documents reviewed by a knowledgeable attorney and to receive advice on them well in advance of signing.

Before making changes to your banking relationships or to your practice, such as a change in ownership, it is critical to consult with a knowledgeable attorney.

Here is an example of a loan provision that is very problematic. Some loan documents contain a provision that says the loans are "payable on demand". That means the bank can call the loan due at any time and that the loan must be paid immediately. Can you imagine the havoc such a provision would wreak for your practice loan or equipment financing loan? This is another reason to consult with a knowledgeable attorney before signing the loan documents.■

**Jeanine Lehman** is a Round Rock, Texas dental attorney who practices dental, health, real estate, employment, and business law.

**Texas Dentist Non-Competes (cont.) --**

dentists if the proposed legislation becomes law:

(A) A covenant not to compete against a dentist is not enforceable unless the covenant:

- (1) provides for a buyout of the covenant by the dentist in an amount that is not greater than the dentist's total annual salary and wages at the time of termination of the dentist's contract or employment;
- (2) expires not later than the one year anniversary of the date the contract or employment terminated; and
- (3) limits the geographical area subject to the covenant to no more than:
  - (A) a five-mile radius, if more than half of the area subject to the covenant is located in a county with a population of 50,000 or more; or
  - (B) a 10-mile radius, if more than half of the area subject to the covenant is located in a county with a population of less than 50,000.

(B) Notwithstanding any other law, a covenant not to compete is void and unenforceable against a dentist if the dentist is discharged without good cause. For purposes of this requirement, "good cause" means a reasonable basis for discharge of a dentist from employment that is directly related to the dentist's conduct, including the dentist's conduct on the job or otherwise, job performance, and

employment record.

If the proposed legislation becomes law, the changes made by the new law would apply only to a covenant not to compete entered into or renewed on or after the effective date of the new law. The proposal is to have the new law be effective on September 1, 2023. A covenant not to compete entered into or renewed before the effective date of the new law would be governed by the law in effect on the date the covenant was entered into or renewed, and the former law is continued in effect for that purpose.

The proposed legislation also proposes changes to covenants not to compete of physicians. These changes would affect oral surgeons who are also physicians.

The Texas legislature is also considering separate legislation concerning covenants not to compete for psychology and counseling professions, and also, separate legislation for covenants not to compete for low wage earners.

Earlier this year, the Federal Trade Commission proposed a federal rule to eliminate most non-competes. That rulemaking process is continuing. ■

Past issues of the **Dental Legal Update** are available at [www.jeanine.com](http://www.jeanine.com)

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## About Our Firm ...

**Law Offices of Jeanine Lehman P.C.** is a Texas law firm headquartered in Round Rock with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building purchases/condos, build-to-suits and real estate law, 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 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](mailto:jeanine@jeanine.com) or PO Box 7965, Round Rock, TX 78683, and visit our website at [www.jeanine.com](http://www.jeanine.com)