



Understanding restrictive covenants and nonsolicitation in dentistry

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There is a **NEED FOR EMPLOYERS to have appropriate protection in maintaining customer relationships after an employee leaves.** In general, courts recognize this. The two basic types of restrictive covenants are “noncompete,” which precludes a former employee from working in the same business as the employer for a certain period of time, and “nonsolicitation,” which restricts the former employee from soliciting customers of his or her former employer or from providing services to those customers.

All this said, only reasonable restraints will be enforced. Typically, restrictions must be no broader than the employer’s legitimately protectable business interests. Those covenants not to compete that are overly broad, overreaching, or lack necessary consideration are not enforceable.

Normally, the burden is on the party that wishes to enforce the covenant to demonstrate that the restraint is no greater than necessary to protect the employer’s legitimate interest, and that such interest is not outweighed by any hardship to the employee or any likely injury to the public.

Since early English common law, there has been a strong judicial disfavor toward a bond or covenant that prevents employees from pursuing their profession or trade after termination of employment. Historically, covenants not to compete were viewed as restraints of trade and were invalid. Eventually, reasonableness came to the rescue.

Covenants given in connection with the sale of a business are viewed with greater favor because courts recognize the need to protect business goodwill.

An additional factor to be considered is the likelihood of injury to the public if the restraint is allowed. For example, an oral surgeon (employee) may be restricted from practicing oral surgery in the geographic area surrounding the employer’s practice, but the oral surgeon (employee) may still provide hospital-based services as a public service in the ER where he or she has privileges, even though it is within the geographic area, when the services are not directly connected with the employer’s oral surgery practice.

General thoughts and considerations

A covenant not to compete is only enforceable if it is reasonable in intent and there is a legitimate business reason

to enforce it, such as protecting customers or confidential information. To determine if a covenant not to compete is enforceable, three aspects must be considered:

1. **SCOPE.** The covenant must be very precise as to what the people involved can and cannot do.

2. **GEOGRAPHY.** The geographic area must be reasonable, and what must be studied is where the employer’s patient base comes from and where the employee works.

3. **TIME.** This portion of a covenant is litigated often due to its being the most misunderstood. In essence, the covenant must be in force only long enough to get a replacement employee up and running; however, the replacement employee could in fact be the owner where the business cannot sustain an extra employee for whatever reason. Circumstances often dictate the time period. It likely will be different for an employee (shorter) than for a seller (longer).

Nonsolicitation

In cases where a contract has a nonsolicitation clause, the clause must be reasonable and must clarify “What is solicitation?” If people want to seek out a health-care provider of their choice, then a contract with a nonsolicitation clause cannot limit these people’s desire to seek care with whomever they wish.

A good illustration is a grade school dance. On one side of the gym are the boys, and on the other side are the girls. One asks the other to dance. Who is soliciting? The person who initiated the contact is soliciting.

A final aspect of covenants is proving damages. Using the example of a patient who wishes to seek out a previous employee for dental care and does not wish to return to the employer’s practice, for whatever reason, what are the damages to the employer if the patient wasn’t going to return anyway?

In closing, restrictive covenants through employment and business purchases or sales are a complex legal matter and must be handled with care. Consult a good attorney who works closely with dentists. **DE**

[Author’s note: The material in this article is not intended to provide legal advice. Rather, it is intended to shed light on a subject matter that comes up quite often in the dental industry.]

Fred Heppner’s experience with dentists nationwide has earned him the reputation of providing sound management and practice transitions consulting services with integrity since 1983. He is a member of ADS. Contact him at FredH@ADSTransitions.com.