

Chapter 13

DISPUTE RESOLUTION — FINDING MIDDLE GROUND

Probably the biggest obstacle for successful co-ownership is the problem of disputes. Co-ownership is relatively complex to manage in that you have a business partner. The fact is, most dentists don't want someone else's nose in their business in the context of co-ownership. This is one reason why solo the group format work well. You share expenses and keep your practices separate.

With co-ownership, dispute can easily develop; often over the following which is not in any given order: (i) allocation of compensation; (ii) work effort; (iii) quality of work; (iv) ethics; (v) philosophical values; (vi) a non-doctor spouse or other relative in the practice; (vii) decision making and operational control; (viii) activities relative to the operation of the practice, e.g., managing the checkbook; (ix) the buy-out of a departing owner; or (x) the size and layout of the practice facility.

With considerable experience in attempting to resolve disputes among co-owners, here are some tips and observations.

Litigation

Try to stay out of the courtroom. Judges often have both criminal and civil dockets and just don't want to hear about doctors who don't get along. Consider that a judge thinks that you make more money than other litigants whom the judge sees in the course of any day. That doesn't "sit" well with the judge. The judge or other arbitration panel also does not know what you do, what your problems are, nor how to resolve what's bothering you. As a result, a judge or other arbitration panel may not provide the best forum to resolve your problem. Further, litigation is enormously expensive. Once you start, litigation will take much longer than you think it should, at both a very high personal and emotional cost, not to mention the financial burden. And once your in, you can't get out.

Board Meetings

Schedule monthly Board or Membership meetings to discuss practice business, e.g., the last Friday of every month at 7:00 a.m. The monthly meeting should last approximately two hours, notes should be taken and a written agenda should be followed in accordance with Robert's Rules of Order. Most doctor disputes involve misunderstandings concerning the business of the practice and the good news is that significant problems and misunderstandings can be avoided through scheduled, monthly meetings.

Annual Meetings

Meet with your accountant and attorney once each year with an agenda, which is prepared in advance by those advisors, to discuss practice business; compensation, bonuses, fringe benefits, retirement design and contributions, buy-sell agreement values, growth, operations, practice succession, new staff members, etc. This meeting will serve to avoid later misunderstandings

concerning practice operations, management, succession and the payment of compensation and bonuses.

Close Corporation, Shareholder or Operating Agreements

Most states permit either a close corporation or other shareholder agreement which vests decision making or operational control of the business or practice in the founder or senior owner, often called "founder's rights." These founder's rights serve to vest the tie breaking vote in the event of a voting deadlock in the senior doctor(s), which may consist of a group of senior doctors. So long as the senior doctor owns at least one share of the professional corporation's stock, the senior doctor(s) retains the tie-breaking vote, irrespective of the percentage of stock owned by the less senior doctors. This means that the senior doctor cannot be fired or outvoted by less senior doctors. However, the senior doctor has certain fiduciary duties to the other less senior shareholders in accordance with applicable state law. These agreements, where permitted, resolves the problem of a senior doctor retaining 51% ownership in the practice or utilizing voting and non-voting stock. Members of a limited liability company usually can use an operating agreement, depending upon the state, to allocate decision making and voting control. The point is, decision making and operational control can usually be designated by contract.

This agreement also resolves disputes because all doctors know who is in charge and who is not. Future control of the practice can also be vested by agreement. For example, when the senior doctor retires, dies or becomes disabled, the second most senior doctor is vested with decision making authority, then the third, etc.

Independent Third Party

In cases where there is an even number of owners, another dispute resolution device may be to appoint an independent third party as the third member or uneven member of the professional corporation's Board of Directors or the limited liability company's management team. In the event of a deadlock among the owners, the third party would hold the deciding vote.

Split Off

A "split off" provision may be used to resolve deadlock in professional corporations. Specifically, the professional corporation can be readily divided by patients or otherwise, a split-off can be agreed to in the event of a deadlock. The split-off would result in the formation of a new professional corporation to which a portion of the practice assets would be transferred. One shareholder would then receive the outstanding shares in the new professional corporation in exchange for his or her shares in the prior professional corporation. If properly structured under IRC Section 355, split-off would be nontaxable for federal income tax purposes.

In the event that one shareholder would leave the premises and the other would remain on the premises, the parties can agree, in advance to share or allocate the cost of one doctor moving to a new practice facility. It should be recognized, of course, that the doctor who moves to the new facility has new equipment, etc., and the doctor who remains in the existing facility may have older equipment which is not worth as much as the new equipment.

Dissolution

Dissolution may be utilized as a deadlock remedy. For example, a particular owner may be granted the right to dissolve the practice at any time. In the event that the parties cannot get along and litigation results, the court may order judicial dissolution to resolve the dispute.

Buy-Sell Agreements

A buy-sell agreement can serve as a deadlock remedy. Stated differently, deadlock would serve as a triggering event under a buy-sell agreement. This would require that one owner sell his or her ownership interest in the practice to the other owner(s) upon deadlock. There are several methods to determine which owner would sell his or her practice interest upon deadlock. The buy-sell agreement may predetermine the seller. That is, the owner(s) can decide the identity of the seller prior to a deadlock. Alternatively, where the owners share an equal interest in the practice, the buy-sell agreement may provide a "shot-out" provision. A shot-out provision may take the form whereby one party offers a price and payment terms and the other chooses to either buy or sell his or her interest in the practice according to such terms. For example, if Dr. Smith wants to break a deadlock or otherwise cause a practice separation, Dr. Smith submits a purchase price and terms per share or unit to Dr. Jones. Dr. Jones is required to sell his or her shares or units to Dr. Smith or buy Dr. Smith's shares or units for a stated purchase price and terms. The downside of this provision is that one owner may take advantage of the other owner's precarious financial condition. That is, if one owner perceives the other owner as not having the funds to effect the buy-out, the first owner can make an offer and the other owner would, in effect, be required to sell his or her shares or units in the practice.

Co-ownership is complex and requires time and effort of the owners to manage the relationship. If you are not willing to put in that time and effort, the simplest way to avoid a dispute is to remain a sole practitioner.