

Transitions Roundtable

We ask two experts the same question on a complex issue.



QUESTION:
What are reasonable restrictive covenants?

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As a practice owner, you should not allow an associate to treat patients if there is not a restrictive covenant. As a purchasing dentist or incoming partner, you should require the selling dentist or senior partner be subject to a restrictive covenant. So, what's reasonable these days? Reasonable restrictive covenants should include time, geographic radius, nonsolicitation, confidentiality, assignment, buy-out, and possibly liquidated damages provisions. Remember, all restrictive covenants are state-specific.

The time limitations for ownership are typically five years from the date that the departing owner discontinues employment with the practice. For associates, the time limitations are typically two years. The geographic radius depends on where the majority of patients and referral sources are located, with averages of eight miles, one to five miles in urban areas, and up to 20 miles in rural areas.

Restrictive covenants contain nonsolicitation provisions, which may include nonacceptance of patient language. Nonsolicitation provisions apply to patients and referral sources, as well as staff during the time limitations of the restrictive covenant. They also apply outside of the restricted geographic radius.

Confidential information refers to patients and referral sources, personnel information, fee schedules, and other items defined in the confidentiality provision. The ability to assign the restrictive covenant to a successor employer or purchaser where the practice has an associate is essential, and without the language the associate may be free to compete.

As to possible buyout provisions, if an associate grew up in the geographic area where the practice is located, a buyout of the restrictive covenant should be considered. If an associate directly refers patients to a practice, those patient charts and records can remain property of the associate should the associate leave and practice outside of the restrictive covenant. Finally, for third-party partners in family practices, a provision can be included that states that a departing dentist can retain the charts and records of patients customarily treated by the former partner, provided that the full buy-in price has been paid and recognizing that the buyout price, except for pro rata equipment value, will be forfeited.



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First of all, obtain legal advice when setting the parameters for a restrictive covenant for your associate. In fact, there are several states that do not allow restrictive covenants for associates. I will only comment here on associate contract covenants, not those that may apply to a dentist who is selling the practice.

There are also no national standards for restrictive covenants as the restrictions vary greatly and are usually based on local legal precedents. In states that do allow restrictive covenants, courts are generally reluctant to enforce them and the bar for enforcing them is high. If there is a covenant violation, the main consideration that is normally taken by the courts regarding enforcement is whether it is reasonable in geographic scope and duration. Most covenant durations that we see vary between one and three years.

However, geographic scope has the most variance. For example, in a large metro area a restrictive covenant may be less than a mile, and in a rural county it can be 25 miles or greater. Rather than rely on a colleague's advice about covenant recommendations, it is a better strategy to run a zip code analysis of your patient base to determine where 80% to 90% of your patients visit from. This will provide a foundation to establish a mileage radius as well as appropriate documentation to justify the covenant radius included in the associate contract.

As more dentists own multiple offices there may be challenges relating to covenant mileage limitations, particularly if there are multiple locations in a specific geographic area. Even if a covenant is not enforceable in your state, at least incorporate clauses in your contract to protect patient information and prohibit solicitation of staff and patients. The solicitation of a key staff member may be more detrimental to your practice than several patients who may leave if your associate leaves.

One clause that we find lacking in many associate agreements is an assignment clause. This allows the restrictive covenant and nonsolicitation clauses to be transferred to the new owner. Absent this clause, we have seen cases where practices' value have been significantly reduced during negotiations for fear that the former associate may become a future competitor. **DE**

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