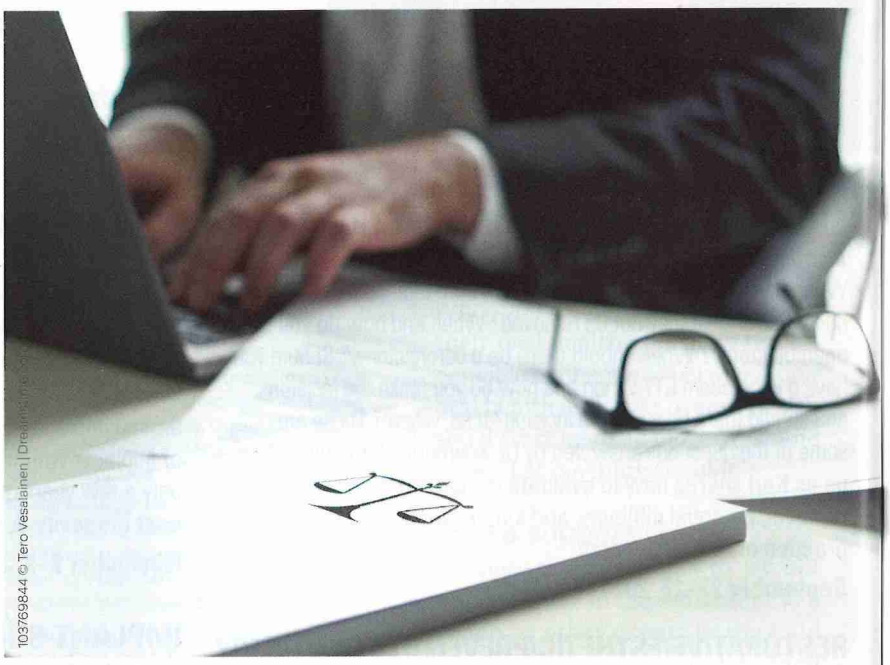
If associate noncompete provisions **remain enforceable**

William P. Prescott, JD, EMBA



The future of noncompete provisions for associate dentists and partners is uncertain. On April 23, 2024, the Federal Trade Commission (FTC) effectively prohibited all noncompete provisions—excluding those for the sale of a business and for senior executives earning more than $151,164 annually. Several lawsuits have already been filed and more are expected to emerge. Even if they are not successful, they are anticipated to delay implementation of the ban. Until then, however, noncompetes can remain subject to state law.

Noncompete signatures

It is important to have an associate employment agreement which contains a noncompete provision signed prior to the associate commencing employment. This is because all contracts have consideration on both sides. In exchange for the associate's compensation, the associate promises to perform professional services and not compete with the practice, solicit patients, referral sources, or employees. They may also not retain or disclose confidential information. Should employment begin and the associate receives compensation in exchange for services rendered before the employment agreement is signed, there is arguably no consideration for the associate's promise not to compete.

One solution for the lack of a signature is to offer an annual noncompete bonus as consideration for the associate dentist's promise not to compete. This bonus may later serve as consideration for the associate dentist's promise to sign a noncompete provision.

Should the associate work at a second practice during the term of employment, the employment agreement should specify any ability of the associate to render professional services at another practice in or outside of the geographic radius of the noncompete. The agreement may specify that the employer must grant or consent to such other employment in writing.

For a full-time position, the employment agreement should specify that all revenue generated by the associate is considered property of the practice.

An associate employment agreement containing noncompete provisions usually includes the transfer of the restrictions to successors and assigns or a new practice owner. This transfer is particularly important if a dentist sells their practice with an associate to a third party. Without language transferring the agreements to successors and assigns, the associate may lack valid noncompete provisions with the purchasing dentist, potentially deterring the sale of the practice. If the practice is purchased with an associate(s) working in it, the purchaser's attorney should review the restriction to ensure that it will remain applicable after the purchase.

If the practice owner and associate/candidate have agreed that a noncompete provision will commence after a specified time span, noncompete language should be drafted into the associate employment agreement up front, so it

becomes self-executing after the specified time. While the associate may not immediately have a noncompete, they should always be precluded from soliciting patients, referral sources, and staff during the term of employment and for an agreed period of time thereafter.

The associate employment agreement should provide that the associate is not bound by any prior or other employment agreement that contains noncompete provisions. If a practice owner hires an associate and has knowledge of a prior agreement restricting the associate from working in his or her practice, the practice owner and the practice could be liable to the other practice for intentional interference with contract.

Liquidated damages

Associate employment agreements sometimes contain "liquidated damages" provisions to deter competition if the working relationship is terminated. While a liquidated damages provision can and should relate to the goodwill of an associate, a court may not grant actual damages or an "injunction." This would prohibit the associate from competing if a liquidated damages provision is present, provided that the liquidated damages are fully paid. Too often, associate employment agreements contain extraordinarily high liquidated damages provisions, which have no relation to the value of the goodwill value of the practice. While it's questionable if a high liquidated damages provision would be upheld, a former associate should not wait until they pay substantial legal fees to find out.

Residency restrictions

Sometimes, a practice desires to protect itself from competition and dilution of value if the associate relationship ends, especially if the associate grew up or resides in the same community. Protecting the practice and the associate's employment in their hometown or place of residence are competing goals. One way to resolve this is by utilizing a liquidated damages provision, whereby if the associate leaves the practice and works or establishes a practice within the restricted area, they would then purchase the associate's goodwill. In the first year of employment, for example, the price would be a fixed sum that is fair to both parties. Thereafter, it would be based upon a percentage of annual production.

Because courts typically consider how reasonable the restrictions to protect the legitimate interests of a business/practice are, they may be considered too broad. Certain states allow "blue penciling." If the restrictions contain language that permits the court to reform them to what is considered reasonable, it will do so. Without such a provision, a court may throw out the entire restriction. Courts usually enforce contracts only within "the four corners of the contract" and usually do not permit involved parties to present outside or parole evidence. This is especially true if the contract contains an "integration" provision that states that the entire agreement is contained within the written contract. An associate should not sign an onerous provision; if they are unhappy due to a previously signed noncompete, the associate must live with what was agreed upon.

Finally, the associate should not be overly intimidated by agreeing to reasonable restrictions to adequately protect the employer/practice. Without agreeing to such a provision, the associate may not be hired because the practice owner would be reluctant to introduce them to patients and/or referral sources. Furthermore, assuming the associate relationship is successful, the practice owner will later to be subject to similar restrictions if the practice is sold to the associate—or if the practice owner and associate become partners.

Concluding thoughts

So long as noncompete provisions remain enforceable, they are useful to grow a practice and locate a future successor or partner. If they are not, the practice owner and the associate/candidate should work with local counsel to ensure that any nondisclosure, nonsolicitation, and confidentiality provisions are fair to both parties and are not drafted so narrowly as to be construed as a noncompete. DE

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WILLIAM P. PRESCOTT, JD, EMBA, *of Wickens Herzer Panza in Avon, Ohio, is a practice transition and tax attorney and former dental equipment and supply manager and representative. His most recent book,* Joining and Leaving the Dental Practice, *4th edition, is available through the ADA Center for Professional Success. ADA members can download the e-book for free at ada.org/prescottebook. For this and Prescott's other publications, visit prescottdentallaw.com. Contact him at (440) 695-8067 or wprescott@wickenslaw.com.*