



The Legal Business of Dentistry

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ABSTRACT Upon graduation and licensure, most dentists anticipate going into the profession of providing dental health care to patients in an office or clinic setting. The profession is also the business of dentistry. Failure to appreciate documentation requirements for the business of dentistry can result in legal battles that are time-consuming and emotionally draining. This article provides an introduction, issue spotting, and tips to avoid those legal battles.

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Dentists too often are so focused on the profession of dentistry that they don't appreciate the business of dentistry. Like any business, the dental practice involves a number of agreements. There are specific types of contracts that dentists will have to consider during their careers. This article reviews the more important common contracts and agreements that dentists will likely encounter from the time they are licensed to the time they retire. These contracts include associate agreements, business entity forms, practice buy-sell agreements, and estate planning.

Dentists emphasize prevention for their patients. With prevention in the form of knowledge and guidance from the right professionals, a dentist can avoid some of the common pitfalls in working with such agreements and make a smooth and profitable transition in every step from licensure to leisure.

Associate Agreements

Most new dental graduates will enter into an agreement to be employed as an associate dentist for another dentist. This arrangement is a contract and can be oral or in writing. A contract is a mutual promise or set of promises the law will enforce. For a valid agreement it is presumed that the terms of the contract were bargained for by both parties, that there was a meeting of the minds where each party understands what they must give up to get what they want, and ends with an agreement having realistic expectations.

Two prime issues come up with associate agreements. The first is whether the associate dentist should be treated as an employee or an independent contractor. The second has to do with protecting the practice from competition by the associate after separating from the practice.

In California, the presumed employment arrangement, unless altered by an

agreement between the parties, is at-will employment. At-will employment is defined in the Labor Coder as employment having no specific term and that it may be terminated at the will of either party without notice to the other party.⁴ (Tip: *Employ written at-will agreements so there can be no dispute about oral changes.*)

Practice owners will often believe it is appealing to have their associate dentist classified as an independent contractor because they will pay less in withholding taxes and they will be insulated from liability for any negligent or intentional acts of the associate dentist.

Employee or Independent Contractor

As to the first issue, employee or independent contractor status, the IRS has a 20-factor test, often termed the right of control test, to determine if an employee can truly be classified as an independent contractor. Under the IRS rules, an independent contractor controls the manner and means by which contracted services, products, or results are achieved. The more control a business exercises over the how, when, where, and by whom the work is performed, the more likely the worker is an employee and not an independent contractor. Associate dentists just are not a good fit with the IRS factors. In fact, it is estimated that as many as 80 percent to 90 percent of independent contractors in California are misclassified. This can have serious consequence for the owner of a dental practice as it may result in government audits by the Employment Development Department and other agencies where penalties and back taxes might be assessed.

Although a worker does not have to meet all 20 factors to qualify as an independent contractor and no single factor is determinative, the key issues in

determining independent contractor status is who controls the means and manner of work. Other important factors include: Who provides equipment and instruments? Is the worker integrated into the employer's business? Are taxes withheld? Are benefits paid? What is the degree of control of staff?

It might be instructive to look at the 20 factors and see how intuitively the independent contractor classification in the private dental practice setting is problematic.

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1. Level of instruction. If the owner directs when, where, and how work is done, such control is indicative of an employment relationship.

2. Amount of training. If the owner requests workers to undergo company-provided training, an employment relationship is suggested.

3. Business integration. Workers whose services are integrated into the business operations or significantly affect the success of the business are more likely to be considered employees.

4. Extent of personal service. Businesses that insist on a particular person perform the task, assert a degree of control whereas independent contractors are typically free to assign work to anyone.

5. Control of staff. If the owner of the

business hires, supervises, and pays a worker's staff, such control suggests an employee relationship. Typically, independent contractors have the control of hiring, supervising, and paying staff.

6. Continuity of relationship. Although an independent contractor relationship can involve an ongoing relationship for multiple and/or sequential projects, a continuous relationship between the business and worker indicates a possible employee relationship.

7. Flexibility. When the owner dictates peoples hours or days of work, such workers are typically considered employees.

8. Demand for full-time work. Full-time work supports an employee relationship because it gives the business control over most of the person's time.

9. On-site services. Particularly if the work can be performed elsewhere, requiring it to be performed at the business premises indicates an employee relationship.

10. Sequence of work. An employment relationship is suggested if a business requires work be performed in a specific order.

11. Reports. If a worker must regularly provide written or oral reports on the status of a project, the suggestion is an employee relationship.

12. Method of payment. Hourly, weekly, or monthly pay schedules are characteristic of employer-employee relationships. However, if the payments are simply a convenient way of distributing a lump-sum fee, an independent contractor relationship could be supported. Independent contractor relationships are characteristically a payment or commission upon project completion.

13. Payment of business or travel expenses. Independent contractors usually pay their own business expenses and set their fees high enough to cover those expenses. An employee relationship

is suggested when the owner covers all business expenses.

14. Provision of tools and materials. Workers who perform most of their tasks with instruments provided by the owner of the business are typically considered employees.

15. Investment in facilities. Independent contractors typically invest in and maintain their own work facilities.

16. Realization of profits. Receiving predetermined earnings, with little chance of realizing significant profits or losses, is typically of an employee relationship.

17. Working for multiple companies. Working simultaneously for several unrelated companies is more likely an independent contractor relationship.

18. Availability to the public. Making the worker's services available to the general public supports an independent contractor relationship.

19. Control over discharge. A business' ability to terminate an independent contractor relationship is generally dependent on contract terms. On the other hand, if the business has the unilateral right to discharge a worker, it suggests an employment relationship (California at-will employment).

20. Right of termination. Most employees can terminate their own work for a business (again, the California default of at-will employment). Independent contractors may not be able to terminate services without liability depending on what is allowed under their contracts.

The IRS usually classifies workers as employees whenever their status is not clear-cut. Moreover, the IRS has traditionally maintained that a written independent contractor agreement between the parties is never sufficient evidence to determine independent contractor status, especially if facts indicate otherwise. For tax collection purposes, the IRS has a strong

incentive in finding employee status.

There is a real concern that classifying the associate as an independent contractor could possibly be considered fee splitting in violation of the Dental Practice Act.² A payment by a percent fee agreement means the owner will share fees with the independent contractor. The owner is referring patients to the independent contractor and receiving a fee. In a recent court case, this was found to be an exception only if there is no profit.³

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Additionally, classifying an associate dentist as an independent contractor may not provide as much protection from liability as hoped for by the practice owner. To obtain as much protection as possible to the acts of the associate dentist, the practice owner will have to, at a minimum, inform all the patients treated of the associate's independent contractor status. Otherwise, the practice owner could still be held liable for the actions of the independent contractor under the theory of "ostensible agency," which states that if the ordinary patient would assume the dentist is an employee, the owner can be liable without a written understanding signed by the patient to the contrary.

Another issue for owners is protecting their practices from competition when an associate separates and moves on to open his or her own practice. Often, a covenant not to compete is incorporated in the associate agreement. California law is unambiguously clear that a covenant not to compete is prohibited in all employment agreements. In the Business and Professions Code, Section 16600 states that "Expect as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The policy consideration behind the statute is open competition, which has been the rule in California since at least 1872.⁴

The law provides an exception when the goodwill of the business is sold and the covenant not to compete is reasonable as to time, duration, and geographic distance. In other words, only a part owner can be bound by an agreement not to compete.⁵

An alternative for the practice owner and associate is incorporating trade secret provisions in the associate agreement. A trade secret is defined under the Uniform Trade Secret Act as "information, including a formula, pattern, compilation, program, device, method, technique, or process that . . . derives independent economic value actual or potential, from not being generally known to the public or other persons who can obtain economic value from its disclosure or use."^{6,7}

A trade secret does not have to be copyrighted, patented, or even novel to be kept as trade secrets by the user. As long as they are kept secret by the user and are obtained improperly then a wrong, for which there is a legal remedy, has been committed. Trade secret law, however, does not protect against discovery by fair and honest means, such as indepen-

dent invention, accidental disclosure, or reverse engineering (starting with the known product and working backward to figure out the process which aided in its development or manufacture).⁸

Thus, such things as patient records, computer data, patient ledgers, promotional material, patient lists, appointment calendars, and holiday or promotional lists are protected as trade secrets of the practice. Associates are able to make a general announcement of his or her new practice without it being a violation of trade secret law. Also, patients independently — not solicited — may seek out the former associate.

Alternative Dispute Resolution

Well-drafted and documented contracts between dentists result in a smooth relationships or transitions. However, dentists still may have disputes with each other. Then, they must either turn to the court and jury system, or some form of alternative dispute resolution, ADR, to assist them in reaching a resolution.

ADR became popular 20 or so years ago as a way to unclog a jammed court system where it was not uncommon to take five years for a case to go to trial. ADR has proved to be an effective way to resolve disputes, and, thus, provisions for ADR are often incorporated in the various contracts discussed in this article. However, ADR is not without its drawbacks, and so ADR clauses must be closely scrutinized. Two forms of ADR appear quite commonly in contracts between dentists, mediation, and binding arbitration.

Mediation is a private, informal dispute resolution process. A neutral third party, the mediator, helps the parties reach a mutually acceptable agreement. No formal evidence is presented at mediation. The mediator does not hear sworn testimony, does not make

evidentiary rulings, and has no power to impose a decision upon the parties. The process is confidential and is not admissible as evidence in a later proceeding, such as a civil action or arbitration.⁹

Mediation is particularly well-suited where the parties have an ongoing relationship, such as a partnership. In fact, many landlords are becoming more sophisticated and incorporating mediation provisions in leases. Usually the cost of mediation, which is mostly the mediator's fees, is equally split between the parties.

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Arbitration has been offered as one reform to the civil court system. An arbitration clause inserted in a contract provides for compulsory binding arbitration to resolve disputes as to rights or liabilities under the contract. The skill of the attorney drafting the arbitration clause is a critical factor as to whether the arbitration will be an effective and efficient dispute resolution method or an expensive and time-consuming quagmire. Often the arbitration clause will state what rules of arbitration will apply, such as the rules of the American Arbitration Association or the California Arbitration Act.¹⁰

The process of selection of arbitrators is another key factor. The arbitrator is typically a retired judge or attorney, or a practicing attorney. Unlike a judge in civil

court, whose salary is paid by the county, the arbitrator's fees are paid by the parties and are usually \$400 to \$500 per hour. Some arbitration clauses call for a panel of three arbitrators to hear the matter, costing as much as \$1,500 per hour, which would make the arbitrators fees alone cost prohibitive for many disputes. Another factor that will greatly influence the cost and, perhaps, the outcome of arbitration is whether or not there is a provision in the arbitration clause to allow for discovery (fact gathering) by the parties to do such things as take dispositions and subpoena records. Without a specific provision for discovery, no discovery is allowed.

While discovery will significantly increase the cost of arbitration, without adequate discovery a party may not have sufficient evidence to put on an effective case.

One clear advantage of arbitration is the expediency of the arbitration process and the resulting decrease in strain might alone make arbitration worthwhile for busy dentists. Finally, the parties waive their rights to a jury trial.

Practice Purchase

After learning the craft of dentistry as an employee or independent contractor, most dentists want to take the next big step of owning a dental practice. Many crucial decisions will need to be made that will impact the dentist for the rest of his or her working career.

Much like the decision to buy a house, the first consideration may be the location of the dental practice. While it is understandable that many dentists want to locate in popular and affluent cities or suburbs, the prospective purchaser must analyze whether that is the best business decision. Factors to consider when identifying the location of the dental practice should involve analysis of the number of competing dentists,

income level, treatment focus of your practice, likely population growth and the nature and extent of the commute.

Once a decision is made on a location or locations of the prospective dental practice, the dentist will need to decide whether to build a new practice, purchase an existing practice, or purchase a share of an existing practice. Many associates may first discuss buying a portion of the practice in which they are currently employed. The dentist may also consider relocating in the same area as they have been working or looking for a new area to practice.

When exploring a practice purchase, a dentist is well-advised to put together a team to advise him or her on the many facets of the law and decision-making process.

The first step when a dentist decides to buy a practice is to use multiple sources to identify the dental practice to purchase, such as practice sale brokers, specialized practice consultants, local dental society publications, in addition to word of mouth in the community.

Practice sale brokers are normally hired by the sellers of a dental practice to assist in valuing and marketing the dental practice, ensuring proper documentation is provided by the seller to prospective buyers, and providing initial drafts of sales documents. Practice sale brokers also facilitate the transaction by providing prospective buyers the names of knowledgeable professionals including accountants, attorneys, and lenders. A major caveat for all buyers is that despite all the assistance provided by the practice sale broker, the broker is an agent of the seller and owes fiduciary duties only to the seller and not the buyer.¹¹

The practice sale broker as an agent owes fiduciary duties including duties of loyalty, disclosure, and due care to the principal.¹² This means

that a prudent purchaser of a dental practice should assemble his or her own team to obtain independent advice throughout the sale process.

The buyer's team should include specialized financial advisors and attorneys who can assist in performing the necessary analysis of the dental practice to assess the viability of the proposed purchase and the chance for long-term financial success. This process known as due diligence precedes making an offer to purchase the dental practice. Your

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financial advisers and attorneys should direct you on your evaluation of the financial condition of the practice.

Frequently this analysis includes examination of the dental practice's current and historical collections from dental treatment, percentage of collections for treatment billed, accounts receivable, practice expenses, fee schedules, and patient payment options. A prospective buyer also needs to analyze the trends of the practice including the number of patients, new patients, percentage of patients on recall, and current appointments scheduled. Further information to analyze includes patient demographics (age, families, insurance status) the seller's practice style (procedures performed, referral patterns), age,

and condition of leasehold improvements and dental equipment, status of office lease, and marketing efforts.

A crucial issue in this due diligence analysis is the status of any dental associate in a practice. As there can be no valid covenant not to compete against an employee or independent contractor, a current or recent dental associate who may compete for the patients of the dental practice may pose a significant hurdle in obtaining the goodwill and loyalty of the existing patient base. Serious consideration of this issue should be undertaken prior to making any offer to purchase a dental practice.

There is a common practice of allowing a prospective purchaser to review patient treatment records during the due diligence process. The provisions of the Health Insurance Portability and Accountability Act, limits the disclosure of private health information to those necessary to provide treatment, facilitate payment, or health care operations.¹³ Further disclosure can be made if the doctor has obtained an authorization from the individual whose records are to be disclosed.¹⁴ This private health information includes any treatment or billing related information. California law also mandates confidentiality of patient treatment records.¹⁵

One means to address such an issue is to obtain authorizations from your patients to allow disclosure of information to prospective purchasers of your practice in your HIPAA Notice of Privacy Practice forms. Those forms can be modified to allow the patients to consent to disclosure of their private health information to prospective purchasers of your dental practice. In the alternative, a dentist can obtain a separate authorization from the patients for such a disclosure. Prior planning can avoid the need to obtain this authorization when a dentist is exploring the sale of his

or her dental practice as the selling dentist will not want to inform their patients that they may be selling their practice. The last alternative is to ensure that any disclosure of patient health information not contain the name or identifying information of the patient in the records disclosed. This would mean that the selling dentist could provide prospective buyers records with redaction of names and addresses.

After due diligence sufficient to analyze the purchase of the practice, negotiation then begins on the sales price and terms of the transaction. Everything is subject to negotiation, including the price and all essential terms of the transaction. Frequently the parties, with the assistance of financial specialists and attorneys, will enter into initial negotiations to reach preliminary understanding of the basic terms of the transaction.

Thereafter, a letter of intent to purchase may be entered into which outlines the price, general terms of the agreement, and payment of a deposit toward the purchase price. It is essential to engage an attorney experienced in dental office business issues to assist in this process as this document provides an outline for the eventual terms of the agreement. The letter of intent may be binding or nonbinding and the deposit for purchase may be refundable or nonrefundable, depending on the terms of the contract. If the letter of intent is meant to be a binding contract, it must contain the necessary contingencies or conditions, that, if not met, can allow the buyer or seller to withdraw from the transaction without incurring any damages.

Common contingencies include the right to examine financial and treatment records to complete the due diligence process, the ability to obtain a loan or seller financing to fund the purchase, the ability to obtain either a new lease for the dental office or assignment of the existing lease,

and most importantly, the drafting and execution of a sales contract agreeable to the parties. Buyers will also want a clause precluding the sellers from negotiating or selling the dental practice to a third party while the contingencies are being met.

The next step is the creation of the sales contract. The sales contract should be a comprehensive document setting out the obligations of the parties for the present transfer and to govern future events after the purchase is completed:

1. Description of the parties and precisely what is being purchased¹⁶
2. The price for the purchase and payment method
3. Allocation of the purchase price between the assets to be purchased
4. Right to use the seller's name, telephone listing referral sources and patient lists
5. Collection of the seller's accounts receivable
6. Covenants not to compete and not to solicit
7. Retreatment provisions on handling a failed dental treatment
8. Completion of current treatment plans, patient scheduling following purchase
9. Letters of announcement or introduction
10. The seller's representations and warranties¹⁷
11. The buyer's representations and warranties¹⁸
12. Liability insurance
13. Custodian of patient records
14. Indemnification and hold harmless agreements¹⁹
15. Contingencies to purchase²⁰
16. Transition obligations of the seller
17. Assumption of obligations of the seller
18. Handling of employees
19. Dispute resolution

The designation and documentation of the assets being purchased, liabilities being assumed, and excluded assets that are not being purchased is crucial. Many disagreements arise when the items to be purchased are not clearly disclosed.

A covenant not to compete while generally held to be invalid under California law may be enforceable following the sale of a dental practice in which compensation is paid for the goodwill of the seller.²¹ Any such valid covenant requires that the agreement clearly discloses the intent of the parties to sell the goodwill of the practice.²² The best way to do this is to specifically state that goodwill is being sold and place a substantial allocation of a specific value to the goodwill that is being purchased. A covenant not to compete is only valid against a seller in a specified geographical area and for a reasonable duration.²³ The specified geographical area is usually consistent with the area in which most of the patients of the practice reside.

Retreatment clauses are designed to establish a mechanism by which the buyer can identify and handle retreatment of work performed by the seller that prematurely fails and requires the buyer to reperform. A retreatment clause should not force the buyer to lose the goodwill of his patients over failed work by the seller, lose money to perform retreatment on patients he did not originally treat, and to avoid malpractice lawsuits against the seller. These provisions either allow the seller to perform retreatment at the buyer's office or allow the buyer to perform retreatment at the seller's expense for a reduced fee.

The seller has no duty to disclose all material information concerning a dental practice. The items to be disclosed by a seller of a practice vary depending upon the information voluntarily disclosed by the seller (which the seller will be required to verify as true and correct) and those items that the buyer

seeks to have the seller represent as true in the agreement. These seller's representations normally include but are not limited to the truth of financial and business records disclosed to the buyer, the absence of current and past malpractice or business lawsuits or administrative actions, the absence of any liens or encumbrances on the practice assets being sold, and the absence of material issues that affect the value of the practice. The untruthfulness of the seller's representations can form the basis of postsale litigation by the buyer for fraud or breach of contract.

Indemnification provisions may also be essential to allocate responsibility for debts of the parties, damages for injuries to others, or responsibility for taxes or other liabilities. These provisions usually require the seller to indemnify, provide a legal defense and hold harmless the buyer for all acts that occurred prior to the sale, and the buyer to do the same for the seller for all acts that occurred after the sale is completed.

The parties must be vigilant how such agreements are drafted as the duty to indemnify and defend the other party arising out of litigation filed by a third party will not be covered by insurance maintained by the indemnifying party (i.e., the buyer or the seller) unless that person is specifically named as a party to be insured under the insurance contract. The unwary party may create personal responsibility to pay for defense or indemnity costs of another.

Other documents normally required in a practice sale are a "Bill of Sale" documenting what was sold, consent of spouse demonstrating their assent to the sale of community property assets, assignment of lease, and, if applicable, an employment contract for any postsale employment.

It is crucial for each party to ensure that all significant representations, warranties and agreements pertaining to the practice sale are contained in the sales contract, exhibits, or related agreements as most sales

contracts contain an integration clause that states that the only valid representations or promises concerning the dental practice purchase are those contained in the sales contract. This means any oral representation or written representation made by the seller or the buyer not included in the contract may not be enforceable.

Prior to and following the sale, verification must be made that you have all the necessary insurance for professional liability, premises liability office contents, workers' compensation, life insurance, disability, business interruption, and health insurance.

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Following the purchase, there are a myriad of actions to be taken, including notification of the Dental Board of the purchase, registering your fictitious name, notifying vendors of the change in ownership, notifying the DEA, obtaining an anesthesia permit, transferring licenses for equipment purchased, obtaining a business license, obtaining state and federal tax identification numbers, ordering prescription pads, opening bank accounts, and creating employee manuals, just to name a few.

If these actions are properly performed in the purchase of a practice, the purchasing dentist can concentrate on the other important aspects for the long-term success of the practice involving quality patient care and managing the patients' needs.

Choosing the Correct Business Entity

The owner of a dental practice has choices to own a practice as a sole proprietor (if the dentist is an individual owner), as a partnership, or as a corporation. California law prohibits dentists from owning a practice as a limited liability company or a limited liability partnership. Issues to consider concerning the correct entity include tax issues and limited liability to protect the personal assets of the owner-dentist.

The tax issues involving entity ownership are beyond the scope of this article and should be discussed thoroughly with the dentist's accountants.

Owning a dental practice as a solo practitioner or partner provides no protection for the personal assets of the owner dentist. A dentist's personal assets are subject to execution for debts or liabilities arising out of the operation of the dental office. This is particularly significant in a dental office owned as a partnership in which each partner may bind the partnership and each partner is personally liable for the acts of the other partner(s) arising out of the operation of the partnership.²⁴

The entity that allows a dentist to limit their liability in their dental practice is a dental corporation. A dental practice owned as a corporation may preclude personal liability of the dentist for the acts of other professionals, such as dentists who are co-shareholders or associates of the practice, for acts that are not covered by insurance, such as fraud, wrongful termination, or harassment. The personal assets of a dentist rendering treatment, not adequately covered by insurance, are subject to liability arising from the treating dentist's own malpractice, regardless of incorporation.²⁵

Most dentists maintain malpractice and liability insurance on the dental practice. More and more dentists recognize

the benefit of employee liability insurance to provide some limited protection related to employment acts. However, under California law, insurance cannot cover intentional acts. Therefore, if your partner or an associate commits intentional acts, such as improper touching or sexual battery, these actions cannot be insured against. Moreover, the limits of typical coverage for employee liability insurance, which may insure against wrongful termination, employment discrimination, sexual harassment or other employment claims, may be inadequate in the event of a large (in excess of low policy limits, such as \$25,000 to \$100,000) claim and may require a substantial deductible payment, leaving the risk of personal liability for the acts of others. In such cases a corporate form of ownership would be beneficial.

If two or more dentists own a practice together and do not have a contract to establish the form of ownership, by statute they will be considered a partnership, which is governed by California law.²⁶ Notwithstanding the provisions of California law, it is prudent for two or more owner-dentists to enter into a comprehensive written agreement to outline their ownership of assets, management, handling of profits and losses, and managing partner withdrawals, or practice dissolutions. The precise terms of a partnership agreement will need to be handled in another article.

Whenever a dentist decides to open their own practice or hire another dentist, it is beneficial to speak with experienced dental attorneys and accountants to evaluate the appropriate form of entity for your practice. (*Tip: A corporation is recommended if employing other dentists, owning more than one office, or employing more than 15 people. However, for a solo practitioner, one office, less than 15 employees, a corporation is not as important.*)

Estate Planning

A final consideration is having an estate plan in place. A properly drafted estate plan will manage assets now and control assets after death. Moreover, an estate will also provide management of assets, such as a dental practice, during a temporary or permanent disability. If you do not have an estate plan, the State of California has one for you in the Probate Code.²⁷

Although one size does not fit all, the basic components of a typical estate

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plan should include a revocable (living) trust, pour over will, an advanced health care directive, and durable power of attorney for management of property and personal affairs. Some of the things an estate plan can do is decrease or avoid estate (inheritance) tax, avoid probate, provide for the care of minor children, and provide for the continued operation of a dental practice in the event of death or permanent disability.

Regarding estate tax, California does not have a state estate tax so the only concern is the federal estate tax. Currently, the estate tax is gradually being reduced over a 10-year period and will be completely eliminated on Jan. 1, 2010. The exemption amount will be incrementally increased from \$675,000 in 2001 to \$3.5

million in 2009. The top estate tax bracket will also be gradually reduced from 55 percent to 45 percent. The law repealing the tax, however, expires on Jan. 1, 2011. Unless the law is renewed, the estate tax will return with the 2002 exemption amount of \$1 million. Historically, the various federal inheritance and estate taxes have been repealed by Congress seven times since 1862. At the time the current law was enacted, there was a federal surplus.

Since then, we have been involved in a costly war (there seems to be a correlation between estate taxes and war). It is unlikely that Congress will renew the repeal. However, Congress might set an exemption amount higher than \$1 million. Even today, in places such as the San Francisco Bay Area, any family owning a home and a few other assets will easily exceed the \$1 million dollar exemption. Therefore, it is likely that the estate tax will come back, but with an exemption amount somewhere between \$1 million and \$3.5 million.

Having a living trust is particularly useful in bringing peace of mind if there are minor children. Again, if there is no estate plan with directions for the care of minors, the State of California has one in the Probate Code. Two issues often come up. One is that if the parents do not provide for who will be the guardian of the minors, a well-meaning relative can get into costly and traumatic court battles over who will have custody and care for the children. Second, many parents would prefer that their children do not receive their entire inheritance at the age of 18, but rather delay that time until there are a bit older and, hopefully, more responsible, such as 25 or 30 years old. Such a delay will also allow the children to complete their formal education.

Another important reason for a custom-made estate in the case of sud-

den death or incapacity of the dentist is if the dentist is not able to work, a major concern is the loss of patients and value of the practice. Properly drafted estate planning documents can help keep the dental practice running smoothly until the dentist can return to practice or the practice is sold.

Under the Dental Practice Act, only licensed dentists can own and run a dental practice or hire and manage another dentist to provide patient treatment.²⁸ As of Jan. 1, 2008, a nondentist may run a dental practice, for a limited time, upon the death or incapacity of the dentist. These new provisions of the Dental Practice Act allows the authorized representative of the dentist to employ a dentist and charge for professional services without being deemed as practicing dentistry. The time limit is one year from the date of the dentist's death or incapacity.

There are certain other requirements that must be strictly adhered to or the Dental Board can shut down the office without a hearing. First, the dentist's legal representative must give notification to the board within 30 days of the death or incapacity, the name and license number of the incapacitated or deceased dentist, the name and address of the dental practice, and the name and license number of the dentist who will run the practice. Additionally, the representative has to state to the board, under penalty of perjury, that the information provided to the board is true and correct, that he or she understands that they cannot interfere with the practice or professional judgment of the dentist running the practice, and that willfully making any false statements of any material fact the representative could be subject to a civil penalty of up to \$10,000.

Also, within 30 days of the dentist's death or incapacity, the representa-

tive must notify all patients of record and provide an explanation as to how copies of their records may be obtained, provide a form signed by the patients, or their guardians, that releases confidential dental records to the dentist running the practice, and may contain an explanation of the continuation of the dental practice.²⁹

By having an estate plan in place, there will be no delay in establishing the dentist's legal representative. If the dental practice is placed in a trust, the successor trustee will be qualified and ready to serve as the legal representative.³⁰ Simply having a power of attorney, alone, or preferably as part of a comprehensive estate plan, will allow the named agent to act as legal representative. With such relatively easy planning, there will be minimum disruption of the dental practice which will maintain the value of the practice. ■■■■

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3. Beck v. American Health Group International 211 Cal.App.3d 1555, 1989.
4. Edwards v. Arthur Andersen, LP, 44 Cal.4th 937, 945, 2008.
5. Deering's California Codes Annotated, Business and Professions Code Section 16601, vol 9, pages 330-1, 2007; Hill Medical Corporation v. Russell R. Wycoff 86 Cal.App.4th 895, 902, 2001.
6. Deering's California Codes Annotated, Civil Code Section 3246 et. seq., page 610, 2005.
7. Deering's California Codes Annotated, Civil Code Section 3426.1(d) (1), page 612, 2005.
8. Witkins, Summary of California Law, 10th ed., vol 13, Equity Section 81, pages 375-6, 2005.
9. Deering's California Codes Annotated, Evidence Code Section 1115 et. seq., page 386, 2004.
10. Deering's California Codes Annotated, Code of Civil Procedure Section 1285 et seq., page 97, 1981.
11. Deering's California Codes Annotated, Civil Code Section 2295, page 214, 2005, an agent is one who represents another, a principal in dealings with third parties.
12. Deering's California Codes Annotated, Civil Code Section

- 2322, page 313, 2005, an agent has duties of a trustee Witkins California Law, vol 3 (Agency Section 97), pages 143-4.
13. Public Law 104-191, Health Insurance Portability and Accountability Act of 1996, 1996.
14. United States Code Services, Title 45, Code of Federal Regulations Section 164.502, pages 691-4.
15. Deering's California Codes Annotated, Civil Code Section 56 et. seq., page 438, 2005.
16. Common assets to be purchased include dental equipment, supplies, goodwill of the practice, patient records, covenant not to compete, transition assistance from the seller, telephone number, trade name, and leasehold interest.
17. Representations normally made include status of the seller, absence of defects or encumbrances on assets being sold, absence of conditions that would affect goodwill, truth of disclosed documents, absence of litigation or threatened litigation, condition of practice assets, current status of office lease, status of past billing practices, and truth of all representations being made.
18. Buyer's status, performance of due diligence, ability to review all requested documents and acknowledgment that there is no guarantee of success in future practice.
19. These agreements allocate responsibility presale and post sale.
20. Including obtaining bank loan, lease assignment, passage of state boards, analysis of records and inspection and repair of nonworking equipment.
21. Deering's California Codes Annotated, Business and Professions Code Section 16600 and 16601, vol 9, pages 319, 330-1, 2007, allow valid covenant not compete following sale of goodwill of a business.
22. Hill Medical Corporation v. Wycoff 86 Cal. App. 4th 895, 2001.
23. Deering's California Codes Annotated, Business and Professions Code Section 16601, vol 9, pages 330-1, 2007.
24. Deering's California Codes Annotated, Corporations Code Section 16305, vol 5, page 282, 2009.
25. Deering's California Codes Annotated, Civil Code Section 2343(3), page 67, 2005.
26. Deering's California Codes Annotated, Corporations Code Section 16202(a), volume 5, page 222, 2009.
27. Deering's California Codes Annotated, Probate Code Section 6240 et seq., pages 812-21, 2004.
28. Deering's California Codes Annotated, Business and Professions Code Section 1625, vol 1, pages 486-7, 2007.
29. Deering's California Codes Annotated, Business and Professions Code Section 1625.3, vol 1, page 493, 2007.
30. Deering's California Codes Annotated, Business and Professions Code Section 1625.5, vol 1, page 493, 2007.