

Practice Purchases & Sales

Restrictive covenant raises concern



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Q: *I am considering several associate positions. One of the associate positions provides that I will have an opportunity to buy the practice in three years. I am most interested in this position and the purchase. However, the associate employment agreement contains a restrictive covenant that provides if I leave the practice before the three years it will apply but if the practice terminates me it will not apply? Is this fair?*

A: Negotiating a practice purchase is not for the timid. It sounds like the expectation of the practice seller is that you will work in the practice as an associate for three years and then there would be a sale to you of the entire practice.

Since the goal of the relationship is a planned purchase and sale, you should be sure to have the purchase and sale agreement settled and in writing and signed at or near the start of the associate terms, or at the least a letter of intent spelling out the proposed transaction.

Regarding your question, it is not inherently unfair to one side or the other to require that a restrictive covenant will apply on an exit from a practice associateship. Here I would suggest that the employment agreement contain specific language defining what is "for cause termination" and what is not. In that way, if you leave because you were forced out by an intolerable situation, you may have a legal position that would provide for the restrictive covenant not to be enforceable.

It goes without saying that the scope of the covenant and duration should be reasonable to both parties, not just the practice owner and you should in fact negotiate the scope so that it is not onerous or a disguised penalty. Further, you may want to consider a liquidated damages provision as a part of the restrictive covenant which would provide that if you did set up within the proscribed area and during the time, the parties would have already negotiated a damages amount and thereby avoid, as a result, a litigated resolution.

Since the owner seems to be showing good faith by the form of the restrictive covenant, i.e., not to apply it if he terminates you, I would consider that a sign that the owner is trying to show a sense of fairness and would be open to the other items discussed here.

If you have a question you would like answered, send it to: Dental Practice Report, Two Northfield Plaza, Suite 300, Northfield, IL 60093-1219; or fax your inquiry to 847-441-3702. Answers to questions are supplied by Randall K. Berning, J.D., LL.M., management / transition consultant, attorney, lecturer and President of Berning & Affiliates, Inc. He can be reached at 800-999-8121 or visit www.Berning-Affiliates.com.

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