



S Y N S T R A T

## The Ethics of Setting up an Opposition Practice

If a dentist plans to leave a practice in which they are employed and set up an opposition practice, then provided there is no contractual impediment they may simply advertise their services. The general legal view appears to be that a dentist has a right to ply their trade.

However if a dentist removes a list of patients from their employer's practice; for example, by downloading files off their employer's computer system with a view to targeting those patients by mail-outs or telephone calls, the situation is quite different. The records of the patient names, addresses and telephone numbers are the property of the practice concerned. A dentist who removes records for this purpose is intending to use the information to take patients from their former employer. In simple terms this is theft. A court may award substantial damages to the injured dentist based on expert analysis of the damage to the practice turnover, profitability and goodwill value, i.e. the economic damage to the practice.

### **Friends and Relatives**

A dentist would reasonably be expected to carry the contact details of relatives and close friends in their own head, and therefore not be reliant on information taken from their previous employer in order to contact them and offer treatment. This is quite different to mailing out to an extended list, the details of which could only be gotten by copying from the previous employer's practice records. The mail-out also leaves an obvious trail.

### **Double Dipping is a Significant Issue**

A situation of a dentist who has sold their practice and then tries to take back the goodwill is more prevalent than some may think. We are aware of a number of cases in at least four states where a dentist, having sold a practice, subsequently advised patients of their new practice address. We are aware of similar cases in the veterinary profession.

The new practice may be located outside of a previously agreed exclusion zone or, alternatively, it may have been established beyond a time exclusion period when the dentist concerned has been employed in their former practice during this period.

The issue is that of contacting patients of the practice which they sold or, alternatively, have been employed in. What has usually occurred is that the offending dentist deliberately used a patient list from the former practice to contact patients and advise them of their new practice address. When challenged, the usual excuse offered is along the lines of:

*"I was simply being courteous to my former patients."*

However this excuse does not stand up to critical analysis:

- Every experienced dentist understands that, given a choice, most patients would choose to be treated by the dentist who treated them previously and is known to them, regardless as to

the qualities of the dentist who has bought that person's practice and who is unknown to them. It is inconceivable that a dentist who has run their own practice for many years does not understand the impact of their writing a letter to patients advising them of their new address/contact details or alternatively telemarketing the new address.

- It is unlikely that a dentist would go to the time and expense of contacting several thousand former patients merely to say "hello". They are knowingly establishing a contact point in the expectation that former patients will choose them over the dentist who bought their former practice but who is unknown to them. The bond between experienced dentists and their patients is usually so strong that a high proportion of former patients would be expected to choose to follow them to the new location rather than attend the former practice.

### **A Key Observation**

- We observe that GP dentists have much stronger patient loyalty than do GP doctors. Perhaps this is because dentists provide a much higher proportion of treatment personally, whereas medical GPs tend to be a sorting point for a multitude of referrals for medical specialist, radiology, pathology, physiotherapy and pharmaceutical remedies.

### **Begging the Question**

All of the above begs the question as to whether a dentist would have purchased the practice off the person concerned if they knew that they would set out to induce the patients, the goodwill of whom they had sold, to follow them to a new location at a future date? The answer is obviously that they wouldn't. The fact that they entered into a contract to purchase practice goodwill, and that the vendor dentist sold it, clearly implies that ownership of practice records, including patient addresses, has changed.

### **Ethical Advice**

Sometimes a dentist setting out to induce former patients to follow them to a new location seeks ethical advice as to the boundaries. In some cases it seems that this is a fig leaf to cover their discomfort. Individuals may canvass for ethical advice until they find somebody who agrees with what they are going to do.

An issue is whether they disclose all of the relevant facts, and whether the person providing the ethical advice has a full knowledge of the facts when endorsing their actions. If, for example, a dentist asks whether it is permissible to set up a new practice outside of an expired time period or outside of a specified exclusion zone, then on the face of it there would be no ethical objection. However if they intended to use a list of patients from the former practice, the situation becomes quite different. Once they do this they are acting unethically. They will also be acting illegally.

It begs the question as to why any dentist would retain a list of patients from their old practice, having sold that practice and handed over all of the patient treatment records to the new owner.

Much "ethical" advice from friends and colleagues in this area is wrong.

### **What If?**

We go back to the old excuse that "I was simply being courteous to former patients." Firstly a mail-out to patients can't be justified if it is based upon a list of patients belonging to the owner of the practice which they have sold, and secondly it can't be justified if it contains contact address and telephone numbers which would enable those patients to make contact with the writer's new practice address.

No other dentist can endorse such a course of action as being ethical if the address list is taken from patient lists or records of the practice which the dentist has sold. Indeed to do so may beg the question as to whether they are compliant in a conspiracy to steal from the new owner of the practice. The issue here is that nobody has a right of access to the patient list except the dentist who owns the practice.

### **The Notion of Goodwill**

Goodwill is more than some intangible benefit which can be bottled and put on a shelf with a price tag. The valuation of goodwill implies that there is a transferable economic benefit. A dentist buying a practice has every right to believe that all of the patient records have been handed over, and that no patient lists have been retained. If there are exceptions then they should be enumerated in the contract. The conditions on which Synstrat's valuation of dental practices are based assumes that an orderly handover will be conducted and that the vendor will act ethically. Fortunately in the overwhelming majority of cases, practice vendors are ethical.

### **Employee Dentist Duty of Care**

The situation of an ex practice owner who works for the new owner for several years is similar to that of other employees. It is not the exclusion zone which is the point, nor the exclusion time. It is the fact that they removed a list of patients which belong to the owner of the practice and used that list to approach patients. An employee owes a duty of care to an employer. That duty of care includes issues of patient confidentiality. The patient records belong to the practice owner, not to the dental employee. The employee who removes that patient list is setting out to remove the practice goodwill of their employer.

### **Re-entering the Market**

If a former practice owner, non compete time conditions having expired, set up a practice nearby and advertised their service by publicly available means and attracted patients who included some former patients, the issue may be viewed as being legally permissible. The issue here is that no patient records were misused, and the terms of the contract between the dentist who sold the practice and the dentist who bought it have been honoured.

### **Quantification of Damages**

Where a practice is damaged through inducing patients to leave it by illegal means, then the legal remedy is that of damages. The loss in practice value may be significantly greater than the proportion of fees diverted since some fixed costs remain. In some cases removal of a significant proportion of patients can mean that a practice which had a high goodwill value now has a negligible value because the remaining fee base renders the practice unattractive to many potential buyers. A full valuation is required and if it is to be used in court it must necessarily be the valuation of an industry expert, who in turn is expert in analysing the financials of dental practices, has access to an accurate database and who has valued a multitude of other dental practices. It is foolish in the extreme to go into court with a valuation from an accountant, however well qualified, who has not valued a large number of other dental practices. Similarly, ad hoc valuations based on percentage of fees won't stand up to analysis in the witness box. Dental practices vary substantially in value dependent upon their fee base, cost base, location, proportion of fees conducted in the owner's surgery vis a vis other surgeries etc. Valuation of dental practices, particularly for expert witness purposes, is a complex issue. This writer has been involved in a number of such events.

### **Purchase Contracts and Practice Valuation**

Prevention is better than cure, and the critical issues when purchasing a practice are to ensure that the price which has been paid is commensurate with the practice value and that the vendor dentist is going to provide an adequate handover. Adequate exclusion conditions must be written into the contract and clearly, in light of a number of recent events, the vendor must be required to confirm that they retained no list of practice patients, whether names, contact addresses or telephone numbers. A specific contractual exception may apply in the case of family and close friends.

### **CBD Versus Suburban Practices**

It is impractical for a capital city CBD practice to grow other than via existing patient referrals, or by purchase of patient lists off retiring dentists. Yellow Pages listings get lost amongst the multitude, and letterbox drops are rendered impossible by corporate security arrangements. A CBD dentist who sets up in opposition to their employer is likely to remain undiscovered. If they draw a large pool of former patients it begs the question as to how this is possible without misuse of patient records belonging to their former employer. If patient records are misused it is likely that it will be impossible to avoid detection. Large numbers of patients receiving letters or telephone calls from or on behalf of the dentist who has left the practice will be accompanied by them cancelling appointments, not

responding to recall notices and requesting records. Inevitably many will talk. Copies of correspondence will surface.

### **No Alternative**

Dentists who seek to establish a modern CBD practice have no practical alternative to purchasing patient goodwill off their employer or off another dentist. The days are long gone when they could easily market their services within the CBD of Australia's major capital cities without commencing with ownership of a significant patient list.

### **Period of Notice for Dentists**

Understandably, dentists are upset if a trusted employee dentist gives notice that they are leaving. In particular instances the hurt is greater if the period of notice is unreasonably short. In extreme cases we have known situations of a dentist saying to their employer "I'm giving you one day's notice". In most cases dentists are more reasonable. However it begs the question as to what is a reasonable and professional period of notice to give.

Among non professional employees the legal position is understood to be the duration of the pay period. If for example a dental receptionist or chairside nurse is paid on a fortnightly basis, then their obligation is to give their employee a minimum of a fortnight's notice.

In many professional areas of employment, the pay period is monthly. This is widespread across the accountancy and financial services sector. An accountant paid monthly would normally be expected to provide a minimum of a month's notice to their employer to the effect that they are leaving. The departing accountant would normally have a substantial number of assignments in progress and would use that month to finalise them or to hand them over adequately to their supervising partner. That is both professional and ethical.

### **What of Employed Dentists?**

Many dentists, but not necessary all, are employed on a monthly basis, with their remuneration tied to the standard formula of a percentage of fees after lab costs have been deducted. The period of payment and the payment arrangement in itself implies that a month is the correct period of notice to give.

### **Length of Forward Book**

Virtually all dentists routinely have forward patient bookings varying from a week's solid bookings but with a smattering of bookings thereafter, but some dentists are solidly booked several weeks in advance with significant bookings beyond that.

### **Ethical Responsibility to Patients**

The ethical issue which governs the situation should be the duty of care to the patient. The dentist who is leaving employment with a full book of patients has an ethical responsibility to the patients to give an adequate period of notice to their employer such that under normal circumstances their employer could arrange for a locum dentist, if not a permanent replacement and, additionally, have sufficient time to work through the patient list with reception staff and the departing dentist and determine which treatment plans need to be reassigned within the practice so as not to disadvantage the patients concerned.

In particular cases where a dental practice has substantial bookings six or seven weeks in advance, an ethical position would be that their notice would be sufficient to ensure that all the currently booked patients are looked after adequately. Certainly the notice shouldn't be less than one month, and there's a good case to suggest that in such circumstances six weeks' notice is appropriate.

## **Some Hypothetical Situations**

### Situation 1

A young dentist buys an established CBD practice. A short while after the handover it becomes apparent that the vendor is enticing patients to his new location. Prompt legal action is taken and the offending dentist is forced to remove himself from the exclusion zone.

### Situation 2

A young dentist buys an associateship in an outer suburban practice. Subsequently the other associate approaches the younger dentist to buy his half of the practice as well. The two agree on a price and on exclusion conditions by time and distance. A contract is drawn up and signed.

Subsequently the vendor establishes a new practice well beyond the exclusion zone and near a well known railway station. He then communicates his new location to former patients who take the train to his new location. Subsequently the purchaser gathers sufficient evidence to prove that the mail-out was to all or at least a major portion of the vendor's former patient list. It is clear that the vendor has knowingly sold goodwill intending to win it back. Legal advice is to the effect that he has violated the contract of sale, regardless as to distance. The key issue is that he has deliberately used a list of patients after he had sold the practice, to induce patients to follow him elsewhere. Those patient records clearly belong to the new owner of the goodwill of his former practice.

After legal arbitration proceedings are in progress, the vendor's lawyers negotiate an out of court settlement.

### Situation 3

A dentist sells his metropolitan practice. He abides by the exclusion conditions and, after taking an extended holiday, works elsewhere in a busy practice. The practice is outside the exclusion zone and he is careful to insist to his employers that his name is not used in practice advertising. The practice is advertised in the name of its associated owners. Several years later, the exclusion time having been observed, he decides that he is in fact too young to retire. The break of several years from practice administration has refreshed him. He decides to buy a smallish practice or, failing that, to rent a space and equip a surgery. He is careful not to approach any former patients, most of whom are now quite happy with the dentist who bought his old practice. He advertises in the local suburban press and lists in the Yellow Pages. Whilst a few former patients do book in to him for treatment, it's apparent it was never his intention to violate either the letter or the spirit of his sale agreement. The majority of his former patients are happy in the practice of the dentist who bought him out.

This dentist has kept to both the law and the spirit of his contract, and abided by professional ethical standards.

### Situation 4

A younger dentist employed in a practice decides to start up their own practice. The young dentist carefully builds up a list of patients and contact details over an extended period. When he has arranged premises he leaves at relatively short notice and immediately forwards letters to a large number of patients he has treated.

Clearly this dentist has violated his duty of care to his employer. He was well aware that the practice goodwill belonged to his employer, including the practice name, telephone number(s), Yellow Pages listing and all patient records. Not content with being fairly remunerated, he has set out to steal patient goodwill from his employer.

Had he taken no patient names and simply advertised his services in the local press then, barring any agreements to the contrary, there would have been no legal or ethical impediment to establishing

practice. Some people's greed outweighs their judgement. When numerous patients of the employer's practice request their records and indicate that they are attending the young dentist's practice, obvious proof emerges that he has mailed out to many patients. Legal action ensues.

#### Situation 5

A dentist purchases a practice and as part of the agreement agrees to employ the vendor dentist. Exclusion conditions apply for three years.

The two prove to be incompatible and their relationship is less than happy. The employing dentist realises that it is likely that the vendor dentist will re-establish a practice as soon as conditions permit.

The dentist who now owns the practice works hard to greet and treat as many patients as possible, maximising utilisation of own surgery time and gradually reducing the patient flow to the vendor dentist, whilst at the same time ensuring that all patients' treatment needs are met. The former vendor dentist is left in no doubt that all practice records belong to the purchasing dentist, and any attempt to direct mail patients by the former vendor dentist's new practice will lead to prompt legal action. The vendor dentist establishes his new practice and takes out general advertisements. The purchasing dentist and his loyal reception staff continue a policy of polite relations with patients allied with quality dentistry.

The disgruntled former vendor dentist finds that his patient drawing power is much diminished.

#### Situation 6

The practice owner has a reverse employment contract with a dentist whereby, for business reasons, the employed dentist technically receives patient payments relating to her surgery but pays an agreed percentage to the practice owner to meet business overheads. Their contract clearly stipulates that if she leaves the practice she is bound by an exclusion zone and time constraint. She wishes to establish herself in practice with another dentist inside the exclusion zone and seeks to negotiate to take what she argues are "her patients". However it is clear that the practice does not belong to her and she finds that she cannot establish a practice in the exclusion zone without purchase of goodwill. Indeed, to attempt to do so is to risk serious legal action. She agrees to purchase goodwill off the practice owner, whereupon the exclusion conditions are dissolved. Subsequently both practices co-exist in the same suburb, each treating their own patients.

#### Situation 7

A dentist sells his practice and agrees to work for the new owner. Several years elapse in which the practice continues to grow steadily. The new practice owner is making a sound profit. The vendor dentist is generating a consistently high level of fees and is paid on a standard formula. The practice is running smoothly.

The vendor dentist notices that recently practice values appear to have risen due to the activities of corporate dental companies, although in truth the corporates impose onerous five year employment contracts and insist on part of the payment being deferred. They also expect their vendor dentists to manage their old practices for little or no management fee, paying them only for dental fees produced. Nevertheless the vendor dentist comes to believe that he has significantly undersold his practice.

The vendor dentist meets an old friend. The friend has a dental practice with a spare surgery. The friend wishes that he

*"had a sufficiently large enough practice to sell to a corporate".*

The vendor dentist says:

*"Well my exclusion period has expired"!*

In due course the vendor dentist resigns from his current employment. Almost immediately the forward book of patients in his surgery disappears, and evidence rapidly emerges that he has directly contacted many patients. Patients contact the practice for their records, indicating that they are moving on with the vendor dentist. Examination of the building's electronic security system reveals that he has entered the practice repeatedly at odd times on weekends and public holidays where there is no rational reason for him doing so. A forensic IT expert reports that he downloaded a large number of patient contact details at those times.

It is apparent to the dental friend that the vendor dentist's mail-out has occurred. Patients send notes to the new practice and ring the practice receptionist referring to the mail-outs. The practice receptionist mentions them in daily discussions with the dental friend. The dental friend is well aware of what is occurring but he turns a blind eye because he is gaining. Before the vendor dentist turned up in his practice he was paying a substantial rent for space that he couldn't fully utilise. He was having trouble meeting staff wages and his other commitments. The arrival of the vendor dentist, who now shares expenses, has eased the burden of fixed overheads considerably.

The vendor dentist and the friend calculate that their associated practices are on track to reach a level of fees and profitability where they can sell for a substantial sum.

Just as they are congratulating themselves on how shrewd they have been, the vendor dentist is served a legal statement of claim from the purchaser of his old practice, which he notes has a State Supreme Court registration stamp on it. The claim alleges that he has used a patient list stolen from the practice to approach patients, and induced them to move to the practice of his friend. The claim alleges that he has stripped the practice of much of its goodwill value, leaving it with high fixed costs overhead including rental of expensive premises, which are now much too large for the reduced size of the practice. He consults lawyers and rapidly finds himself facing escalating legal expenses. The evidence continues to mount against him.

The dental friend commiserates with the vendor dentist, but is shocked when he too is served with a legal claim alleging that he has been an accessory to the removal of patients. The two are put on legal notice that any proceeds they may receive from a future sale of their practice(s) are subject to ownership dispute.

Suddenly their scheme doesn't look so clever after all.

## **Legal Representation**

While solicitors and barristers are competent at accessing case law, they first must recognise and determine what the principal issue involved is. On occasions I've noticed that barristers wrongly confuse exclusion conditions with theft and misuse of patient records. Either:

1. A competing practice is being set up in opposition to the vendor's former practice in breach of exclusion conditions; or
2. Alternatively the legal issue is based on the theft (or illegal retention) of practice records belonging to a new practice owner (or employer) and the use of those patient records to induce patients away from that practice.

## **Ethical Impact**

A colleague who advises a dentist that it is permissible to utilise practice records belonging to another dentist's practice to notify patients of that dentist's new practice address may well be treated as an accessory to what is in reality theft of patient goodwill.

## **Some Big Questions**

Consider:

A dentist, having previously sold his busy practice, then agreed to work for the new owner and does so apparently harmoniously for several years. He is fairly remunerated. The practice remains well booked several weeks in advance. He then approaches a senior colleague and asks whether, in that person's opinion, there is an ethical obstacle to him re-establishing his own practice and mailing to former patients a courtesy letter advising them of his plans.

Questions:

Should the senior colleague demand to know how it is that he has a list of patient addresses when he is an employee of the practice? What ethical advice should his senior colleague provide? What obligations does he owe to the dentist who purchased his practice and was subsequently his employer? What period of notice should he give?

Consider:

A dentist has worked in a practice for several years. She has built up a strong rapport with patients and is fully booked. She is paid fairly and works with good equipment, ably supported by a competent chairside assistant. She has signed no restrictive covenants on her employment. Another dentist has offered to provide her with facilities on the basis that she attracts her own patients and works as an associate. She leaves her employment at short notice. Immediately virtually all patients previously treated by her stop making appointments. There are instantly cancellations among patients already booked. An IT expert discovers that she had downloaded a list of all patient contacts from her employer's computer. A number of her letters to patients find their way to the possession of her former employer, who commences legal action.

Question:

If she had discussed her plans with the dentist who provided her with facilities to work as an associate, does that make that dentist an accessory to her actions, and therefore at risk of being joined in legal action?

### **Can't Put Cork Back in Bottle**

Once a dentist has written to patients whom they have treated to advise them that they have moved, the genie is out of the bottle. Most patients seeking treatment will follow that dentist. If that dentist's new location is inconvenient, they are likely to seek treatment off some other dentist who is conveniently located. There is no practical way that those patients can be persuaded to return to the original practice location and be treated by another dentist. Most will have followed the dentist who wrote the letter or have taken up treatment by somebody else. The genie has escaped and the bottle cannot be re-corked.

The act by either an employed dentist or an ex practice owner in wrongfully using a patient list belonging to the practice owner to direct mail to their new practice address is therefore extremely damaging to a practice.

### **Summary**

Over the years I've seen a vast number of dental practice situations, each at least a little different to the next. One issue which is clear is that neither an employee dentist nor a former practice owner have any right to utilise lists of patients taken from the practice which belongs to another dentist. In particular they have no right to use those records to market their own dental services unless they have purchased that right from the current practice owner. The existence of a practice exclusion zone or the expiry of a non compete period does not permit material which rightly belongs to the current practice owner to be used by other dentists for the purpose of communicating with former patients.

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