

**WRITTEN ASSOCIATE DENTIST AGREEMENTS:  
REQUIRED PROTECTION FOR BOTH PARTIES**

**(Part 1 of 4)**

*By Barry H. Josselson, A Professional Law Corporation \**

Dentists associating with owner-dentists has become more prevalent in recent years than has been the case in the past. The number of dentists graduating from dental school, the greater competition among the profession for a shrinking dental population (especially in California), the increased overhead costs of operating one's practice, the rigor of starting a practice from scratch, and the increasing difficulty of obtaining total institutional financing to purchase dental practices are all reasons for the unbridled growth of associateships. However, as associate dental relationships continue to flourish, so do unfortunate and unnecessary legal disputes related to such associate dental relationships.

In our law firm's dental health care practice we have discovered that the most successful dentists (either as associates or owners) recognize the need to have written associate agreements because of the protections afforded to each dentist as a party to the agreement.

Parts 1 and 2 of this four-part article shall outline the reasons to have written associate agreements with your colleague. Parts 3 and 4 shall detail twelve (12) points to be addressed in every properly drafted associate dentist agreement.

**Part 1: Written Associate Agreements: Mandatory and not Optional.**

There are few business owners who would spend \$40,000 to \$50,000 per year on their office equipment and other business assets without having a detailed invoice or bill of sale setting forth both the equipment's warranties (to protect the owner) and the reciprocal promises by the business owner to make payments on a certain time schedule (to protect the vendor selling the equipment). The associate relationship is every bit as important and substantial a monetary investment because of the annual compensation paid to the associate. Yet, it can be fraught with greater risks. Your *memorializing in writing* the associate dentist relationship in lieu of maintaining a simple and incomplete *verbal* agreement is necessary for the following reasons:

1. *Written Agreements Cause Parties to Address and Focus on Issues about which the Parties would not Otherwise have Thought.* This is especially true if the dentists have sought experienced dental law attorneys able to apprise them of those legal issues unique to the dental field. For example, owners can compensate their associates in a variety of ways: daily salary, a percentage of collections, a percentage of production or a base salary with a bonus based upon a percentage of dentistry produced. Many owners frequently pay their associates based upon a percentage of collections for services rendered by that associate.

Does the associate's entitlement to a percentage of collections *end* upon the associate's termination of employment? We have encountered numerous owners of dental practices who feel that the associate's percentage should end upon termination of employment or, at the very best, continue for only a limited period of time (i.e., ninety (90) days after termination of employment). A

---

\* Mr. Josselson's law firm is the *pre-eminent* law firm in California *devoted exclusively to the representation of dentists*. Mr. Josselson advises more than 2000 dentists regarding their dental legal and business matters. His law offices are located in the cities of Orange, San Diego, Walnut Creek, and Sacramento, California. Mr. Josselson currently serves as an instructor in the UCLA School of Dentistry Graduate Practice Residency program. He currently also guest lectures at the UC San Francisco, USC and Loma Linda Schools of Dentistry. Mr. Josselson can be reached at 800-300-3525 or via e-mail at [barry@josselson.com](mailto:barry@josselson.com). You may also access his website at [www.josselson.com](http://www.josselson.com) or [www.dentallawfirm.com](http://www.dentallawfirm.com).

partial answer to this question may be based upon what form of compensation the associate received at the time that the associate first became employed and rendered the dental services. If the associate during the first sixty (60) or ninety (90) days of employment were compensated *only* upon the basis of collections, the owner would have a more difficult argument to assert that the owner were entitled to all of the collections than if the associate were paid a base salary during the initial sixty (60) to ninety (90) day period of employment.

What rights does the associate retain subsequent to the termination of employment to examine the owner's financial books and records relative to the associate's production of dentistry? If the associate is being paid a percentage of those accounts receivable collected by the owner, does the associate have a *broad* or *limited* right to examine and corroborate the owner's representations that only certain accounts receivable have been collected on behalf of the associate?

What rights does the associate have to collect accounts receivable, especially in those circumstances where the patient may have followed the associate to a new office location and the patient is making the patient's co-payments to the associate?

If the associate is instead being paid a daily salary with a bonus based upon production in excess of a certain amount, does the bonus apply based upon the production being reached *that particular day* or the production being reached on an average for *all days* worked by the associate during that month?

What rights does the owner retain regarding who performs the more lucrative dentistry (i.e., the crown and bridge cases) as opposed to the less expensive dental procedures (i.e., prophys and amalgams)? What rights does the owner retain regarding hiring more associates to perform the dentistry and, consequently, preventing the associate from reaching a bonus level of production?

Should the associate be paid a greater salary if the associate is spending more time managing the dental office as opposed to rendering dental services?

We have discovered that the parties rarely address, let alone resolve, the above-identified issues. A properly drafted written agreement would specifically raise these issues and resolve them!

2. *Some People Lie and Try to Take Advantage.* If you are in a business relationship with a dishonest individual and such party is attempting to take advantage of you, a written agreement which can be reviewed by your legal counsel or, in the event of trial, by the presiding judge shall give you far greater leverage than your merely alleging the existence of a verbal agreement. With verbal agreements the presiding judge is forced to determine which of the dentists is more credible and to choose which party is telling the truth. A written agreement on the other hand helps preclude such guesswork by the court, and gives you or your attorney leverage to threaten litigation with a successful conclusion if the other dentist breaches the associate agreement. *The result: written associate agreements forestall litigation which would otherwise occur in the absence of an agreement documenting the parties' intentions.*

*Next issue:* Part 2 of this 4-part article shall address written agreements resolving ambiguity, eliminating confusion and refreshing people's memories.

**WRITTEN ASSOCIATE DENTIST AGREEMENTS:  
REQUIRED PROTECTION FOR BOTH PARTIES**

**(Part 2 of 4)**

*By Barry H. Josselson, A Professional Law Corporation \**

Dentists associating with owner-dentists has become more prevalent in recent years than has been the case in the past. The number of dentists graduating from dental school, the greater competition among the profession for a shrinking dental population (especially in California), the increased overhead costs of operating one's practice, the rigor of starting a practice from scratch, and the increasing difficulty of obtaining total institutional financing to purchase dental practices are all reasons for the unbridled growth of associateships. However, as associate dental relationships continue to flourish, so do unfortunate and unnecessary legal disputes related to such associate dental relationships.

In our law firm's dental health care practice we have discovered that the most successful dentists (either as associates or owners) recognize the need to have written associate agreements because of the protections afforded to each dentist as a party to the agreement.

Parts 1 and 2 of this four-part article have outlined four (4) reasons to have written associate agreements with your colleague. Parts 3 and 4 shall set forth twelve (12) points to be addressed in every properly drafted associate dentist agreement.

**Part 2: Written Associate Agreements: Mandatory and not Optional.**

There are few business owners who would spend \$40,000 to \$50,000 per year on their office equipment and other business assets without having a detailed invoice or bill of sale setting forth both the equipment's warranties (to protect the owner) and the reciprocal promises by the business owner to make payments on a certain time schedule (to protect the vendor selling the equipment). The associate relationship is every bit as important and substantial a monetary investment because of the annual compensation paid to the associate. Yet, it can be fraught with greater risks. Your *memorializing in writing* the associate dentist relationship in lieu of maintaining a simple and incomplete *verbal* agreement is necessary for the following reasons:

3. **Written Agreements Resolve Ambiguity and Eliminate Confusion.** Your spelling out clearly the terms of any business relationship will eliminate ambiguity if the attorney drafting the document is intimately familiar with the nuances of that particular profession. For example, many owners initially employ associates with the hope for a long-term relationship and that the associate dentist's patient-following shall also parallel the practice's increased growth. During the early months of the associateship relationship, the owner may not be making a profit on the services rendered by the associate. This is especially true if the associate is a recent dental school graduate and works slowly. The associate's liability to the owner upon termination of the relationship will vary depending upon whether the associate's compensation has been designated as a "salary" or a "draw".

---

\* Mr. Josselson's law firm is the *pre-eminent* law firm in California *devoted exclusively to the representation of dentists*. Mr. Josselson advises more than 2000 dentists regarding their dental legal and business matters. His law offices are located in the cities of Orange, San Diego, Walnut Creek, and Sacramento, California. Mr. Josselson currently serves as an instructor in the UCLA School of Dentistry Graduate Practice Residency program. He currently also guest lectures at the UC San Francisco, USC and Loma Linda Schools of Dentistry. Mr. Josselson can be reached at 800-300-3525 or via e-mail at [barry@josselson.com](mailto:barry@josselson.com). You may also access his website at [www.josselson.com](http://www.josselson.com) or [www.dentallawfirm.com](http://www.dentallawfirm.com).

What if the compensation to the associate is designated as "salary"? The associate has no duty to refund any compensation to the owner regardless of the amount of the associate's production.

What if the compensation to the associate is defined as an "advance" or "draw"? There may be a *liability by the associate to reimburse the owner* for money paid to him or her if the compensation is greater than the fees generated from the dental services rendered by the associate.

What happens if part of the associate's compensation is being held back by the owner (with the associate's consent) to be applied as a partial payment for a purchase or a buy-in of the dental practice? Who is taxed as having earned the income and what happens to the money if the associateship relationship terminates prematurely? Your clearly and accurately defining in a written agreement the nature of the associate's compensation and any forfeiture of the associate's earnings upon an aborted buy-in would obviate these and other problems.

Many associates in California are also paid as employees based upon a per day basis and, therefore, may arguably be treated similarly to the owner's other employees. On numerous occasions our law offices have had to defend the owner or assert the associate's rights after the parties have disputed the associate's claim to certain employee fringe benefits: paid vacations, paid holidays, paid sick leave, paid health insurance, paid malpractice insurance, additional compensation for night or weekend emergencies, etc. If these issues and concerns had been addressed in their written agreement rather than the parties having to recall their prior discussions, there would have been far less acrimony and legal costs incurred.

4. *People Forget.* Most dentists are too busy taking care of their patients and maintaining their professional skills to remember the intricate details of every business transaction or business relationship in which they enter. A busy dental office with associates, hygienists, dental assistants, insurance-billing employees and front office staff may all have unique and different terms characterizing their employment relationships. For this reason "legally organized" dental offices will have employee manuals and employee agreements setting forth the terms of their staff's employment. (For example, employee manuals set forth the dental office's practice regarding sexual harassment, pregnancy disability leave, paid holidays, sick leave, vacation, staff absenteeism, tardiness and termination.) Both parties to a verbal associate agreement frequently recall differently many of the integral points previously negotiated between the parties, and such differences in recall unfortunately often lead to subsequent litigation. For example, our offices previously represented an associate before the Labor Commissioner for the State of California. The owner had held back part of the associate's compensation to pay for (i) reworking of allegedly defective dentistry and (ii) completion of cases by the successor associate. Both the owner and associate disagreed as to what provisions to which they had verbally agreed before the relationship terminated relative to the holdback of the associate's compensation and his liability for dentistry completed by the successor associate. The Labor Commissioner finally ruled in favor of the associate regarding the unfairness shown by the owner after the owner retained part of the associate's salary to pay for allegedly defective dentistry having to be redone by the new associate. However, this result was only after a substantial expenditure of time and money by the associate to vindicate his rights. All of this could have been avoided had the parties initially placed in writing the terms of their verbal agreement.

**Next issue:** Part 3 of this 4-part article will identify numerous points to be addressed in any properly drafted associate dentist agreement to protect you from unnecessary liability.

**WRITTEN ASSOCIATE DENTIST AGREEMENTS:  
REQUIRED PROTECTION FOR BOTH PARTIES**

**(Part 3 of 4)**

*By Barry H. Josselson, A Professional Law Corporation \**

Dentists associating with owner-dentists has become more prevalent in recent years than has been the case in the past. The number of dentists graduating from dental school, the greater competition among the profession for a shrinking dental population (especially in California), the increased overhead costs of operating one's practice, the rigor of starting a practice from scratch, and the increasing difficulty of obtaining total institutional financing to purchase dental practices are all reasons for the unbridled growth of associateships. However, as associate dental relationships continue to flourish, so do unfortunate and unnecessary legal disputes related to such associate dental relationships.

In our law firm's dental health care practice we have discovered that the most successful dentists (either as associates or owners) recognize the need to have written associate agreements because of the protections afforded to each dentist as a party to the agreement.

Parts 1 and 2 of this four-part article have previously outlined four (4) reasons to have written associate agreements with your colleague. Parts 3 and 4 will now identify twelve (12) points to be addressed in every properly drafted associate dentist agreement.

**Twelve Critical Issues to be Addressed in Every Associate Dentist Contract.**

The following list sets forth those points which should be addressed in any properly drafted associate dentist agreement. Some concerns may be more important to you than others (for example, the dentist's status as independent contractor or employee, ownership of patients' records, covenant not to compete by the departing associate, confidentiality and trade secret status of certain practice assets, and the associate's right to buy in to the practice). The dentists' addressing each of these issues in their agreement will help prevent later disputes because of these points previously having been resolved between the parties.

1. *Status of Associate Dentist.* The owner's treating the associate as an employee or an independent contractor has divergent consequences. Current California case law and recent Internal Revenue Service rulings have made it increasingly difficult to characterize associate dentists as independent contractors rather than as employees. However, great familiarity with the present status of the law in this area and proper documentation of the criteria needed to establish an independent contractor relationship can cause the owner to be successful in establishing a legitimate independent contractor relationship with the associate. While an in depth review of independent contractors and employees is beyond the scope of this article, the right to control and direct the individual who performs the services not only as to the result to be accomplished but also as to the details and means by which that result is accomplished is an indication of an employee relationship.

---

\* Mr. Josselson's law firm is the *pre-eminent* law firm in California *devoted exclusively to the representation of dentists*. Mr. Josselson advises more than 2000 dentists regarding their dental legal and business matters. His law offices are located in the cities of Orange, San Diego, Walnut Creek, and Sacramento, California. Mr. Josselson currently serves as an instructor in the UCLA School of Dentistry Graduate Practice Residency program. He currently also guest lectures at the UC San Francisco, USC and Loma Linda Schools of Dentistry. Mr. Josselson can be reached at 800-300-3525 or via e-mail at [barry@josselson.com](mailto:barry@josselson.com). You may also access his website at [www.josselson.com](http://www.josselson.com) or [www.dentallawfirm.com](http://www.dentallawfirm.com).

2. *Schedule and Location of Services.* The agreement should explicitly state the number of days per week of work, the hours that the dental office is open, and the associate's responsibilities, if any, for weekday and weekend emergency coverage. If the owner has multiple offices, the agreement should also indicate if the associate has any responsibility to be available to render dental services at the satellite office locations as well.

3. *Malpractice Insurance.* The agreement should explicitly state the obligation by both dentists to maintain malpractice insurance, the limits of such coverage, and any unusual or special provisions (for example, coverage for nitrous oxide).

4. *Duties by Owner and Associate.* The agreement should specify the associate's duties with regard to the rendering of dental services as well as the associate's duty, if any, to become involved in administration and management concerns. The owner's duties should be clearly set forth including, but not limited to, any promises of patient distribution and providing hygienists, chairside assistants or business office staff to perform billing and collection services.

5. *Compensation to Associate.* The agreement should carefully define the method by which the associate is to be paid. For example, as previously discussed in part one of this article, there are numerous variations of compensation including a flat per day salary, a percentage of the associate's daily gross production, or a percentage of the associate's monthly collections. The frequency with which the associate shall be paid must be stated as well as any financial responsibility by the associate for laboratory fees or defective dentistry. Any bonus provisions as well as the means by which such bonus is to be computed should also be clearly drafted.

6. *Business Related Expenses.* The agreement should detail what business related expenses are the sole responsibility of the associate and which expenses are to be paid for or reimbursed to the associate by the owner. Professional license fees and association membership fees, automobile expenses, entertainment and promotion expenses, continuing education expenses, malpractice insurance, health, disability income and life insurance are expenses which should be addressed in this agreement.

7. *Patients' Charts and Records.* Many health care professionals have the incorrect perception that they can "own" patients' charts and records. The dentist is solely a custodian of the information acquired by the dentist during the course of the dentist-patient relationship and, therefore, has no ownership of such information. The agreement should clearly state, however, that all patient information is confidential and may not be used by the associate for any purpose inconsistent with or in breach of any of the provisions of the agreement. (See part 4's discussion of confidentiality and trade secrets.)

*Next issue:* Part 4 of this 4-part article will identify the remaining significant legal issues such as covenants not to compete, an associate's right to buy in, the parties' mutual indemnifications, and recovery of attorneys' fees if you have to sue the other party to protect yourself.

**WRITTEN ASSOCIATE DENTIST AGREEMENTS:**  
**REQUIRED PROTECTION FOR BOTH PARTIES**

**(Part 4 of 4)**

*By Barry H. Josselson, A Professional Law Corporation \**

Dentists associating with owner-dentists has become more prevalent in recent years than has been the case in the past. The number of dentists graduating from dental school, the greater competition among the profession for a shrinking dental population (especially in California), the increased overhead costs of operating one's practice, the rigor of starting a practice from scratch, and the increasing difficulty of obtaining total institutional financing to purchase dental practices are all reasons for the unbridled growth of associateships. However, as associate dental relationships continue to flourish, so do unfortunate and unnecessary legal disputes related to such associate dental relationships.

In our law firm's dental health care practice we have discovered that the most successful dentists (either as associates or owners) recognize the need to have written associate agreements because of the protections afforded to each dentist as a party to the agreement.

Parts 1 and 2 of this four-part article have previously outlined many reasons to have written associate agreements with your colleague. Parts 3 and 4 detail twelve (12) points to be addressed in every properly drafted associate dentist agreement.

Twelve Critical Issues to be Addressed in Every Associate Dentist Contract.

The following list sets forth those remaining points which should be addressed in any properly drafted associate dentist agreement. Some concerns may be more important to you than others (for example, the dentist's status as independent contractor or employee, ownership of patients' records, covenant not to compete by the departing associate, confidentiality and trade secret status of certain practice assets, and the associate's right to buy in to the practice). The dentists' addressing each of these issues in their agreement will help prevent later disputes because of these points previously having been resolved between the parties.

8. Covenants Not To Compete. Most associate agreements have clauses in them stating that the associate may not compete with the owner subsequent to termination of employment for a particular period of time and within a certain geographic area. California Business and Professions Code Section 16600 states that agreements which restrict a dentist's ability to practice dentistry are void with a few limited exceptions. Such exceptions, however, pertain only to the transfer of goodwill based upon the sale of the dental practice. They do not permit restricting an associate from practicing dentistry subsequent to the associate's departure from the practice. California is a jurisdiction which prohibits such covenants restricting associate dentists, and many other states (such as Washington and Colorado) allow such restrictions to be legal and enforceable.

9. Confidentiality and Trade Secrets. The agreement should address what information in the dental practice is deemed to be confidential, trade secrets or proprietary to the owner and may not, therefore, be appropriated by the associate for his or her own benefit and the owner's detriment.

---

\* Mr. Josselson's law firm is the *pre-eminent* law firm in California *devoted exclusively to the representation of dentists*. Mr. Josselson advises more than 2000 dentists regarding their dental legal and business matters. His law offices are located in the cities of Orange, San Diego, Walnut Creek, and Sacramento, California. Mr. Josselson currently serves as an instructor in the UCLA School of Dentistry Graduate Practice Residency program. He currently also guest lectures at the UC San Francisco, USC and Loma Linda Schools of Dentistry. Mr. Josselson can be reached at 800-300-3525 or via e-mail at [barry@josselson.com](mailto:barry@josselson.com). You may also access his website at [www.josselson.com](http://www.josselson.com) or [www.dentallawfirm.com](http://www.dentallawfirm.com).

The wrongful use or misappropriation of such information (for example, patients' health histories, insurance carriers, parties financially responsible for patients' obligations, phone numbers and addresses of both patients' home and office) could give rise to liability.

10. *Associate's Right to Buy In.* The agreement must clearly and unambiguously state whether the associate's right to buy in constitutes an option to purchase or a first right of refusal. Our law offices continually review agreements which are ambiguous regarding the associate's right to buy in. An option to purchase gives the associate an unfettered right to purchase the owner's practice at any time during the specified period regardless of the existence of other parties' offers. A first right of refusal, by contrast, only gives the associate the right to purchase the practice after a third party has tendered an offer or the owner wishes to sell his or her practice and must, therefore, first offer the practice to the associate prior to offering it to third parties. This section of the associate agreement must be well drafted because of the potential great amount of money involved in the purchase of the practice, the method of appraisal of the practice, the time at which the practice is to be valued (for example, at the time that the associate commences working for the owner or after a certain period of time that the associate has been employed), and the owner's responsibility, if any, to help finance the purchase price. The most important issue to be aware of is that the associate's desire to purchase at a future point in time is often the impetus for his or her joining the owner's practice. There can be substantial bitter feelings and risk of litigation if the associate has invested considerable time in the relationship, and the opportunity to purchase the owner's practice is never offered to the associate or is unilaterally revoked by the owner.

11. *Indemnification.* The agreement should address each dentist's responsibility to the other should one party be held responsible for (i) any malpractice liability resulting from the treatment of patients by the other dentist or (ii) any non-malpractice liability resulting from negligent acts by the other dentist.

12. *Attorneys' Fees.* California law generally precludes the recovery of attorneys' fees by a prevailing party in a lawsuit should a party be forced to resort to litigation to redress a grievance. California Code of Civil Procedure Section 1021 does permit, however, parties to agree contractually to recover their attorneys' fees if they are forced to file suit because of the other party's breach of the agreement. Such attorneys' fees clauses are important in those cases where the damages incurred by one party are small (for example, less than \$5,000), and the legal fees to be incurred to protect the injured dentist could equal or exceed the potential recovery. Such clauses would, therefore, assist the injured dentist in recovering both his or her damages and out-of-pocket costs spent on attorneys' fees.

*Conclusion.* Written agreements of any kind (and especially written associateship agreements) always create a "win-win" opportunity for the parties involved.

When the associate and owner are given the opportunity to express his or her goals and expectations regarding the associate relationship, the likelihood of that goal or expectation being met is heightened by the parties discussing it and reaching a conclusion. And the best way of reaching a conclusion is to have the parties resolve it in writing by recognizing the great number of possible issues, simple and complex, which exist in the owner-associate relationship!

*Your investing a little time and energy (before you hire that associate or you commit to work in that owner's dental practice) by seeking the wise counsel of an experienced dental attorney will assure you of a far more successful business endeavor.*