

# Associate Contracts

*By Edward J. Guiducci, Esq.  
Guiducci & Guiducci PC*

Most practice owners believe that the process of hiring an associate veterinarian is completed upon their locating an associate that has the desired clinical and interpersonal skills to work with the client base and the staff and that is willing to work for an agreed upon wage. Many practice owners believe that the process is over at that point in time and that there is little benefit to have a written Associate Agreement. After all, what do they have to lose?

## All Associate Agreements Should Be in Writing

It is a good business practice to reduce any important verbal agreement to writing. An Associate Agreement is no exception and should be written and signed by both parties. This is true whether the associate is classified as an employee or an independent contractor.

All too frequently veterinarians believe that the associate they want to hire is a person of their word. They claim that it is unnecessary to have a written agreement because they are both honest and honorable individuals and it over complicates a straightforward relationship. The flaw with this logic is that two people will frequently interpret and remember different details from a verbal conversation. If you take two perfectly honest individuals and ask them about the specific terms of an agreement that arose after a verbal conversation, each one will focus on certain details that will frequently conflict with the understanding or memory of the other individual.

This problem can become serious if it involves terms of a verbal Associate Agreement relating to compensation or other significant issues. When this happens, the party that feels that he or she has been misled (normally the associate) may start questioning whether the hiring veterinarian is honest or is trying to take advantage of him. The effect of such a scenario is that the parties who once believed the other to be honest begin to question the character of the other. This is especially important if the doctors work well together otherwise and were looking for a long-term business relationship.

This problem can easily be avoided by having a well drafted Associate Agreement or Independent Contractor Agreement. A poorly drafted agreement that fails to address important issues is frequently no better than a verbal agreement because there remains a misunderstanding or ambiguity on important issues. It is also important to understand that ambiguities in written agreements are construed against the drafters of the agreements. The effect of this is that the party that drafts the agreement, frequently the hiring veterinarian, will have any ambiguous or missing sections construed in a light most favorable to the associate and against their legal interest. The legal system has evolved over hundreds of years to protect the weak by construing the ambiguous contract provision against the drafter.

Some of the major terms relating to business issues that should be included in a written Associate Agreement are as follows:

- **Define Associate as Employee.** Make it clear in the Agreement that the associate is your employee and not an independent contractor. This language is important to avoid any confusion as to the intentions of the parties. However, if your practice is audited, the IRS will use its own tests to determine whether or not the associate is in fact an employee or independent contractor.
- **Term.** When does the associate's employment begin and when does it end? Most Agreements provide that the Agreement can be terminated by either party and for any reason upon either 30, 60, or 90 days notice to the other party. In addition, you need to address what happens upon the associate's death or disability, loss of license, or other circumstances.
- **Duties and Hours.** Define the associate's work schedule and the associate's duties and responsibilities. It is important for the practice to have a very broad and flexible definition of duties to avoid an associate who desires to narrow the scope of his or her job duties. There needs to be language permitting the practice to alter the specific tasks that are being undertaken by the associate so long as it falls within the broad definition in the Associate Agreement.

The Associate Agreement should generally permit a practice to alter the hours of work by the associate: i.e., emergency, on call, etc.

Does the associate have the right to work in other practices? The Associate Agreement needs to specifically indicate whether or not the associate is permitted to work in other practices.

- **Compensation.** What compensation will you pay the associate? Fixed monthly, hourly rate, percentage of collection, percentage of production or a combination. What is the going rate for associate salaries? While it is important to know what associates are being paid in the marketplace to determine a fair compensation, more importantly, what compensation can you afford to pay an associate? A proper analysis of your practice income and expenses and projections is very important. The practice should also consider sharing this information with the associate if the associate has expectations of a big raise and the practice cannot afford to give him or her the raise. If your practice cannot afford to give a large raise, you will have to decide whether or not you will provide the associate with any performance bonus or incentives?

If the term of the Associate Agreement expires after one year, the Associate Agreement will need to be rewritten with the new compensation package or contain language permitting it to automatically renew with new compensation terms.

- **Benefits.** In addition to the associate's compensation, will you provide any employee benefits such as health insurance, disability insurance, paid personal leave for vacations, paid professional leave for attending continuing education and other business functions? Will you pay for the associate's malpractice insurance, pay for the associate's continuing education, dues and other business expenses? The number of benefits offered in the market place varies considerably from practice to practice. Usually those Associate Agreements that are part of an eventual buy-in will provide more benefits than just a straight associate relationship.
- **The Associate Should Be An Employee.** The associate should generally be hired as your employee and not as an independent contractor. Many veterinarians desire to treat their associates as independent contractors to avoid withholding employment taxes and unemployment taxes from the amounts paid to the associate. However, whether the associate is an employee or independent contractor is often based on a number of common law factors that may or may not be present in the relationship. These factors vary from state to state depending upon specific rulings by the appellate courts of each state. More importantly, the Internal Revenue Service has developed a list of twenty factors that it examines in making a determination whether a worker is an employee or an independent contractor for tax purposes. In normal associate veterinary relationships, the vast majority of veterinary associates should be classified as employees. If you treat your associate as an independent contractor, you could be subjecting you and your practice to an IRS audit and potential penalties and interest charges.

Many veterinarians are unwilling to classify their associates as employees because of the problems that can develop if they associate does not work out and they are forced to terminate the relationship. The hiring veterinarian is frequently uncomfortable about claims for unemployment filed by the terminated associate. Veterinarians need to accept the fact that unemployment insurance fees are simply a cost of doing business. They also need to have their individual state laws examined to determine whether they are protected from payment on unemployment claims if they terminate the employee during an established "orientation" or "probationary period" to determine if the employee will work out with the practice. Assuming that your state law permits "trial periods" for purposes of unemployment benefits, you could terminate the relationship within the trial period without being exposed to additional fees for unemployment claims by the terminated employee.

Veterinarians also need to understand that they will not be able to avoid discrimination claims by having their associate's classified as independent contractors versus employees. Most state and federal discrimination laws are not based on the worker being classified as an employee versus an independent contractor.

- **Ownership of Client and Patient Records.** Almost all of the Associate Agreements we have reviewed or drafted have contained a clause stating that all client and patient records are owned by the employer veterinarian. While this appears to protect the employer from losing clients to the associate, this protection is illusory. We all know that any client, at anytime, has the right to request copies of their veterinary records and can transfer their animal's treatment to another veterinarian. If the Associate Agreement does not contain

an enforceable Covenant Not to Compete prohibiting the associate from practicing within a reasonable area of your practice, this clause will offer little or no protection for the hiring veterinarian.

- **Nonsolicitation Clauses.** Under most states laws an associate can solicit the clients that he or she has become acquainted with while employed unless bound by an Associate Agreement that prohibits him or her from soliciting. This is equally true for an associate that solicits co-workers and other employees of the hiring veterinarian. Accordingly, it is extremely important that the Associate Agreement contain language prohibiting the associate from soliciting clients and co-workers. Contrary to popular belief, there is no common law protection from this type of solicitation for the hiring veterinarian after the associate leaves his or her employment. There is however a remedy for a hiring veterinarian that learns that his or her associate is or was soliciting the clients of the practice while still employed by the hiring veterinarian. Further, under most states laws it is a breach of the employee's duty of loyalty to solicit clients of the hiring veterinarian's practice prior to leaving his or her employment and there is a specific remedy available for the hiring veterinarian.
  
- **Trade Secret Protection.** Any associate working for your practice has access to certain business information that you want to protect. When your associate becomes a former associate you will want the right to prevent the associate from utilizing this business information. The business information may be protectable under most states laws if it can be classified and maintained as a trade secret. Associate Agreements need to contain broad language prohibiting the associate from utilization of the hiring veterinarian's trade secrets. However, in much the same fashion as the contract term providing the hiring veterinarian with ownership interest in the client and patient records this protection is also illusory. In order for a hiring veterinarian to protect its trade secrets, the records and information must meet the definition of a trade secret under the specific state's law and specific steps must be followed protecting the trade secret. If the business information is not a "trade secret" under the applicable state laws or if proper steps to protect the business information have not been taken then the ability to protect the business information is lost. Courts around the country focus on a variety of factors to consider whether or not a trade secret exists. Some of the more commons factors are:
  1. how widely the information is known outside of the particular practice;
  2. how widely the information is known by employees and others involved in the practice;
  3. the steps taken to guard the secrecy of the information;
  4. the value of the information;
  5. the cost or effort involved in the development of the information;
  6. the cost and effort that would be required to duplicate or acquired by a third party.

In practice, a trade secret can be any information that provides a business with a competitive edge in the marketplace. Some common examples of business information that may constitute a trade secret in a veterinary office include client and patient lists, patient charts and marketing strategies.

- **Covenants Not to Compete.** A Covenant Not to Compete prohibits a terminated associate from operating a competing practice within a geographic area for a set period of time. This is distinguished from nonsolicitation provisions that prohibit an associate from soliciting specific existing clients or co-workers regardless of where the former associate is practicing. Under most states laws, Covenants Not to Compete are enforceable only if they are reasonable in the geographic location that the associate is prohibited from practicing within and reasonable in length of time. The Covenant Not to Compete cannot be too broad in defining the area that the associate is prohibited from competing. Courts commonly will consider the area around the practice that clients are drawn from in determining whether or not the geographic area is reasonable. The reasonableness of the length of time of the Covenant Not to Compete is also of concern for most courts. Courts will not allow the length of time to be excessive. Ultimately, what are reasonable geographic and time restrictions will depend on the location of the practice and the facts relative to each transaction.

It is important to keep in mind that most courts measure the geographic area limitation radius as a bird flies as opposed to measuring based upon the distance it takes to drive the roads to a particular competing location. This rule is very relevant when an employing veterinarian attempts to enforce a Covenant Not to Compete against a former employee who had sets up a practice in a location close to the outside distance of the Covenant Not to Compete. In this scenario, one or both of the veterinarians may measure the distance by driving between the employer's location and the employee's new location.

It is additionally important to understand that if a court determines that the Covenant Not to Compete is unreasonable in geographic location or length of time that the court may void the entire agreement or the specific Covenant Not to Compete or judicially modify the length of time or geographic location of the Covenant Not to Compete to make it reasonable. Courts around the country differ on their preference when faced with this issue. If the employing veterinarian is located in a state that prefers to judicially modify the terms of the noncompetition agreement, the employing veterinarian should take an aggressive position on what is reasonable. The employing veterinarian can always choose to settle with a former employee if he or she chooses to not attempt to take the issue before a court. However, it is a possibility that a former associate veterinarian will choose to not violate an aggressive Covenant Not to Compete in order to avoid the costs of litigation.

- **Attorney's Fees.** It is important that your Associate Agreement contain language permitting you to recover your attorneys' fees if you are forced to file a lawsuit to prevent a terminated associate from violating a Covenant Not to Compete. Most states require an attorney's fees provision in an Associate Agreement before the enforcing veterinarian is entitled to recover the sums that he or she paid to their attorneys. Further, having such language in your Associate Agreement may influence a former associate to comply with its terms if he or she would have to pay your attorneys fees as well as his or her own.
- **Liquidated Damage Provision.** The majority of states permit parties to negotiate into contracts the amount of damages that a party will be entitled to recover if a breach of the contract or covenant occurs. These contract terms are called "liquidated damage

provisions” and can be an effective tool to prevent an associate from violating a Covenant Not to Compete or a non-solicitation provision of an Associate Agreement.

- **Associate Agreement Must Be Assignable by Employer.** The Associate Agreement must provide that the employing veterinarian is entitled to assign the agreement to a new purchaser or a new entity. This is very important to the employing veterinarian if he or she would decide or need to sell or restructure the business. The value of a veterinary practice is dependent on preventing key employee veterinarians from competing with the business after the acquisitions.
- **Employing Veterinarian Must Give “Consideration” When Employee Veterinarian Enters into Covenant Not to Compete.** All states require that both parties to a contract give “consideration” in order for the contract to be enforceable. The legal concept of consideration requires that each party either give some right, interest or benefit or give up a forbearance or detriment. This is also true for Associate Agreements and Covenants Not to Compete. In order for the Associate Agreement and the Covenant Not to Compete to be enforceable, the employing veterinarian and the associate veterinarian must have each given consideration. An associate veterinarian obviously meets the legal obligation by agreeing to the restrictive Covenant Not to Compete. The same can be said for the employing veterinarian if the associate veterinarian enters into the Associate Agreement prior to becoming an employee. A problem develops when the employing veterinarian imposes the Associate Agreement upon the associate veterinarian after he or she has been working for the employing veterinarian. The employing veterinarian has arguably not given any consideration if the associate veterinarian has already been an employee. If a court rules that consideration has not been given as a result of prior employment, the contract containing the Covenant Not to Compete cannot be enforced and the employing veterinarian is at risk of the associate taking a portion of the clients of the practice.

In certain states, it has been held that the employing veterinarian has given consideration by permitting the associate veterinarian to retain his or her job. However, courts in many states have ruled that the employing veterinarian has not met its obligation simply by permitting the associate veterinarian to retain his or her job. In light of the uncertainty of this issue around the country, it is advisable for the employing veterinarian to provide the existing associate veterinarian with a sum of money for his or her entering into the Associate Agreement. This is especially important for an employing veterinarian in the event he or she wants to sell the veterinary practice because the buyer will reduce his offer for the practice based upon his perception of the risk that an associate veterinarian would leave and legally compete with the practice. An employing veterinarian can choose to give an existing associate veterinarian with consideration of a benefit other than a cash payment. There is no specific requirement on what the benefit needs to be or the value of the benefit. One example of consideration other than cash is payment of professional liability insurance, if not already provided, or additional funds for continuing education.

- **Tips to Conduct Negotiations with Your Associate.** How can the terms of an Associate Agreement be negotiated without damaging the relationship of the hiring veterinarian and

the associate veterinarian? The inherent problem in these negotiations is that there are conflicting goals. The goal of the hiring veterinarian is to obtain contract terms to protect his or her practice in the event that the relationship is not successful. This is in sharp contrast to the goal of the associate veterinarian who is interested in contract terms that will permit him or her flexibility if the relationship fails. There is a point in the negotiation of an Associate Agreement when these equally compelling goals conflict with each other and hard feelings can develop. Frequently, these hard feelings that arise during these negotiations have long-term effects upon the relationship of the parties to the negotiations.

There are a number of steps that a hiring veterinarian can take to minimize the risk of hard feelings developing during the negotiations.

- **Negotiate in a Neutral Site.** Conduct the negotiations in a neutral site where there is no perceived power position. This approach is intended to place the associate veterinarian at ease. If a hiring veterinarian conducts the negotiations in his or her office, he or she is more likely to be perceived by the associate veterinarian as being in the power position.
- **Describe Expectations.** A technique that can be successful is for the hiring veterinarian to describe his or her expectations of the associate veterinarian and his or her goals at the beginning of the negotiations. If the intention of the hiring veterinarian is to have a non-solicitation provision and Covenant Not to Compete, it is important that this issue be brought up at an early point in the negotiations with the associate. This is also an opportunity for the hiring veterinarian to explain why he or she feels strongly about having these provisions. A common explanation for a hiring veterinarian to give to an associate veterinarian is that the Associate Agreements are designed to protect the hiring veterinarian until the two veterinarians have decided that the veterinarian should stay with the practice and become an owner. The hiring veterinarian should communicate that at the point that the hiring veterinarian and the associate veterinarian have decided to stay together, the Associate Agreement will be restructured to be more beneficial for the associate veterinarian.

Talk to the associate veterinarian about what his or her compensation will be early in the negotiations. There is no benefit to delaying communicating what the hiring veterinarian's expectations are for compensation.

- **Do Not Rush the Associate.** It is important to give the associate veterinarian enough time to analyze and fully understand what is being proposed. The associate needs to have an opportunity to have his or her own attorney review the draft Associate Agreement. A hiring veterinarian needs to keep in mind that this may be the first time that the associate veterinarian has dealt with Associate Agreements and may be very uncomfortable about the entire process.
- **Your Remedies Against An Associate Who Violates the Associate Agreement and Covenants.** Despite your considerable thought and consideration, your associate has not

met your expectations. Instead of having the extra time that you always wanted, you are spending your time dealing with a disgruntled staff and complaints from unhappy clients. You terminate the associate and are shocked to learn a short time later that your former associate has set up a practice within the geographic area of your Covenant Not to Compete and is soliciting your clients and employees. What are your remedies against your former associate?

A hiring veterinarian with an enforceable and properly drafted Associate Agreement has several remedies. The first remedy that a hiring veterinarian can obtain is the remedy of injunction. An injunction will take care of the immediate need of stopping the former associate from continuing to damage your practice by soliciting your clients and employees and competing with your practice. A properly drafted Associate Agreement will waive certain legal requirements to make obtaining a temporary injunction more probable until the case can be taken to trial. The second remedy for the hiring veterinarian is the remedy of monetary damages. If the Associate Agreement contains a liquidated damage provision, you will be entitled to recover the amount that was agreed upon. If the Associate Agreement did not contain a liquidated damage provision, you will be able to recover the damages that you have incurred based upon the profits that you lost as a result of the actions of your former associate. If you are able to prove that the former associate solicited your clients prior to leaving your employment, you are entitled to recover the compensation that you paid the associate for the period of time that he or she was soliciting clients while in your employ. In addition to the above, if you have included an attorneys' fees provision in the Associate Agreement you will be entitled to recover your attorneys' fees if you prevail.

Hiring an associate veterinarian is an important decision that could have serious adverse impacts upon your practice. Since no one can predict with any certainty that the associate relationship will be successful, it is very important that you have a well drafted Associate Agreement to protect you and your practice in the event that your associate decides to start his or her own practice at your expense.

### **Contact the Author**

Edward J. Guiducci, Esq.  
Guiducci & Guiducci PC  
14239 W. 69th Place  
Arvada, Colorado 80004  
O: (303) 355-3463  
F: (303) 355-4722  
C: (303) 570-0945  
[ed@guiduccilaw.com](mailto:ed@guiduccilaw.com)