



Purchasing Patients

Legally speaking, dentists cannot own, buy or sell patients. But what about patient records? Read on to find out more.

Patient Records

The title of this article is a bit misleading. Canadian courts have ruled that patients are free to choose their service provider and cannot be tied to any particular dentist or practice. But who owns patient records? And can they be bought and sold like other types of property?

In *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, the Supreme Court of Canada held that “the physician, institution or clinic compiling the medical records owns the physical records.” And in *Axelrod (Re)*, [1994] O.J. No. 2277, the Ontario Court of Appeal held that there was no difference between physician and dentist files. **So dentists can and do own patient records.**

It is quite common these days to see dentists sell their patient records either as a stand-alone asset or as part of a larger practice purchase. And such sales are permissible as long as dentists follow their legal, professional and ethical duties concerning the transfer of patient records. For example, in *Axelrod (Re)*, [1994] O.J. No. 2277, the Ontario Court of Appeal commented that a dentist could sell his or her practice as long as the dentist acted “with the utmost good faith and loyalty in protecting the patient’s confidence.” Some of the dentist’s obligations can be found in RCDSO *Practice Advisories*. For example, the *Practice Advisory* on “Change of Practice Ownership” (February 2007) states that dentists who have sold their practice should notify their patients about the change in ownership, change the name of the practice (where applicable), and notify the RCDSO of any change in their practice address. Furthermore, the *Practice Advisory* on “Release and Transfer of Records” (August 2007) states that contracts made between dentists should not prejudice the future treatment of patients, restrict patients’ rights to choose their own dentist, or limit patients’ access to their own patient records.

Active Patients

Dentists who are looking to buy patient records don’t want just any records; rather, they want to buy the records of so-called “active patients.” An active patient is generally viewed as someone who has attended a dental practice within the past 12 months and who has a regular history of doing so. The number of active patients is based on a chart count and typically found in an appraisal that has been prepared by a professional practice-appraiser hired by the selling dentist.

Do Your Due Diligence!

Purchasing dentists should be careful not to rely on practice appraisals without doing their own due diligence. In *Obrazcova v. Ramsden*, [2000] O.J. No. 2743, Dr. Kira Obrazcova agreed to sell her dental practice to Dr. Daniela Ramsden. Dr. Obrazcova hired ROI Corporation to prepare a practice appraisal. The appraisal indicated that there were about 1,300 active and registered patients. Dr. Ramsden reviewed the appraisal and stated that she trusted Dr. Obrazcova and relied on the appraisal (which Dr. Obrazcova had approved). But Dr. Ramsden never discussed the number of patients estimated in the practice, nor did she count the number of charts in Dr. Obrazcova’s practice.

When the relationship between the two dentists deteriorated, and all the parties found themselves in court, the issue arose as to whether there had been a misrepresentation concerning the number of active patients presented in the purchase and sale transaction. Dr. Ramsden counted the number of patient records and concluded that there were only about 800 active patients. As such, she argued that she should only have to pay one half of the previously agreed upon amount for those patient records.

But Justice Chilcott rejected Dr. Ramsden's argument for a number of reasons. First, the appraisal was not Dr. Obrazcova's opinion, nor was it prepared for selling the business; rather, Dr. Obrazcova obtained it for personal reasons and to get an idea of the practice's value. Second, the 1,300 figure was an estimate and a realistic figure from an experienced dental practice valuator. Third, Dr. Ramsden made no attempt to verify the number of active patients prior to purchasing the practice. Fourth, Dr. Ramsden did not seem to be overly concerned with the number of patients that she bargained for: she raised the issue 3 1/2 years after the sale and only as an excuse for not having to pay Dr. Obrazcova. Finally, the agreement of purchase and sale did not assist Dr. Ramsden; the agreement contained a clause that precluded the Court from going outside the words of the agreement itself to determine whether the existence of 1,300 active patients was part of the contract. As such, the case was dismissed.

Dr. Ramsden appealed but the Ontario Court of Appeal found no palpable and overriding errors with the trial judge's findings and dismissed the case.

Clear Contracts

When purchasing patient records, it is essential to have a clear and complete contract between the purchaser and the vendor. In ***Dr. David F. Charbonneau Inc. v. Dr. Peter Brawn Inc.***, [2002] B.C.J. No. 1021, the agreement of purchase and sale stated that 1,700 active patients were included in the transaction. The term "active patients" was not defined. After the sale, Dr. David F. Charbonneau Inc. sued for misrepresentation, arguing that it had only received 693 "active patients" defined as patients who had received treatment at the practice in the year preceding the sale. Dr. Peter Brawn Inc. asserted that the term "active patients" had no precise meaning and was therefore unenforceable. The B.C. Supreme Court found that, in the context of that specific purchase and sale transaction, an "active patient" meant someone who had attended the practice within the previous two year period. Applying this definition resulted in there being only 1,001 active patients. As a result, Dr. Peter Brawn Inc. was found liable for breach of representation and warranty regarding the number of active patients and a trial was ordered to assess the amount of damages.

Tips When Purchasing Patient Records

In light of ***Obrazcova v. Ramsden*** and ***Dr. David F. Charbonneau Inc. v. Dr. Peter Brawn Inc.***, purchasing dentists should endeavour to:

- Include a proper definition of "active patients" in the agreement of purchase and sale.

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EPSTEIN INSURANCE
1/4 AD
B&W
(REF AD # 25)

CIBC WOOD GUNDY
1/4 AD
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- Have the selling dentist confirm that there are a minimum number of active patients as of a certain date.
- Have the selling dentist agree not to compete with the purchaser or solicit patients, staff, associates and referring dentists.
- Confirm where patients are coming from through a postal code report generated from practice management software.
- Perform at least one chart audit to confirm the number of active patients prior to purchasing the practice.
- Review the selling dentist's staff contracts and associate agreements to confirm that they include non-compete (for associates) and non-solicitation provisions (for staff and associates).
- Have the selling dentist prepare a letter of introduction, which the purchasing dentist can send to patients after the sale.
- Have all marketing communications (e.g. signs, newspaper ads, brochures, website, social media, etc.) include the purchasing dentist's name alongside the selling dentist's name for up to one year after the sale.

By taking these steps, the purchasing dentist may be better protected and better able to retain patients after the sale. 

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This article is provided for educational purposes and does not constitute legal advice. For more information and advice, consult a lawyer.

You may read Michael Carabash's article, "When Your Associate Leaves", in the November 2013 issue of *Ontario Dentist*. It's also available on our member website at www.oda.ca/member in the archived section of *Ontario Dentist*.

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