

# Expense Sharing Arrangements

If you're thinking of going into a partnership, the legal options can be confusing. To help you make the decision between a partnership and an ESA, dental legal expert Russell Abrahams explains the differences between both agreements.

There are only two basic ways in which two or more dental principals can practice together. The first is in Partnership, the second is under an Expense Sharing Arrangement ("ESA").

Partnership is basically a pooling of resources, capital costs, revenue costs (i.e. day-to-day expenses) and income, under which the net profit is divided in a pre-determined way, regardless of individual effort. The Partnership relationship is characterised by shared liability, so that regardless of the arrangements between the partners, a creditor of the business (be he landlord or Laboratory) can collect the entire debt from whichever partner he may choose. It is worth noting that this so called Partnership liability depends not on whether the parties are in Partnership, but whether they appear to the relevant creditor, from the manner in which the Practice is run, to be in Partnership.

ESAs are more akin to sole proprietorship in terms of rewards being a direct function of individual effort. The shared joint profit principles, which characterise a partnership arrangement, as described above do not apply to ESAs.

Unlike other agreements practitioners will come across in practice such as Employment Agreements and Associate Agreements, which tend to follow a common framework, ESA's can vary tremendously in the areas that they cover. There could be any number of Principals, premises could be leased or owned outright, by one, some or all Principals, the Practice could be newly acquired on an expense sharing basis or it could be an existing Practice where the Associate is being "promoted". In each set of given circumstances, the parties could decide to run their practice in many different ways. For example, are expenses shared by reference to gross fees, sessions spent at the Practice or simply on a "per Principal basis"?

When considering entering into an ESA, it is important to take legal advice from a Solicitor experienced in dental related matters at a very early stage. This is because the ESA that will be drawn up will provide a framework within which to operate when dealing with most situations. Thus, problems are to some extent catered for before they arise, which means that the acrimony/greed/hostility often arising in such situations can be avoided, as the Agreement sets down agreed principles in advance.

## Let us now focus on a typical ESA scenario:-

John and Mary have known each other for years; they met at Dental School. They are both in their late twenties, married (but not to each other) and they presently work as Associates in (different) predominantly NHS practices in the London Suburbs.

John and Mary have both decided that the time is right for them to purchase a Dental Practice. They are both aware that owning a business carries risks and requires significant capital costs (and inevitable borrowings). The larger the Practice, the smaller, in theory, the expenses per surgery. Typically, a "two handed" Practice is easy enough to run and the general overhead is split between two dentists. John and Mary have thus decided to purchase a "two handed" Practice together,

close to home, in St Albans. They have taken the decision to enter into an ESA, which suits them for a variety of reasons, not least because, in time, Mary expects to take 6 months' maternity leave, followed by 5 years on a 3 days per week basis, before returning to the Practice full time.

As would be the position in a 50:50 partnership arrangement, John and Mary will each own one half of the intended Practice. Each will contribute half of the necessary capital. The Practice will operate out of leasehold premises and the Lease will be assigned to both Principals, giving them joint rights of occupation over the whole of the premises. John and Mary have agreed that each of them will be responsible for half of the rent and other property expenses.

John and Mary propose to purchase the equipment and the goodwill of the Practice in equal shares. This differs from Partnership arrangements. In a Partnership, the equipment and the goodwill will be owned by the Partnership in which John and Mary would be 50:50 partners. Under the ESA, each Principal will purchase the goodwill and equipment relating to one surgery. The office furniture and shared equipment will be jointly owned. Each Principal will be responsible for updating their own surgeries/hand tools etc. and will be jointly responsible for repairs/replacements of "common equipment" such as office furniture and the X-ray machine.

Reception staff, cleaning expenses and maintenance of the common parts etc. will be shared expenses, but John and Mary will each employ their own DSA. This is because John prefers a young, inexperienced DSA and Mary prefers the experience and time-saving characteristics of engaging a fully experienced older DSA, at a commensurately higher salary. The receptionist will help out either of them as a DSA, as and when required. Equally, were John and Mary to have similar views on DSA's, they could also be treated as common expenses.

John grosses more than Mary, so his laboratory and materials bills are correspondingly higher. They will each meet their own laboratory and materials bills, which is a bit of a headache as regards separate stock cupboards, but worth it to avoid disagreement in the long run. Although they use the same laboratory, referenced billing is no problem these days for laboratories.

The salary and materials etc. used by the Hygienist are common expenses. These are met by a notional contribution by each of the Principals of 25 per cent of the fees generated on their schedules resulting from work referred to the Hygienist. Provisions exist to vary this percentage if the "notional payments" are insufficient or too much. Thus, the extent to which one Principal delegates more work to the Practice Hygienist is met (to a greater or lesser extent) by paying a greater sum to the Hygienist as 25 per cent of fees.

If Mary decides to take time out as envisaged, she will still be obliged to deal with her share of the administration of the practice and she will have to make arrangements (at her expense) to have her patients treated. Such arrangements can take a variety of forms, which are beyond the scope of this Article but which a solicitor can explain in detail. In any event, Mary will be entitled to the gross fees generated by treatment given to her patients and will pay her "temporary replacement" and her share of practice expenses out of those fees.

Each Principal will pay monies into a common account to meet common expenses. Shared Expense accounts will be drawn up each year and appropriate adjustments will be made. The Agreement itself will deal with such matters as specifying the Practice Accountants, Bankers, Premises and other pre-agreed matters. The term of the Agreement will be defined. Usually, the Agreement will be for an indefinite period, subject to termination on notice or immediate termination following the death or inability to practise of one of the Principals.

The Agreement will specify the common assets (e.g. reception furniture) and individually owned assets (e.g. the respective Principals' dental chairs). In this way, the respective Principals can either "make do" with aged equipment or, if they wish, spend their own money on "top of the range" electronic gadgetry.

The Agreement will deal with the way in which capital expenses (e.g. a new telephone system) and revenue expenses (e.g. laboratory bills) will be apportioned. The Agreement will also deal with the treatment of fee income, both that of the respective Principals and that of the Associates and (indirectly) that of the Hygienist. It will also have a section on administration, including bank accounts, staff and how responsibility for administration is apportioned.

The Agreement will deal with essential obligations of the Principals to each other, as regards dental/other work undertaken outside the Practice, matters requiring the Agreement of both Principals (e.g. hiring and firing and cheques on the joint bank account) and professional responsibilities to each other (e.g. maintenance of indemnity insurance).

Importantly, the Agreement will record that the relationship is not that of a Partnership, with the taxation and other risks that would thus arise and that each Principal is responsible for her/his own Income Tax and National Insurance contributions.

Finally, and most importantly, the Agreement must specify how the Agreement can be brought to an end. This will be either immediately following death/disqualification from practice; or following a serious breach of the Agreement; or, on the expiry of, say, 6 months' notice in a non-contentious situation. The Agreement must deal with the consequences of termination, which, typically, will give an option to one party to buy out the other. If this right is not exercised, the outgoing Principal is free to sell his interest in the Practice on the open market or the Practice as a whole can be sold and both Principals can leave the Practice.

The provisions concerning termination have to be detailed and precise as any ambiguity in such circumstances is likely to cause difficulties. Where one Principal purchases the other's share of the Practice (including goodwill) the Agreement will include provisions for the outgoing Principal not to poach Patients etc. (i.e. binding out provisions).