I know what you’re thinking: non-dentists cannot own a dental practice. But is that true? What exactly is a dental practice and what do Ontario’s laws say about who can own it? Are we heading towards non-dentists becoming involved in owning and operating dental practices — like in the U.S. or Australia? And is it a good idea? If you’re intrigued, just keep reading…

What is a Dental Practice?
A dental practice is made up of assets — such as equipment, furniture, fixtures, supplies, and computer hardware and software. Generally all of those types of assets can be bought and sold by practically anyone. But what about patient charts, lists and records (Dental Records)? That is where the true value of a dental practice lies. So what exactly are Dental Records? Who owns them? And can they be sold to and owned by non-dentists?

What are Dental Records?
Dental Records are information about a patient’s dental care that are created and maintained by a dental professional or dental practice. At a minimum, this information includes general patient information (e.g. name, contact information, date of birth, etc.). The Royal College of Dental Surgeons (RCDSO) has said in its Dental Recordkeeping Guide—
lines that dental records must also include things like a patient’s medical and dental history, diagnosis and treatment plans, and even financial records.

**Who owns Dental Records?**

Over the years, Canadian courts have consistently held that the physical or electronic dental records of patients are owned by the dental professional who compiles them; patients do not have a right to possess or own the records, but have an interest in the personal information contained therein and can access them [see for example: *Lamothe v. Mokley*, [1979] S.J. No. 354 (Saskatchewan Court of Queen’s Bench); *Peters v. Palmer et al.*, [1985] N.J. No. 278 (Newfoundland District Court Judicial Centre of St. John’s); *McInerney v. MacDonald* [1992] 2 S.C.R. 138 (Supreme Court of Canada); *Axelrod (Re)*, 1994 P.J. No. 2277 (Ontario Court of Appeal); and *Lodwig v. Mather* [1995] A.J. No. 382 (Alberta Court of Queen’s Bench)].

**Can Dental Records be bought and sold?**

When it comes to buying and selling Dental Records, there is nothing wrong with dentists selling them as part of a practice sale to another dentist. As long as dentists follow their legal, professional and ethical duties concerning the transfer of Dental Records, such sales are fine.

But can Dental Records be sold to and owned by non-dentists?

There are many different (and seemingly conflicting) laws that could govern this situation (for example, property law, contract law, privacy law, and the professional and ethical laws governing dentists); however, at the present time, these laws do not appear to come to a single conclusion about whether Dental Records can be sold to and owned by non-dentists.

So where does that leave us? Two words: clever arguments.

There’s a strong argument out there that Dental Records cannot be sold to or owned by non-dentists. This seems to be the position that the RCDSO has taken. For example, in a February / March 2012 article by in *Dispatch Magazine* (at page 28), an RCDSO Practice Advisor responded as follows to the question of whether dentists can leave their dental practice (including Dental Records) to their spouse in their Will: “No. While non-dentists can own dental office premises, supplies and equipment, non-dentists cannot own dental records…”

In support of this position, there are other laws that come into play — most of them dealing with patient privacy and practicing dentistry generally. And they all point towards (although not saying it unequivocally) the conclusion that Dental Records can only be owned by dentists and those working under their authority.

But there’s also a strong argument out there that Dental Records, like other types of property, can be sold to and owned by non-dentists — so long as those non-dentists do not possess or access them. This view finds support in Ontario court decisions.

For example, in *Axelrod (Re)*, 1994 P.J. No. 2277 (Ontario Court of Appeal), a dentist had signed a general security agreement with a non-dentist and pledged patient lists and files as collateral in case the dentist defaulted on the loan. When the dentist defaulted, the non-dentist sought to seize those lists and files and transfer them to another dentist. The dentist argued that those assets could not be pledged as security because of their confidential nature and because of the fiduciary relationship that existed between a dentist and patient. The Ontario Court of Appeal ultimately ruled in favour of the non-dentist and wrote:

“I see no difference between a dentist’s entitlement to sell his or her practice, and a dentist’s entitlement to pledge records [to a non-dentist]. Both can be accomplished in a manner compatible with a dentist’s professional responsibilities, as long as the dentist acts with the utmost good faith and loyalty in protecting the patient’s confidence. The doctor may use the records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient’s best interest....

When a dentist sells or pledges his patient list, as the [dentist] did in this case, I think that he or she should be held to have parted with his or her own interest in the patient list, subject to his or her patients’ rights to confidentiality and access.”

More recently, in *Smilecorp v. Pesin*, 2012 ONSC 1966 (Ontario Superior Court of Justice), a dentist had signed a management agreement with a non-dentist (denturist) to provide dental services at the non-dentist’s dental care facility. That management agreement included a non-solicitation clause. When the dentist left and took a patient list, the non-dentist sought to enforce the non-solicitation clause. The Ontario Superior Court of Justice held that the non-dentist had established sufficient goodwill in their facility (which included client lists) that was worthy of protection in the form of a non-solicitation. The Court stated that the agreement between the dentist and the non-dentist “does and can prohibit solicitation of the goodwill built up in ready made dental practice that [the non-den-
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[Text content]

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