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an article.

For example, trade-dress protection will extend to a dental instrument or appliance if the design is inherently distinctive or has acquired "secondary meaning." That is, purchasers (other practitioners) must recognize the article as emanating from a single source, even if they cannot identify that source.

You also can protect "trade secrets," as long as you keep them secret. The law will protect technical secrets and some business secrets, provided the owner

of the information takes reasonable steps to prevent its discovery.

Usually, those required steps include restricting employees and others from viewing the item or information—and keeping the item under lock and key.

Another requirement for trade-secret protection: employees who must have access to the information sign agreements, as a term of their employment, assuring that they will not disclose or use the information except at the owner's direction and for the owner's purpose.

Be aware, however, that trade-

secret law does not prevent others from independently discovering or using the secret. (In other words, your idea is not protected if others come up with the same idea on their own, without being aware of yours.)

Useful innovations that you develop not only make your practice unique and increase its efficiency; they also can mean added income. By choosing to protect and market your innovation, you can serve another important purpose: you can improve the practice of dentistry for other practitioners and their patients.

Consult an attorney to deter-

mine whether your bright idea could be your ticket to fame and fortune.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE:

● An innovation that makes your practice more efficient or valuable can be protected and exploited for your benefit and the public good.

● You can protect your innovation by using one of several types of patent or trademark protections, depending on the nature of the innovation.

Can you live with a living trust?

In states where probate is costly and inconvenient, a living trust may be the way to go.

LOUIS S. HARRISON, J.D.
 Lord, Bissell & Brook
 Chicago, Ill.

The first part of this series explored probate as a sometimes-painful way of distributing your property after your death. But there are other strategies you can use to avoid probate if desired. One is to create a revocable trust while you are living. This often is referred to as a **living trust**.

If you've never been involved with a trust before—either in setting one up or as a beneficiary or trustee—the concept may seem a bit mysterious to you. But trusts are fairly easy to understand. And you don't have to be extremely

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wealthy to take advantage of the many uses of a trust.

What Is A Trust?

A trust is a type of contract. When you set up a trust, you choose the contract terms you think will accomplish your goals. Because you grant life to the trust, or settle upon its terms, you're known as the grantor or settlor of the trust.

Although you have great flexibility in selecting trust terms, your trust must have four basic elements. First, there must be property in the trust, though no minimum amount is necessary. A trust

could be created with just \$1.

Second, you must name a trustee. The trustee is the person who runs the trust and makes sure that the property it contains is invested and distributed in line with the trust's terms. You can name yourself trustee or someone else, your spouse, for example, or a bank. Even if you name yourself as trustee, you must still follow the terms of the trust you create. As trustee, you are no longer necessarily acting in your own best interests. Instead, you must act in the best interests of the trust beneficiaries, following the terms of the trust.

Third, there must be one or more named individuals or organizations—or classes of individuals or organizations—who benefit from the trust. These are known as the beneficiaries.

Fourth, there must be evidence of your intent to create a trust. A written statement or oral declaration that you are holding property "in trust" will satisfy this requirement.

Revocable or Irrevocable: You Decide

When you create a trust, you

must decide whether the trust should be revocable, meaning that you can change the terms, or irrevocable, meaning that you can't change the terms of the trust. If your main purpose is to avoid probate, you will want to use a revocable trust.

You also must decide who to name as trustee. If the trust is revocable, your options for trustee are very broad. You can name yourself as trustee, or you could choose your spouse, an adult child, a friend, a trusted business acquaintance or a professional trustee, such as a bank.

Using A Living Trust To Avoid Probate

When you decide what will be the terms of the living trust, and you sign the written trust document with those terms, you are transferring your assets to the trust. A transfer to the trust means that you, in your individual capacity, are transferring the assets to the trustee of your living trust.

At this point you may be wondering, "If I transfer all of my assets to my living trust, how

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will I support myself?" That's not a problem. Because you are setting up the trust, you get to choose the terms of the trust.

You have complete say over when and how the property in the trust will be distributed during your lifetime. And because a living trust is revocable, you can change its terms at any time during your life.

For example, the language used in your living trust may say that you are entitled to all dividends, interest and other income from the trust during your lifetime. The trust also may provide that you are entitled to other property, in addition to income, whenever you request it.

When you die, the trust property goes to your beneficiaries in whatever way you have designated in the trust. For example, you could provide in the trust that all of the remaining trust property is to go to your spouse upon your death. Or you could provide that this property should continue to be held in the trust for your spouse's benefit. Under the terms of most living trusts, the courts will not interfere. Typically, there is no court supervision involved in distributing trust assets by the trust to its beneficiaries.

Although using a living trust has many advantages, using it to avoid probate is not cost-free. In those states where probate procedures have been simplified, don't bother to set up a living trust just to avoid probate because you probably won't save any money that way.

What will it cost you to use a living trust to avoid probate? First, you'll need an extra document, the living trust, when you set up your estate plan. If you don't use a living trust, the only document typically required to give away property when you die is a will. But if you want to use a

living trust, your estate plan requires two documents, a will and the living trust.

Why do you still need a will if you have a living trust? For one thing, certain matters are traditionally covered in a will rather than a trust document. For example, naming guardians for your minor children is typically done—and often required by law—in a will.

A will also can serve as a backstop to the living trust. Suppose you forgot to transfer certain property to the trust. Without a will, the property would become part of your probate estate and would be distrib-

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uted according to state intestacy law, a result you may not like.

Example: *John is a widower with three children and two grandchildren. His children are doing well financially, and John doesn't think that they need any property when he dies.*

After discussing a living trust with his attorney, John decides to use such a trust to avoid probate. Under the terms of the living trust, John leaves all the property in the trust to be distributed in equal shares to his two grandchildren when he dies.

John does not sign a will. Instead, he has his property transferred to himself as trustee of his living trust. Unfortunately, he forgets to transfer a \$50,000 certificate of deposit to the trust.

At his passing, all of the trust property passes in equal shares to his two grandchildren under the

terms of the trust, a result he intended. But the \$50,000 certificate of deposit passes to his probate estate.

Because John has no will, this property passes according to the state's intestacy law, which in all likelihood gives the property to his children, a result that John didn't intend.

John could have avoided this result if he had signed a will providing that all his property be distributed to the trustee of his trust. Then, the \$50,000 certificate of deposit would have been distributed initially to the trust. From the trust, this property would have gone to the two grandchildren, the result John wanted.

You may also find it convenient to have both a will and a living trust. For example, you may not want to retitle certain properties that are easily disposed of under a will, like furniture or jewelry. If the total value of this property is less than a certain amount (say, \$50,000), then the property can be given away under the will without requiring probate, using a document sometimes called a small estate affidavit. Check with an attorney about the provisions of your state's law.

Example: *John also has a 1986 Cadillac worth \$5,000. He doesn't want to go through the difficulty of changing title to the trustee's name. When he dies, he will still hold title to the car. His will provides that all of his personal property goes to his grandchildren. Other than the car, all of John's other property is held by the trust. Thus, only John's car is covered by his will. At John's death, the car can be distributed to his grandchildren, without probate, by means of a small estate affidavit.*

You and your attorney need to

coordinate the trust terms and the will terms carefully. Because two documents are involved, mistakes can happen if you aren't careful. You must make sure that there are no overlaps between, or gaps within, the trust and the will. These types of errors could lead to litigation after you die.

For example, an overlap between the trust and the will can result in an unintentional double gift. Suppose you wanted to give \$10,000 to your aunt. You can give her the money either under the terms of the trust or under the terms of the will. But if you aren't careful, you could accidentally give her \$10,000 under both documents. Your intended gift of \$10,000 would unintentionally become a gift of \$20,000.

A gap between the trust and the will also can lead to unintended consequences. For example, if neither document provided for the payment of funeral costs, your intent would be unclear. The result may be needless in-court battling over whether these costs should be paid from money in your probate estate or from the funds in the living trust.

If you want to use a living trust to avoid probate, you also must consider retitling your assets. "Title" refers to who owns the property. For example, your car is usually titled in your name, or jointly in your name and your spouse's name. The title to property placed in the trust should be changed while you are living to the trustee of your trust.

Retitling assets is not a difficult process, but it can be tiresome and even expensive at times because of the paperwork that may be necessary. Requirements vary depending on the asset being retitled.

For example, a bank may require a copy of the trust agreement, a letter by the trustee, and a letter by you in your individual

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capacity before it will retitle your bank account.

It's important to transfer most assets that would otherwise be subject to probate to the trustee of the living trust. If not, you won't accomplish your goal of avoiding probate. The only exception to this rule: the personal and household effects that can be transferred without probate by a small estate affidavit.

Say, for example, that all of your assets, aside from a \$60,000 certificate of deposit, were retitled to the trustee. If the \$60,000 exceeds the small-estate limitation in your state, the estate would still be subject to probate.

In that scenario, you have not accomplished your goal: you will not be significantly better off than if you had no trust document at all because you will not have avoided probate.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE:

- Setting up a living trust is one strategy you can use to avoid probate in those states where it is costly and inconvenient to go through probate.
- If you use a living trust, you should also use a will, but you should make sure that you do not create any overlap or any gaps in the two documents.
- You may have to "retitle" some of your assets if you use a living trust.
- To decide whether a living trust is a good strategy for you, consult an attorney with experience in estate planning to determine whether your state's probate procedures are onerous.

Do not delay

You forgot to tell your insurance company that, six months ago, a patient threatened to sue you. Are you still covered? Because of a 'timely notice' clause in your policy, the answer could be 'no.'

JEROME F. CROTTY, J.D.
Rieck and Crotty, P.C.
Chicago, Ill.

Betty Morris, a new patient, was unhappy with the dental care you provided last year. Six months ago, she called and threatened to sue you for malpractice. You never told your insurer about this call. If she sues you now, are you still covered?

If Ms. Morris follows through on her threat, there is a good chance that your malpractice insurer may refuse to go to bat for you. Why? Because a clause in your insurance policy requires you to give the company "timely notice" of a possible legal action or claim.

Most practitioners probably don't read the fine print in their professional liability policy. They should. The fine print is where insurers place a number of important provisions, including

those provisions that address the insured's duty to notify the insurer when an occurrence or claim arises.

Unless the practitioner complies with a policy's notice requirements in a timely fashion, the insurer's duty to provide a defense or coverage may not apply, even though the occurrence or claim falls squarely within the scope of the policy's coverage.

The key word here is "timely." Most insurance policies require the insured to give prompt or timely notice of any "occurrence" that could lead to a claim, even if an actual claim or suit has not yet been made or filed. This notice requirement gives the insurance carrier an opportunity to investigate possible claims and defenses while witnesses are available and their memories are fresh.

Many practitioners unwisely adopt a "wait-and-see" approach

to reporting possible claims. In some states, a court will assume that the insurer is "prejudiced" by late notice, and the insured must either overcome this assumption—by proving that the insurer was not prejudiced—or go without coverage.

Other states follow a different path and give the insured practitioner a better deal. In these states, the court will place the burden on the insurer to prove that the late notice had a prejudicial impact. Although this rule helps the insured, it does not guarantee coverage because the insurer has the opportunity to prove that it was prejudiced by the delay. Still other states follow the rule that the insured's coverage is forfeited unless the insured can justify or explain in a satisfactory way why he or she delayed giving notice.

Giving timely notice is essential to obtaining coverage, but that alone may not be enough to invoke the insurer's duty to defend. Insurance policies commonly provide that the insurer has the right and duty to defend any suit seeking money damages against the insured.

Courts have consistently construed this duty to defend so broadly that it includes a duty to defend occurrences that potentially fall within the scope of the policy's coverage.

You may practice in a state that does not strictly enforce the "timely notice" rule. You should consult an attorney to determine whether or not you do.

From a purely practical standpoint, practitioners should not "wait and see" when it comes to deciding whether to give their liability insurer notice of potential claims and occurrences. Giving timely notice to your insurer is critical to your defense and coverage, and may prove critical to the ultimate outcome of the case.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE:

- Liability policies typically require an insured to give timely notice to the insurer of any occurrence or claim against the insured.
- Depending on the circumstances, some states will allow an insurer to deny coverage to a practitioner who fails to give timely notice.
- Practitioners in many states risk losing their insurance coverage if they "wait and see" instead of notifying their insurers of an occurrence or claim, even if the claim only potentially falls within the scope of their policy's coverage.