

DENTAL LEGAL UPDATE

Cover All Your Bases When You Sell Your Dental Practice

by Jeanine Lehman, Attorney

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A solid team of advisors, a plan that will cover contingencies, and a well written, comprehensive contract are necessary to successfully sell your dental practice.

Dentists sell their practices for a number of reasons: retirement, relocation, disability, or change of career objectives. With the aging of baby boomers, more practices are being sold. You should have two major goals when you put your practice on the market: receiving a fair price, and ensuring that your patients continue to receive the dental care they need.

Preparation is Key

Over the life of the practice, the selling dentist should work with an attorney who is knowledgeable in dental, business and real estate law. This attorney will provide ongoing legal advice and collaboration; form and maintain the dental practice's professional entity; and prepare associate dentist contracts, lease provisions, buy sell agreements and other contracts and documents. This advance planning will be very helpful when it is time to sell the practice.

Assembling the Team

A solid team of advisors is critical. The team includes the attorney, accountant, dental practice broker, and practice management consultant. Having an experienced team in place early is very helpful for a successful sale and transition.

Planning the Sale

The first step is to develop goals for the sale, including the timeframe in which

you would like to sell. The second step is getting the practice in good order. Early on, the advice of an attorney who is experienced in dental practice sales is important. Your attorney can assist you in making sure that your practice entity, such as your professional corporation or professional association, is in good shape from a legal standpoint to be able to transfer assets. Also, liability exposures should be evaluated, including by interview and by lien search. A determination should be made of how the assets that will transfer are titled, and the terms for assignment of the dental practice lease. Your attorney will assist you in such matters. You also need to provide your attorney with all contracts before you agree to their terms and sign them, so that you can be protected. Concurrently, your accountant will work with you to make sure that your books are in good order, and that proper financial statements and tax returns are in place for inspection during the due diligence process. The credit balances on your books need to be properly handled, including by reporting and payment of balances that are unclaimed property to the Texas Comptroller of Public Accounts, and by applying or refunding other credit balances that are not transferring in the practice sale. If you anticipate selling one office of a multi-office practice, it is a good idea to establish separate accounting cost cen-

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Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at (512) 918-3435 or jeanine@jeanine.com

**Website Favorites**

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of
Dental Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental
Association
www.ada.org

Texas Unclaimed Property
www.comptroller.texas.gov/

Sell Your Dental Practice (cont.) --

ters for the different offices, so a clear financial picture can be provided for the office being sold. The advice of a dental practice broker should be sought, so that you can maximize your return, determine valuation range, and avoid pitfalls. For example, Brannon Moncrief of the Austin office of McLerran & Associates, a dental practice brokerage and transition consulting firm, warns that a selling dentist should not wind down his practice to part-time and drop insurance plans if he plans to sell, because by winding down the practice, the cash flow and patient base are reduced – thereby reducing the sales price. A better approach is for the seller to keep the practice at full volume, continue to accept insurance, and, in some cases, negotiate to stay on with the buyer as a part-time associate after the sale.

The name of the practice is a factor to consider. Having a practice name that does not include the name of the selling dentist can help with the “branding” of the practice and the transition. Texas State Board of Dental Examiners rule 108.4 limits how long the name of a departing dentist can be used by a practice. In the case of retirement or death, the departing dentist’s name can be used for one year. In other cases, the departing dentist’s name can be used for 40 days after departure. However, if the transferring dentist remains actively engaged in the practice of dentistry in the transferred practice, the acquiring dentist may continue using the name of the transferring dentist.

Associate Dentist Purchaser

In some cases, the associate dentist is the purchaser. After working in the practice for a satisfactory time period, the seller may offer the associate dentist the opportunity to buy a part of or

all of the practice. For a partial practice purchase, the common structure is for the associate to buy a portion of the stock or other ownership interests in the practice entity. In such case, the compensation packages of the senior dentist(s) and the purchasing associate need to be restructured, since both are then owners, and a buy sell agreement needs to be negotiated and signed. It will cover events that trigger departure by a dentist (such as death, disability, dispute, divorce, retirement or relocation). A noncompete is also advisable.

In other cases, the buying dentist may work as an associate for a short “honeymoon period” to see if the practice sale is beneficial to both the buying and selling dentists. After the honeymoon period is over if both parties agree, the buying dentist purchases the practice and the roles reverse, so that the selling dentist stays on as an associate. For this structure to work well, there needs to be adequate revenue for both dentists and the dentists need to be compatible. This structure helps with transition of patients, provides an opportunity for mentoring and collaboration between the dentists, and may provide a reduced schedule for the senior dentist – allowing time for family and outside interests.

The associate dentist should prepare professionally and financially to be a practice owner. The selling dentist may counsel the associate dentist to establish a banking relationship to obtain capital to purchase the practice. Moncrief advises potential purchasers of the importance of living within their means and avoiding luxury purchases before buying the practice, so that they can qualify for financing.

Asset vs. Stock Sale

There are two general types of practice sales – the stock sale and the asset sale. In the stock sale (or limited liability membership interests sale), the liabilities of the practice, including unknown liabilities, such as malpractice claims, remain with the entity, and therefore remain for the practice buyer. In the asset sale, either the assets only, or assets and named liabilities transfer. Therefore, there is less liability exposure to a purchaser when purchasing in an asset sale and many purchasers will prefer to buy using that method.

Inventory Process

The seller should begin by taking an inventory of his practice's hard and soft assets. Hard assets may include dental equipment; furniture; supplies; signage; real estate; assignable leases on both real estate and equipment; accounts receivable; assignable prepaid fees such as memberships, subscriptions, and insurance; assignable computer software and billing systems, and any other items. Soft assets may include the practice name, telephone numbers, websites, the loyalty and skill of employees who will stay under new management, and goodwill, including but not limited to patient, referral source and community. If you own the real estate, a decision needs to be made if the real estate will transfer in the practice sale or if it will be leased to the buyer. For retained real estate, you may want to have your attorney analyze the feasibility of using a limited liability company to hold the real estate due to liability concerns associated with being a landlord and if feasible, form the LLC.

Similarly, the seller should assemble an inventory of the practice's liabilities. These include operating debt; real estate and equipment financing; employee wages and benefits; taxes; accounts payable; insurance premiums (including tail malpractice insurance coverage); litigation or anticipated claims.

Death & Mental Incompetency

If your practice is a sole proprietorship, recognize that the sole proprietorship ceases to exist upon your death. Upon death, your heirs need to rush to probate court to get an administrator or executor appointed to carry on the practice. In the

meantime, bills need to be paid, employment matters need attention, a substitute dentist needs to be hired, and many other matters need to be addressed. When the sole proprietor dies, the practice's bank account is frozen and no checks may be written. Rather than having a sole proprietorship, you should own your practice in a professional entity, which survives your death; examples include the professional limited liability company, professional corporation, and professional association. Being able to continue to write checks, have employees, and hire a substitute dentist is critical for continuity of patient care and for protecting the value of your practice until it can be sold.

In all cases, be sure to have an up-to-date Texas will, statutory durable power of attorney, medical power of attorney and related estate planning documents – signed, notarized and stored in a safe place where they can be located. The persons appointed as administrator/ executor of your estate under your will and having the authority to act for you pursuant to your power of attorney need to be asked to provide this service, be informed of your wishes, and be informed of the location of your will and and power of attorney. Your will takes effect upon your death. Your power of attorney can only be used during your life.

Under the Dental Practice Act and Texas State Board of Dental Examiners rule, the estate or legal representative of a deceased or mentally incompetent dentist may carry on the deceased or mentally incompetent dentist's practice for a reasonable period – meaning no

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more than twelve months from the date of the dentist's death or the date the dentist is lawfully determined to be mentally incompetent, whichever is applicable. That reasonable period provides time for the executor or legal representative to sell the practice. To satisfy the twelve month deadline, estates and personal representatives need to work expeditiously and closely with their attorneys and team.

Checking out your Buyer

The selling dentist should check the background of the purchaser with the assistance of his team. This includes obtaining a resume with employment history, list of references, details on credentials including board certifications, proof of state dental licensure, and disclosure of past or current litigation or disciplinary action. Early in the process, it should be ascertained if the buyer will qualify for financing. Third party financing is preferable, as seller financing has significant risks to the seller. Also, the buyer's credit will need to be acceptable to the practice's landlord.

Contract and Sales Process

A well written, comprehensive contract is critical to the sale of the practice. Your attorney, broker and accountant will assist you in covering the key terms, including price, payment terms, financing, lease assignments, dental records transfer, seller noncompete agreement, employment agreements, title transfers including real estate and equipment, prorations, training period terms and responsibilities, tax provisions,

and more. Then, your advisors can assist you through the closing process in accordance with the contract.

Liability Releases

If possible, it is advisable for the selling dentist to obtain releases or partial releases of liability for liabilities that will transfer, such as the dental office lease. If the dental office building or condominium will be sold to the purchasing dentist or his entity, typically a new loan is needed in the name of the purchasing dentist or his entity. Also, the selling dentist should inventory any guarantees he has signed for practice indebtedness, even if the loans have been paid off, and inform his attorney, so that assurance can be obtained that the guarantees are no longer in effect.

Conclusion

There are pitfalls to avoid in selling a dental practice. Close advance collaboration with your team of advisors will help you to cover your bases and achieve a successful closing and transition.

Anesthesia Rule Alert: The Texas State Board of Dental Examiners is in the process of adopting major revisions to its anesthesia/sedation rules that apply to all permit types ranging from nitrous oxide to general anesthesia. These include portability, preoperative anesthesia checklist, emergency preparedness policies and procedures, prevention/response to emergencies, pediatric & high risk patients, inspections, and more. Many of these rules are contained in the Rule 110 series.

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About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building purchases/condos, build-to-suits and real estate law, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com