

MEDICAL LEGAL UPDATE

Medical Office Condo Purchase: Be Your Own Landlord by Jeanine Lehman, Attorney

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Physicians are buying office condominiums for their practices for several reasons, including to avoid the risk of having to move if a lease cannot be satisfactorily renewed, and to be able to invest in real estate, thereby becoming their own "landlord". A condominium owner owns the condo unit and also owns an undivided percentage interest in the common property with the other unit owners. The common property, a.k.a. common elements, typically includes all the real property that is not included in the condo units. Thus, the common elements may include parking, land, all the building structure that is not contained within the units, such as exterior walls, roofs, elevators, hallways, bathrooms not in units, foyers, and more. The advantage of common ownership is that the common element costs are shared by the unit owners, rather than borne by a single owner.

The condominium regime is established by a developer, who then sells the units to buyers. To establish the condominium form of ownership, the developer complies with state and local laws for this type of ownership, including filing condominium documents in the land records.

Since ownership of a condominium is ownership in a community, it is important that the condominium regime is well structured, the building and improvements well-made, the unit owners cooperative, and the management good.

Earnest Money Contract

Once the office condo is located, an earnest money contract is negotiated to set the terms for purchase. The earnest money contract should be reviewed by the physician's attorney and real estate broker prior to signature. Various provisions are advisable for the contract, including but not limited to: option of the buyer to terminate the contract; financing contingency; title contingency; and a feasibility/inspection period to determine if the condo meets the requirements of the physician. Equipment transfer, evaluation, and lien searches need to be addressed. If the condo is currently leased to a tenant, provisions are needed to address the lease, including estoppel certificates attesting to the status of the lease, rent prorations, and transfer of security deposit. Strict adherence to deadlines in the Earnest Money Contract is required.

Zoning

The physician or his advisors should check that zoning allows the condo to be used as a medical office.

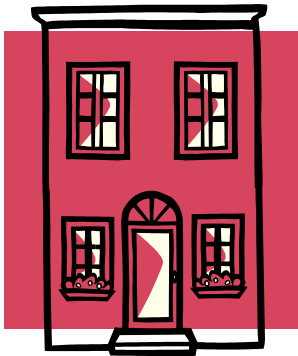
Title Commitment/Policy

The earnest money contract should provide for a title commitment to be delivered and a title policy to be issued. Title policies insure title to real property for the buyer and the buyer's lender.

For background – many types of insurance are prospective. For example, vehicular insurance is purchased to cover an

**"Buy land, they're not making it anymore."
Samuel Clemens
(Mark Twain)**

Often a physician will prefer to have his office condominium unit owned by an entity separate from the medical practice entity. A top choice is a Texas limited liability company.



Unclaimed Property

Many medical practices have hundreds to thousands of dollars of unclaimed property, such as uncashed checks, managed care payments, old bank accounts, utility/tax refunds or other payments, which money is now held by the Texas Comptroller of Public Accounts. This money can be claimed by the owner at:

<http://www.window.state.tx.us/up/>

Medical Office Condo Purchase (cont.) --

accident that occurs in the future. By contrast, title insurance is retrospective and covers title defects that already exist on the effective date of the policy. Therefore, the title insurance company searches title to look for title defects or other matters that it will not cover with the title insurance. These items that are excluded from coverage are listed as exceptions in the schedules to the title commitment. Therefore, it is critical that the physician's attorney review the title commitment, exceptions to insurance coverage, and the documents described in the exceptions to insurance coverage, to determine if the exceptions affect the physician's use and ownership. Also, after the purchase closes, the physician should request that his attorney review the title policy to see that it corresponds to the title commitment. The title policy and the deed should then be retained as permanent records in safekeeping, such as in a safety deposit box.

Condominium Documents

The condominium regime is established by a developer, who is the condominium declarant. The declarant has the condominium documents prepared in collaboration with his advisors. The condominium documents include the Condominium Declaration, a detailed document which establishes the condominium regime and includes plats of the units, Rules, and the condominium association's Certificate of Formation and Bylaws, Information Statement or Resale Certificate (which contains disclosures of items such as budget, assessments, unpaid amounts due from seller, future capital expenditures, amount of reserves, judgments, litigation, insurance coverage, improvements that violate the condominium documents, governmental notices of health or building code violations, leases, and management). The physician should

review the condominium documents with his advisors. The physician should have his attorney review the legal documents. For example, the Condominium Declaration needs to be reviewed to ascertain that the use of the condo for a medical office is not prohibited. Also, for future planning, it is important to ascertain what restrictions are in place, i.e. is there a right of first refusal that other persons have before a condo unit can be sold, or are there restrictions on leasing a condo unit. The declarant (developer) governs the condominium project for some period of time and then typically turns over governance of the condominium project to the condominium association of the unit owners, when a specified number or percentage of units are sold. Often, a management company will provide the management of the condominium project for the declarant or the condominium association. The unit owners are subject to periodic assessments and special assessments to pay the expenses of the condominium regime, which include costs such as real estate taxes, insurance, security, utilities, landscaping, maintenance and repairs, capital expenditures, and management fees.

Feasibility Period

During the feasibility period or other inspection periods in the Earnest Money Contract, the physician should work with his advisors to determine that the office condominium satisfies his legal, business, and structural requirements. Inspections should be performed. In some cases, the physician will be buying a "shell" and will need to build out the interior of the space. In other cases, the physician will be buying a completed space, but will need modifications for his use. Planning for

necessary utilities, including electric, water, sewer, telephone, gas, and cable to the condo unit, is critical and should be evaluated with engineers/construction advisors. For example, if sewage capacity is not adequate to the main line, expensive work and delays will occur. Parking adequacy is important. The occupancy mix and parking rules will impact parking. For example, allergy clinics and call centers are high parking users. Also, sign rules should be reviewed.

Ownership of Condo Unit

Often a physician will prefer to have his condo unit owned by an entity separate from the medical practice entity. A top choice is a Texas limited liability company. By using a separate entity such as an LLC, the physician has the flexibility to have non-physicians own all or part of the separate entity. This allows family members, such as a spouse, or others to be co-owners of the LLC, which owns the condo unit. Also, flexibility is built-in, i.e. if the medical practice will be sold in the future, the medical practice can be sold separately from the office condo and then the office condo can be leased to the medical practice buyer. Similarly, if an associate is buying a part of the medical practice entity, the office condominium can be kept separate, thereby making the buy-in by the associate more affordable. The physician’s attorney should form the separate entity for ownership. It is advisable to plan for this option in writing in the Earnest Money Contract and with others, i.e. the title company and lender. The separate entity needs to be formed before closing, and preferably before the contract. When a separate entity is used for ownership, that entity leases the office condo to the medical practice entity.

Financing

Most purchases will be financed by a lender. Therefore, it is important for the physician to obtain financing to fund his purchase of and improvements to the office condo, as well as working capital, if needed. The physician needs to have funds to pay the down payment, closing costs, prorated expenses, and advisor fees, not funded by the lender.

Closing Documents; Closing

The physician should have his attorney and other advisors review the closing documents. The closing documents should comply with the requirements of the Earnest Money Contract, the title company, and the lender. The deed is the legal document that transfers title to the condo unit and should be reviewed by the

physician’s attorney. The closing documents also include the settlement statement, which sets forth the financial terms of the purchase, the tax statement, the lender’s documents, the condominium association’s documents, and the title company’s documents. These closing documents should also be reviewed by the physician’s attorney, in advance of the closing. Written confirmation of insurance being in place needs to be provided by the physician’s insurance agent prior to closing. The signing of the closing documents occurs at the title company or a closing attorney’s office. The physician may want to have his attorney and real estate broker with him at the closing to advise him.

Conclusion

The purchase of an office condo is a significant investment with complex steps. Careful planning and collaboration with the attorney and advisors facilitates a smooth transition for the physician to be an owner and obtain the security of being his own “landlord”. ■

Jeanine Lehman is an Austin, TX attorney who practices medical, health, real estate, and business law.

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.

HIPAA Practice Tips:

A great resource for HIPAA information is the U.S. Department of Health and Human Services (HHS) FAQ’s. The FAQ’s are searchable by key word.

<http://www.hhs.gov/ocr/privacy/hipaa/faq/index.html>

HHS has published a new HIPAA Sample Business Associate Agreement (BAA) to include HIPAA HITECH breach notification provisions. Now is the time to revise BAA’s with legal advice from the covered entity’s attorney.

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html>

The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally, nor is it applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2013 Jeanine Lehman.

Medical Board Complaints: Due Process Reforms

In the current Texas legislature, several bills have been PROPOSED to amend the Medical Practice Act (Act) and provide more due process to Texas physicians. For background -- prior to September 1, 2011, the Texas Medical Board (TMB) accepted "anonymous" complaints against physicians, meaning there was no requirement to identify who filed the complaint, not even to TMB. In 2011, the Act was amended to prohibit "anonymous" complaints and further, to require that the accused physician be provided the name of an insurance agent, insurer, pharmaceutical company, or third-party administrator filing a complaint against him, unless the investigation would be jeopardized.

TMB continues to keep the identity of other complainants "confidential" from the physician against whom the complaint is filed. Not knowing the identity of the accuser makes it difficult for the physician to defend himself. Also, abuses can occur when unfounded complaints are filed by competitors, ex-spouses, and disgruntled employees. Allegations of unfounded complaints by competitors, including allegations of manipulation of those complaints by TMB, were made in the U.S. District Court lawsuit in Austin, [Association of American Physicians & Surgeons, Inc. vs. Texas Medical Board](#) (civil action no. 1:08-CV-675-Y).

House Bill 1262 by Representative Zedler, House Bill 2348 by Representative Zerwas, and Senate Bill 1193 by Senator Campbell PROPOSE amending the Medical Practice Act to require that the identity of the complainant no longer be kept confidential from the accused physician. These bills also PROPOSE that the accused physician be notified of complaints by personal delivery or certified mail, and be provided an unredacted copy of the complaint and the alleged violations

stated in plain language. These bills also PROPOSE that the accused physician receive a copy of the preliminary and final reports, including any dissenting or minority report, of TMB expert physician reviewers, along with the name and medical credentials of each physician who files an expert report. As this newsletter goes to press, the legislature is still in session and the fate of the proposed legislation is unknown. ■

R_x for Doctor Shopping: Prescription Access in Texas

The Texas Department of Public Safety's Prescription Access in Texas (PAT) is a secured, online prescription monitoring program.

PAT is now open to Texas licensed physicians, physician assistants, and advanced practice nurses with DPS numbers (as well as Texas Medical Board investigators). Such a prescriber can search the last 365 days worth of prescription dispensing history for Schedule II – V controlled substances for the following:

- Prescriber's patient's prescription history
- Prescriber's own prescribing history

A prescriber may not delegate access to the data to another person.

PAT helps protect against "doctor shopping", which is when a patient obtains the same controlled substance from multiple health care practitioners in the same timeframe. PAT also helps protect against prescription fraud, which includes unauthorized use of a physician's prescriptive authority, for example, when someone steals and uses a prescription pad.

To register for PAT, a physician, PA or APN goes to this website: <https://www.texaspatx.com/login.aspx> ■

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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 physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts, incorporations/LLC's, office/facility leases, building purchases/condos, and build-to-suits, 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 been in private practice as the owner of her firm for over 25 years and has over 30 years experience as a Texas attorney. She has had one book and over 70 articles published. She was formerly a hearings examiner for the Texas Medical Board. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have four physicians and two nurses 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 Suggestions for future newsletter topics are appreciated!