

DENTAL LEGAL UPDATE

Cover All Your Bases When you Sell Your Dental Practice

by Jeanine Lehman, Attorney

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

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 most helpful for a successful sale and transition.

Advance Planning

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. This means making sure that your practice entity, such as your professional corporation or professional association, is in good shape from a legal standpoint. 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

Contract Law Workshop

Attorney Jeanine Lehman is hosting a free workshop, **Contracts 101: Business Contract Basics**, on **Friday, March 30, 2012**, from 10 a.m. to 11:30 a.m. Q&A included. Location for the workshop is:

Business Success Center - Chase Bank Bldg
7600 Burnet Rd., Austin, TX 78757
(512) 933-1983

This workshop will be helpful to dentists, as well as dental office managers. Seating is limited. Registration is required through the RISE Global website at www.riseglobal.org If you need help registering or the workshop is full, please contact Jeanine Lehman at (512) 918-3435.

with all contracts before you agree to their terms or 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. If you anticipate selling one office of a multi-office practice, it is a good idea to establish separate accounting cost

A solid team of advisors and a plan that will cover all contingencies are necessary if you sell your dental practice.

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A well written, comprehensive contract is critical for the successful sale of a dental practice.



Website Favorites

Capital Area Dental Society:

www.capitalareadental.org

Texas State Board of Dental Examiners:

www.tsbde.state.tx.us

Texas Medical Disclosure Panel:

www.dshs.state.tx.us/hfp/tmdp.shtm

Law Offices of Jeanine Lehman P.C.:

www.jeanine.com

Cover Your Bases (cont.) --

centers for the different offices, so a clear financial picture can be provided for the office being sold. Early on, 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 negotiate to stay on with the buyer as a part-time associate after the sale.

Even the name of the practice is a factor to consider. Texas Dental Board rule 108.4 limits how long the name of a departing dentist can be used by the practice. Having a practice name that does not include the name of the selling dentist can help with the “branding” of the practice, which will help in the transition.

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 of 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. It will cover events that trigger departure by a dentist (such as death, disability, dispute, divorce, retirement or relocation). A noncompete is also advisable.

The associate dentist should prepare professionally and financially to be a practice owner. The selling dentist may counsel the associate dentist to establish a relationship with a bank or other lender 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. See his article in the September 2008 issue of Dental Economics.

Asset vs. Stock Sale

There are two general types of practice sales – the stock sale and the asset sale. In the stock sale, the liabilities of the practice, including unknown liabilities, such as malpractice claims, remain in 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.

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.

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.

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, the selling dentist should obtain releases of liability for liabilities that will transfer, such as the dental office lease. If the dental office building or condominium will be sold, typically a new loan is needed. 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.

Pitfalls to Avoid

There are many pitfalls to avoid in selling a dental practice. The selling dentist should not give the purchasing dentist a warranty on patients' dental work. Potential purchasers should sign a nondisclosure and nonuse agreement before receiving confidential information. Care should be taken that they do not remove patient lists or other confidential information from computer systems or elsewhere.

Close advance collaboration with your team of advisors will help to avoid these pitfalls and help you achieve a successful closing and transition. ■

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

Past Issues of the Dental Legal Update are at www.jeanine.com Enjoy them and forward them to colleagues.

- ✓ **Your Dental Office Lease: Watch the Terms**
- ✓ **Ownership Options for Your Dental Practice**
- ✓ **Financing Your Dental Practice: Tips & Terms**
- ✓ **Buying a Dental Practice: Deal Points**
- ✓ **Texas Legislative Update**
- ✓ **Internet "Coupons": Dental Practice Time Bombs**

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Informed Consent:

Texas Dental Board; TX Medical Disclosure Panel

Informed Consent is required under the rules of the Texas State Board of Dental Examiners. Rule 108.7(6) requires a dentist to maintain a written informed consent document, signed by the patient or the patient's legal representative, for all treatment plans and procedures where a reasonable possibility of complications exists. Such consent should disclose risks or hazards that could influence a reasonable person in making a decision to give or withhold consent. The informed consent is a part of the dental record (Rule 108.8(a)). Specific informed consent is required under Chapter 110 of the Dental Board rules for the use of several types of sedatives and anesthesia – ranging from nitrous oxide to general anesthesia.

On 1/20/2012, the Texas Medical Disclosure Panel held a public meeting in Austin. Under section 74.102 of the Texas Civil Practices and Remedies Code (the "law"), the Panel determines which risks and hazards relating to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients, and develops informed consent disclosures. The disclosures developed thus far have been primarily for physicians. Texas Dental Association representatives urged the panel to develop informed consent forms for dentists, to provide protection under the law, and to save dentists the cost of developing their own informed consents. Dentists are health care providers under the law. Panel discussion noted that some of the services provided as oral & maxillofacial surgery overlap with ear, nose and throat surgery. For background, dental services are not "medical care" under the law. However, the law does cover "surgical procedures". The question arises: do "surgical procedures" include the cutting of both hard and soft

tissue, namely, is the treatment of dental caries or performing a root canal considered to be surgery, or is surgery, by dentists, confined to oral surgery. The TDA representative indicated that the Panel had been provided with a list of procedures and a form for dental informed consent. The Panel asked the TDA to submit a list of risks associated with dental surgical procedures.

The Panel has two lists for disclosures. List A procedures require full disclosure of specific risks and hazards. List B procedures require no disclosure of specific risks and hazards. Procedures that are not on either list are covered by the duty otherwise imposed by other laws. Local and regional anesthesia are included on List B, while other types of anesthesia are included on List A. The Panel recently adopted a "Disclosure and Consent – Anesthesia and/or Perioperative Pain Management (Analgesia)", which discloses risks specific to anesthesia. In response to a question, the Panel indicated that nitrous oxide is under the "Sedation/Analgesia" section of that Disclosure and Consent. Dentists can obtain the anesthesia Disclosure and Consent at 25 Texas Administrative Code sec. 601.9 and www.dshs.state.tx.us/hfp/tmdp.shtm. The next meeting of the Panel is scheduled for 5/11/2012. In developing informed consent documents and interpreting the provisions of applicable law, it is recommended that dentists consult with their attorneys. ■

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.

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 contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, 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

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(512) 918-3435.