

# High Risk Scenarios – Things to Avoid

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# DISCLOSURE

The information in these slides and the presentation is general in nature and does not constitute legal advice. Recipients are advised to engage an attorney for legal advice and consultation applicable to their own situation.

# Practice Ownership (Entity) Choice

- ▶ **Unlimited personal liability**
  - ▶ Sole Proprietorship
  - ▶ General Partnership
    - ▶ Where partner is agent
- ▶ **Better alternatives**
  - ▶ Professional Corporation
  - ▶ Professional Limited Liability Company
  - ▶ Professional Association

# Maintain Professional Entity(1)

- ▶ Avoid piercing of corporate veil
- ▶ Annual minutes for PC's and PA's
- ▶ No commingling of funds
- ▶ Operate in name of professional entity
- ▶ Dental real estate in separate entity from dental practice, i.e. LLC or LP

# Maintain Professional Entity(2)

- ▶ Keep current Registered Office and Registered Agent
- ▶ For PA's, file timely Annual Statement
- ▶ File and pay timely taxes
  - ▶ (Federal, state and local)

# Insurance

- ▶ Malpractice insurance - cover dentists and professional entity
- ▶ Hired and unowned vehicle coverage
- ▶ Umbrella insurance coverage for higher coverage - personal and business
- ▶ Flood insurance, if at risk - home and business

# Office Lease(1)

## ▶ Gross vs. NNN Lease

### ▶ Failure to true-up NNN expenses each year

- ▶ Real estate taxes
- ▶ Insurance
- ▶ Common area maintenance

### ▶ Failure to true-up NNN expenses when practice sold/purchased

# Office Lease(2)

- ▶ Failure to exercise option to renew
- ▶ Forced relocation clause
- ▶ Exclusive
- ▶ Assignment & sublease
- ▶ Parking
- ▶ Signage

# Office Lease(3)

- ▶ Subordination of landlord's liens on personal property to third party financing
- ▶ Ability to remove trade fixtures, such as dental equipment, even if affixed to property
- ▶ Tenant improvement allowance & terms for construction
- ▶ Landlord's reputation and financial strength

# Office Lease(4)

- ▶ Foreclosure Risk - subordination  
nondisturbance & attornment  
agreement
- ▶ Option to buy building/right of first  
refusal
- ▶ Neighboring tenants

# Office Lease(5)

- ▶ Failure to have tenant real estate broker with dental experience representing dentist
- ▶ Failure to have attorney with real estate experience thoroughly review lease before signing

# Employment Relations(1)

- ▶ Failure to
  - ▶ Perform background check on employees
  - ▶ Sign and deliver employment agreements
  - ▶ Obtain dental record ownership from employee/contractor dentist
  - ▶ Pay overtime to nonexempt employees

# Employment Relations(2)

- ▶ Misclassification of employees as independent contractors
- ▶ No risk assessment
- ▶ Payroll tax - personal liability

# Americans with Disabilities Act (ADA)(1)

- ▶ An individual with disability has:
  - ▶ Physical or mental impairment that substantially limits one or more major life activities
  - ▶ A record of such an impairment; or
  - ▶ Is regarded as having such an impairment

# Accommodating the disabled(1)

- ▶ Qualified employee or applicant
- ▶ Reasonable accommodation
  - ▶ Upgrade existing facilities
  - ▶ Restructure jobs
  - ▶ Modify work schedules
  - ▶ Reassign to vacant position
  - ▶ Buying or modifying equipment

# Accommodating the disabled(2)

- ▶ Modifying exams, training materials and policies
- ▶ Providing qualified readers or interpreters

# Covenants Not to Compete

- ▶ Get it in writing
- ▶ Can't be overly broad
  - ▶ Reasonable scope, duration, and geographic area
- ▶ Needs buyout provisions (for MD's & DO's)
- ▶ Case law is continually changing
- ▶ Definitely a job for your attorney

# Contracts in general

- ▶ Like dentures, must be custom made
- ▶ Don't use old, or internet contracts
  - ▶ The law changes; situations differ
- ▶ May favor one party's position
- ▶ Should be done by your attorney

# Guarantees

- ▶ Writing required under Statute of Frauds
- ▶ Payment and Performance
- ▶ Continuing Guaranty
  - ▶ Other Debt
  - ▶ Revival
- ▶ Obtaining and Documenting Releases of Guaranty
  - ▶ Loans
  - ▶ Leases

# HIPAA - Privacy & Security(1)

- ▶ Uncle Sam can be gentle
  - ▶ AIDS stickers on patient folders - changed policies and apologized
- ▶ Or Uncle Sam can **NAIL YOU**
  - ▶ \$1.5M fine for unencrypted stolen laptop
  - ▶ \$1.5M fine for unencrypted stolen drives
  - ▶ \$1.7M fine for unencrypted stolen thumb drive “possibly” containing PHI (Ouch!)

# HIPAA - Privacy & Security(2)

- ▶ \$100K fine: Online calendar of appointments was accessible to public. (Cardiology)
- ▶ \$150K fine: Malware on pc caused HIPAA breach. (Were not regularly updating software and security patches. (Mental Health)

# Special Case: Computer Sabotage

- ▶ Outgoing IT vendor:
  - ▶ Changed passwords
  - ▶ Disabled all accounts
  - ▶ Removed drive mappings
  - ▶ Removed backup program
  - ▶ Deactivated antivirus software
- ▶ This could have been done by a disgruntled employee!

# Computer Backups

- ▶ Regular backups - verify execution
- ▶ Encrypted
- ▶ Verify that backups can actually be successfully restored

# CareCredit Crunch!

- ▶ If you don't follow the procedure for a newly-enrolled patient, for charges over \$1000, you could lose money!
- ▶ In a Consent Order, CareCredit was ordered to refund up to \$34M due to deceptive credit card enrollment practices at medical/dental offices around the country
- ▶ Required substantial changes to provider contracts
- ▶ You must comply

# DPS Prescription Access Program

- ▶ Dentists with Department of Public Safety (DPS) numbers can access controlled substances prescription data online:
  - ▶ Patient's prescription data
  - ▶ Dentist's own prescribing information
  - ▶ Helps detect
    - ▶ Doctor shopping
    - ▶ Diversion of drugs by staff and others

# Children's Online Privacy Protection Act (COPPA) & Websites(1)

- ▶ COPPA requires the FTC to issue and enforce regulations concerning children's online privacy
- ▶ Designed to protect children under age 13
- ▶ Websites, services, and apps that collect, use, or disclose personal information from children under 13

# Children's Online Privacy Protection Act (COPPA) & Websites(2)

- ▶ FTC got \$3M from Playdom and Howard Marks
- ▶ FTC got \$450K from Yelp
  - ▶ Allowed users with birthdates less than 13 years old to register
  - ▶ Didn't adequately test its apps to ensure that users under the age of 13 were prohibited from registering

# Dental Advertising

- ▶ TSBDE adopted new set of rules for business promotion/advertising in 2012
- ▶ Review advertising for compliance with TSBDE rules and other applicable law
- ▶ Evaluate developments in sleep dentistry lawsuit by Texas Medical Association

# Risk Mitigation - Team(1)

- ▶ Assemble your Team (with dental experience) to advise & assist you
  - ▶ Attorney
  - ▶ Accountant
  - ▶ Practice Management/Compliance Consultants
  - ▶ Banker
  - ▶ Real Estate Broker
  - ▶ Financial Planner

# Risk Mitigation - Team(2)

- ▶ IT Advisor
- ▶ Credentialing Firm
- ▶ Billing/Electronic Medical Records Firm
- ▶ Dental Supply Representative
- ▶ Dental Practice Broker
- ▶ Insurance Advisor
- ▶ and More

# Risk Mitigation

## - Succession Planning

- ▶ Professional Entity
- ▶ Wills & Estate Planning for Dentist and Spouse/co-owners in building/assets
- ▶ Buy Sell Agreements for Dental Practice and Dental Real Estate
- ▶ Non-competes & Dental Records Ownership
- ▶ Lease assignability

# Risk Mitigation - Calendar System for Deadlines(1)

- ▶ Lease
  - ▶ Rental Due Dates
  - ▶ True-up of NNN
  - ▶ Option Exercise Deadlines
  - ▶ Expiration
- ▶ Insurance coverages

# TSBDE (Texas State Board of Dental Examiners) Deadlines

- ▶ Licensure of Dentists and Staffs
- ▶ Permits of Dentists and Staff
- ▶ Continuing Education & Other Requirements
- ▶ See Self-Monitoring Checklist from TSBDE Enforcement on TSBDE website

# DEA & DPS Permits Deadlines

## Radiation Permits Deadlines

- ▶ DPS permitting has been slow.
- ▶ TSBDE has penalized dentists who prescribed without DPS permit
- ▶ Permits and inspections for Radiation

# Deadlines

- ▶ Other operational and regulatory deadlines
- ▶ Tax deadlines

# Compliance Plans

- ▶ Medicaid - Affordable Care Act requires Medicaid, Medicare & CHIP providers to have Compliance Plan

# About Jeanine Lehman

**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 and physicians. 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 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 speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family.

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