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Dan Schulte JD

Kerr Russell, dschulte@kerr-russell.com

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Some Legal Considerations to Consider When Selling a Practice



By Dan Schulte, JD
MDA Legal Counsel

Question: I am a probate attorney assisting the widow of a deceased dentist in the sale of his dental practice. What are the specific legal consider-

ations I should keep in mind when selling a dental practice? My client is not a dentist and I assume she cannot hire a dentist and continue the practice. Can she keep it in operation by engaging a dentist while trying to sell?

Answer: Like the seller of any business, the seller of a dental practice is generally concerned about receiving the entire purchase price when due, and limiting the obligations that survive the closing. Going into these considerations in detail would be beyond the scope of this column. However, I can give some general advice regarding dental practice sales, both in the case of a deceased dentist as well as a dentist who is merely selling the practice.

If the buyer is going to pay the purchase price over time, the seller becomes the bank and should act accordingly. This, among other things, means obtaining a security interest in all the assets of the practice to serve as collateral for the loan. One consideration applicable to dental practices is whether and to what extent a security interest can be obtained in patient records. Yet even if the seller takes a security interest in the patient records of the practice it may not be very beneficial. This is due to two factors. First, in the event the buyer defaults the seller likely will not be able to ethically foreclose and take the patient records if doing so would interfere with the buyer's treatment of patients. Second, patients always have the right to obtain a copy of their record for a fee; therefore, unlike other forms of collateral the seller will not have the ability to take back patient records and keep patients from obtaining a copy and going to the buyer or any other dentist for their care.

In addition to the survival of representations and warranties made in the purchase agreement and a covenant not to compete, which all sellers seek to limit to a reasonable period following the closing, sellers of a dental practice should pay particular attention to any post-closing

employment obligations and to their indemnity obligations. Any obligation to work in the practice following the closing should be contained in a written employment agreement. If the seller is counting on working for a certain time period following the closing, the termination provisions contained in the employment agreement must take that into account (i.e., until the seller has worked as long as planned, termination should only be for cause, or else a severance payment should be required).

A seller's indemnity obligation should be limited to breaches of the purchase agreement and expenses, claims, liabilities, etc., that arise from events occurring prior to the closing. When the seller is a dental practice, the indemnity should expressly exclude malpractice liability (an indemnity obligation for malpractice claims is usually not insurable). Instead, the seller should agree to purchase/maintain malpractice insurance coverage until the statute of limitations has expired on all claims arising from services provided by the seller prior to the closing.

In the event of a dentist's death, Michigan law allows a non-dentist to control the deceased dentist's ownership in a professional corporation or professional limited liability company for a "reasonable" period of time to allow for the transfer to a person or entity who can legally own the stock or membership interest. This means that a non-dentist could engage a dentist to work in the practice and preserve its value for some period. What exactly this reasonable time period is is not defined. I believe that non-dentist control will be permitted so long as commercially reasonable efforts are diligently being made to transfer the ownership of the practice. ●

Two great resources — *Dentist's Guide to Michigan Law and Most-Asked Legal Questions*, both available at \$19 or as free e-Books. Order at store.michigandental.org.