



IMPORTANT LEGAL AND PRACTICAL CONSIDERATIONS WHEN BUYING OR SELLING A PRACTICE

IDEAS22 - APRIL 28, 2022

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Today's Agenda

- Transactional
- Employment
- Regulatory





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General Transaction Structures




- Straight Sale
- Sale with Overlap
- Single Dentist to Group Practice



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Goals of the Transaction


- **Both parties:** clarity regarding obligations, managing tax issues and risks, transition of business operations
- **Seller:** getting best price for practice, minimize ongoing obligations and liabilities, maximize up-front cash
- **Buyer:** pay lowest price for practice, understand and minimize risks of the practice being purchased, ensure available remedies if there is a breach or misrepresentation



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Asset Purchase vs. Stock Purchase


Asset Purchase	Stock Purchase
Best way to limit successor liability for buyer	Can be simpler (no assumption of contracts, etc.).
Stepped up basis for tax purposes	No stepped up basis for tax purposes
Ordinary income up to amount of depreciation recapture, then capital gains	Generally all capital gains in excess of basis



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Due Diligence Process

- **Buyer's opportunity to research Seller's business**
- **Required disclosures:**
 - Financials
 - Info on assets and real estate
 - Corporate documentation (i.e., formation documents, minutes)
 - Tax information
 - Litigation and insurance claim information
 - Employee information
 - Existing contracts
 - Regulatory Compliance



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Financing

- Cash
- Bank
- Seller Financing
- Combination



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Agreement Terms

- Indemnification
- Employment Agreement with Selling Dentist
- Non-Compete and Non-Solicitation
- Confidentiality
- Earn out provisions
- Transition obligations



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Payor Contract Considerations

- Medicaid & MCOs; Commercial Payors
- What existing contracts does the dental office have with payors and who is covered?
 - Office
 - Individual Dentists
- What are the termination or amendment provisions for those payor contracts?
- What additional payor contracts are needed for your expected practice?



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Employment Considerations



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Offer Letters and Employment Contracts

- Will you hire the practice's employees
- If you intend to hire the practice's employees/continue their employment, on what terms
 - Whether they have offer letters or employment contracts
 - What the terms are of their employment per the offer letter or employment contract
 - What the offer letter or employment contract says about assignability in the event of a sale
 - Whether the employee at-will
 - If the employee is not at-will, what the implications are of changing the employment terms



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Employee Handbook and Other Policies

- Determine whether the practice has a legally compliant employee handbook and other policies
- Consider whether the employee handbook should be updated and/or policies created and added
- If the practice does not have an existing handbook, create one
- Consider whether there are provisions in the handbook or other policies that you want to change
 - Think about culture of the practice
 - Leave, paid time off
 - Dress code
 - Reporting structure/Human Resources contact person



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Employee Compensation

- Analyze whether employees properly classified as exempt/non-exempt from overtime under the Fair Labor Standards Act
- Exempt employees must qualify for an exemption under the law
 - Employee is paid at least \$684/week
 - Executive, administrative, professional, computer, outside sales → salary alone is not enough!
- If employee is misclassified, the risk is past unpaid over time (and attorneys' fees)
 - 2 years, 3 years if willful
- Paid Time Off/Vacation
 - If there is a policy that states accrued PTO/vacation will be paid upon termination, it must be paid or risk violating Iowa law



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Independent Contractors

- Similar to exempt employees under FLSA, calling someone an independent contractor doesn't necessarily make it so
- Factors considered by Iowa courts include (but not limited to):
 - the right to control the physical conduct of the work
 - whether the worker was on the employer's payroll
 - who provided the equipment to accomplish the work
 - the independent nature of the worker's business or distinct calling
 - the employment of assistants, with the right to supervise their activities
 - the worker's obligation to furnish necessary tools, supplies, and materials
 - the worker's right to control the progress of the work, except as to final results
 - whether the work is part of the regular business of the employer
- You may need to hire employees who were formerly independent contractors of the practice



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Non-Compete Agreements

- Difference between a non-compete in the purchase agreement and a non-compete with an employee (i.e. the selling dentist who stays on as an employee for a period of time)
- Non-competes for employees are permitted in Iowa, including in health care fields
- Burden of establishing reasonableness of employment-related non-compete rests with employer
- Factors in determining reasonableness: (1) if the restriction is necessary for the protection of the employer's business, (2) if the restriction is unnecessarily restrictive of the employee's rights, (3) if the restriction is prejudicial to the public interest



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Non-Compete Agreements

- A court will look at whether the employee would be effectively denied gainful employment in the given geographic area if the restriction is enforced
- Generally, two years will be enforced by Iowa courts
- Geographic area should be limited to location(s) in which employer does business or areas in which employer legitimately competes (i.e. a non-compete stretching to eastern Iowa for a practice in Sioux City will likely be struck as overbroad)
- Should include a "blue pencil" provision allowing a court to reduce the non-compete rather than void the contract in its entirety



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Regulatory Considerations – Licensure of RDHs and Registration of DAs

- Is the license or registration current?
- Any restrictions imposed by Dental Board?
- Any active investigation/complaint?
- Expanded functions (Iowa Admin Code r. 650-23)
- Local Anesthesia permit of RDH (Iowa Admin. Code r. 650-11.7)
- Radiography Qualification for DA (Iowa Admin. Code r. 650-22)



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Regulatory Considerations – Other Dentists

- Is the license current?
- Any restrictions imposed by Dental Board?
- Any active investigation/complaint?
- Sedation permit (Iowa Admin. Code r. 650-29)



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Regulatory Consideration – Your Dental License

- Required to notify Board of change of address within 60 days
- Required to report all full time and part time practice locations to Board
- Provide email address where Board can contact you
- If you have a sedation permit, need to ensure the location you are performing the sedation meets the facility and equipment requirements

Iowa Admin. Code r. 650-10.6; Iowa Admin. Code r. 650-29.8



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Regulatory Considerations – Prescribing Requirements

- If controlled substance, requires registration with federal DEA and Iowa Board of Pharmacy (updates to address, practice location, etc. would be needed)
- If dispensing, ensure that you have ability to meet requirements and that staff are trained on requirements, especially if this is new to them
- Prescription Monitoring Program (“PMP”)
 - Must query the PMP before issuing an opioid prescription or dispensing an opioid
 - Query must be within 48 hours prior
 - Must be done for each patient, each time
 - Require to report dispensing to PMP within one business day

Iowa Admin. Code r. 650-16; Iowa Admin. Code r. 657-37



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Regulatory Considerations - Advertising

- Announcement of transition and/or changes that may be required in existing ads
- Advertising requirements
 - Must be accurate – no false, untrue, deceptive or misleading info
 - Must not appeal to anxiety in an excessive or unfair way
 - Must not create unjustified expectation of results
 - Must not represent credentials, training, experience or ability
 - Must not claim superiority that cannot be substantiated
 - Specific requirements related to specialty advertising
- If fees are advertised, it must clearly define the service being offered and will be presumed to include everything ordinarily required for that service
- Must have name, address and phone number of dentist who placed the ad
- Each professional who is a principal partner, officer or licensed professional employee is jointly responsible for the form and content of ads
- Maintain copy of all ads for 2 years

Iowa Admin. Code 650-26



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Regulatory Considerations – Notice to Patients

- When practice is being transferred, written notice must be given to active patients
 - Notice must be in writing or by publication each week for 3 consecutive weeks in newspaper of general circulation in the community
 - “Active patient” = person who the transferring dentist has examined, treated, cared for or otherwise consulted within during the two year period prior to the transfer
 - Additional notice requirements regarding where records will be available if the practice is being discontinued
- Iowa Admin. Code r. 650-27.10



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Regulatory Considerations - Records

- Required to keep records, even if patient doesn't continue to see you after purchase
 - Minimum of 6 years after last exam, prescription or treatment
 - Minors – one year after patient turns 18 or six years, whichever is longer
 - Study models – keep for 6 years or can provide to patient for retention 1 year after completion of treatment
- Required to have proper safeguards to ensure safety of records from destructive elements (also HIPAA requirements related to safekeeping)



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Thank you!

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