



## Oral and Maxillofacial Surgery Practice Transition

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### Introduction

The decisions and agreements made at the time of the purchase of an oral and maxillofacial surgery practice can have significant impact on the quality of the practice for the buyer and the quality of retirement for the seller.

The following is a guide and outline for issues to consider as part of a practice transition, including tips and warnings of potential problem areas.

### Team Concept

Both the seller and the buyer should understand and accept that each party will, by nature, have a bias. The seller wants to get and keep as much money as possible, and the buyer wants to pay as little as possible. Therefore, the buyer and seller of an oral and maxillofacial surgery practice have the best chance of a successful transition if they form and use teams to evaluate, analyze, and document the transition and agreements.

### Seller's Team

The seller's team should be comprised of an *accountant* and *attorney*, and may include a *practice sale broker*.

The *accountant* should help collect financial information on the practice for presentation to the buyer, and assist in determining allocations of purchase price among different assets of the practice for advantageous tax treatment.

**Warning:** The tax goals of the seller may be the very opposite of those of the buyer.

The *attorney* drafts the sales contract, if the contract is not provided by the broker. If the broker provided the contract, the attorney evaluates the contract terms. If desired, the attorney may help negotiate the terms of the agreement. In addition, the attorney evaluates other legal documents, i.e., leases, and assignments for leases. It is recommended that the seller seek attorneys experienced in practice sales as they will be aware of the local customs and practices pertaining to contracts and issues required for disclosure to a buyer.

**Warning:** If the broker or attorney for either party claims that only one attorney is needed for both sides, it is important to remember that the ethics of law require that an attorney

advocate for a client and, as noted above, the seller and buyer have opposite goals in a practice transition. Therefore, sharing an attorney should be avoided.

The *practice sale broker* advertises and markets the practice, provides advice on structure and terms of sale, and may provide referrals to other consultants as needed. The broker may draft form agreements for the purchase, and will generally issue a caveat that he/she is not providing legal advice. In addition the broker may help set the price for the practice, based upon experience and the marketplace. It must be understood that the broker is an agent of the seller and has no duty to evaluate the truth of documents and representations made by seller unless he knows that specific information is incorrect. The broker's goal is to facilitate the transaction and ensure that the practice is sold.

### Buyer's Team

The buyer's team should consist of an *accountant/practice consultant*, an *attorney*, and a *dental equipment evaluator/salesperson*. The role of buyer's team is to undertake due diligence in order to evaluate the

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information available concerning the practice. The buyer should retain and rely on professionals and not try to undertake these tasks on his or her own.

The *accountant/practice consultant* will evaluate and determine a price for the practice, and assist in the evaluation of patient charts to verify the practice's current status. The accountant should review current accounts receivable statements, past financial statements and past tax records, and help evaluate the allocation of the purchase price for taxes and depreciation.

The *attorney* should evaluate all contract documents drafted by a broker or counsel for the seller; evaluate the other legal documents including leases to ensure compliance and assignability of the remaining term on the lease, if applicable; and may renegotiate leases. If desired, the attorney may also negotiate the price or other terms of purchase, including buying the building that houses the practice, if applicable.

The *dental equipment evaluator/salesperson*, as part of due diligence, will evaluate the quality and condition of the dental equipment and fixtures, including the potential costs of repair.

**Warning:** Naturally, the equipment salesperson wants to sell dental equipment and may tend to emphasize the risks of equipment failure or the need for replacement.

The members of the team need to communicate and collaborate with each other to have a successful practice transition with minimal complications or residual problems.

## Covenant Not To Compete

An essential element of any practice transition agreement is that the seller agrees not to compete against the buyer. State laws may

vary as to who may be covered by the covenant not to compete. However, some general rules apply.

Under many states' laws, restraint of trade regulations preclude covenants not to compete against anyone other than the seller of a practice or the seller of a partnership or corporate interest in a practice, and are not generally binding against employees, associates of the practice, hygienists or, if a multi-doctor practice, other doctors within the practice.

**Warning:** If there is a long-term associate in the practice, that person could compete with the buyer after leaving the practice, without restriction, because he or she cannot be bound by the terms agreed to by the seller/employer.

The extent of the covenant not to compete must be of a reasonable duration, with three to five years typically considered reasonable by most courts. The terms must also be reasonable as to geographic location. The rule of thumb is that geographic location should be co-existent with the area in which patients reside. What is reasonable will be determined by population density and transportation. A reasonable covenant not to compete in Montana might be 50 to 100 miles, while in New York City it might be a mile or 40 blocks.

If the duration or geographic area is unreasonable, courts have the power to disregard the terms of the covenant not to compete in its entirety or may redraft it to make it what the court feels is reasonable. Don't take the chance that a court will reject a covenant in its entirety if it is unreasonable; agree to a reasonable time and geographic area from the onset.

In addition to covenants not to compete, the seller should agree not to contact, speak with (unless first

contacted by the patient), or advise patients to seek the services of the seller (if practicing outside the geographic location of covenant) or any practitioner other than buyer. The duration of the covenant of non-solicitation should also be reasonable.

The legal remedy for damages for breach are usually not sufficient to make up for the loss of business because it is impossible to determine the harm to the value of the practice due to competition or solicitation by the seller, and by the time the court hears the matter, most patients will have started treatment at the other office and cannot be forced to return to the buyer. Therefore, the contract should contain an agreed upon amount of money damages should there be a violation of the covenant not to compete.

## Seller Representations

The seller should represent that he or she is currently licensed, that there are no past or pending actions by the dental board against the seller, that he or she has no knowledge of any investigation by the dental board, that there is no current or threatened litigation of any type, no threatened or pending litigation or actions by tax authorities, and no liens against any of the assets being sold. Additionally the seller needs to assure that all financial data provided at the time of the practice sale are accurate and that there will be no material changes in the practice prior to sale such as a change of salary, firing of employees, selling of any assets, or any change in PPO, HMO, or similar contracts with referral sources.

Further, there should be representations that all equipment to be sold is in good working order, that all employment taxes have been paid and that there are no written or oral

contracts binding the practice that have not been disclosed.

Finally it should be represented that, to the best of the seller's knowledge, the office is in compliance with OSHA regulations, and the seller has disclosed all PPOs, HMOs, or major contractual referral sources to the practice and will assist the buyer in obtaining approval to continue with those agreements.

### Buyer's Representations

The buyer should represent having a license to practice, that buyer is accepting the assets and practice in an as-is condition and with no guarantee as to future success.

**Warning:** Agreements to continue to use the same employees should be avoided as they may establish a long-term employment contract and prevent termination of an employee by the buyer except for good cause and then only with detailed documentation of the problems and warnings by management.

### Patient Records

Normally all the practice's patient records are transferred from seller to buyer. The buyer will agree to maintain all patient records for a minimum number of years after the date of last treatment (recommend minimum of seven to 10 years). There must be an agreement that if the buyer wants to dispose of records, the seller is given the option to take those records and store them at the seller's expense, and the buyer agrees never to dispose of records without notice to and consent from the seller.

Further, there should be an agreement that the seller can access all pre-sale financial and patient records for reasonable needs (lawsuit, collec-

tions, taxes) and upon reasonable notice.

**Warning:** Without a records agreement, once the office and patient records are transferred, the buyer is free to dispose of them.

### Continued Treatment of Patients

A specific agreement should be drafted stating how patients should be handled in cases where postoperative care extends beyond the date of sale and that the buyer cannot charge the patient for the costs of such continued treatment.

The seller could be given the opportunity to treat patients at the buyer's office, with the seller paying the buyer the hard costs, i.e., laboratory fees, the cost of supplies and cost of using staff. Or, the buyer can perform treatment and charge the seller a reduced fee for that treatment. Or, the costs of continued treatment can be built into the price of the practice. However, if the buyer and seller disagree as to the need for continued treatment, a dispute resolution procedure should be agreed upon, such as the use of a third-party mediator or OMS society peer review.

**Warning:** Failure to plan and agree on the method for handling of these issues is the primary source of post-sale litigation between sellers and buyers.

### Post-Sale Assistance Provided by Seller to Buyer

The terms of the contract should include a requirement that the seller provide assistance to assure a smooth transition because, if there is no agreement to provide assistance by the seller, no assistance is required under the law.

### Transition Aids by Seller

The seller should educate the buyer as to the existing office systems and the normal customs and practices of the office. The presence of the seller to introduce the buyer to current referral sources is important and should be formalized by a joint letter to patients and referral sources announcing the sale and transition.

### Legal Liability/Allocation of Responsibility

It is essential that buyer and seller agree that each of them will maintain insurance to cover pre- and post-sale liability and the limits of liability should be spelled out in the contract. There should be an agreement to exchange declaration pages to ensure compliance. The seller also should maintain "tail" insurance if the seller retires from practice.

The buyer and seller can agree to allocate responsibility for legal actions, with the seller responsible for all legal actions before the date of closure of the sale and the buyer responsible for all actions after the date of sale. Indemnity clauses can be added to the agreement to spell out that the seller shall defend all actions or claims arising before the date of the sale, be responsible for the expenses of all actions or claims arising before the date of sale closure and, if necessary, the seller shall pay the buyer's attorney fees incurred in connection with any such actions. The buyer should make the same agreement as to all actions after the date of closure, i.e., agree to defend any actions, to indemnify for any liability and to pay for attorneys of the seller for any such actions.

**Warning:** Indemnity agreements are a contractual assumption of a liability and professional malpractice insurance policies and other policies

may not agree to cover liabilities created by contract. Documenting mutual insurance for malpractice, and general and premises liability is essential and should not be taken for granted.

### Accounts Receivable

Some amount of accounts receivable (A/R) will, unavoidably, remain outstanding after the practice sale is finalized. Collections of A/R can become a source of dispute if not included as part of the practice transition.

The buyer should collect the seller's A/R because the buyer has the records, employees, and systems to collect them more easily than the seller. In that case, the seller may compensate the buyer, normally by a small agreed upon percentage of the A/R, such as 4-6%. The buyer and seller should also agree as to any actions to be undertaken to collect the A/R, i.e., sending bills or the number of follow-up telephone calls or letters per month by staff. An agreement should be made as to how long the buyer will collect the seller's A/R and when A/R receipts should be paid to the seller.

**Warning:** Collection of A/R can be a major source of conflict and, therefore, the buyer can offer to purchase the seller's A/R at some discounted fee upon consummation of sale.

### Employees

Prior to finalizing the sale, the buyer should know the number of employees, hours typically worked, responsibilities, existing salaries, benefits, typical bonuses, and retirement and profit sharing plans. The seller should be responsible for payment of all employees, and pay all taxes for employees before the date of sale. The buyer should be given the opportunity to determine which employees he or she wants to hire after the closing date of sale.

The buyer must be told of any contracts or agreements the seller has with employees and if there are any residual disputes between the seller and employees as of the date of the closing. The buyer should attempt to maintain most employees to allow continuity of the practice while evaluating competency.

**Warning:** To avoid creating long-term employment contracts, the seller should agree to terminate the employment of all employees on the closing date of the sale and the buyer should agree to hire any desired employees on an "at will" basis after the closing date.

### Post-Sale Dispute Resolution

All too often the costs (attorney fees, court costs) of resolving post-practice transition disputes are more costly than the sums in dispute. Planning for potential disputes is an important element of a successful practice transition. If no agreement was provided, the only formalized means of dispute resolution would be a lawsuit.

An alternative dispute resolution plan built into the contract may establish a low cost and less traumatic dispute resolution method. Mediation may be the best means to resolve matters short of arbitration or filing a lawsuit. The contract terms can require parties to undertake mediation before resorting to legal action, and the process is not binding unless mutually agreed to in the form of binding contractual arbitration. The attorneys for each team should explain and help determine the most appropriate format.

**Warning:** The experience, or lack thereof, of the team members may influence the recommendation for pre-litigation dispute resolution. Consider obtaining a consensus of the team members before making a choice of resolution dispute vehicles.

### Summary

The selling and buying of an oral and maxillofacial surgery practice can be either the beginning of a rewarding new practice and deserved retirement or the start of a long road of disappointments, frustrations, litigation and expense. Carefully planning for success and utilizing the team approach with consultants and experts will assure that the practice transition is smooth, successful and not the source of significant and/or recurrent problems. ■