

# WHEN TO SEEK LEGAL ADVICE FOR DENTAL PROFESSIONALS

**William M. Mandell, Esq.**

Pierce & Mandell, P.C.

11 Beacon Street, Ste. 800

Boston, MA 02108

Tel. 617-720-2444

[www.piercemandell.com](http://www.piercemandell.com)

Email: [bill@piercemandell.com](mailto:bill@piercemandell.com)

# When Should You Seek Independent Legal Advice?

- Accepting a dental position
- Owning a Practice
  - Choice of Entity
  - Compliance
  - Renting or purchasing office space
  - Hiring and terminating dentists and staff
  - Patient issues
- Making practice transitions
- Buying, selling or retiring

# Employee verse Independent Contractor

## ■ Employee (W-2)

1. Full time verse part time
2. Control

## ■ Independent Contractor (1099)

1. Freedom from Control
2. Service Outside the Employer's Usual Course of Business
3. Independent Profession

# Contract Negotiations for Associates

## Preparation – Knowledge is Power

- What is the market for your services?
  
- What are dentists with comparable skills/training/specialty being offered for such positions in local area?
  
- Resources
  - Recruiters
  - Colleagues, Faculty and Senior Staff
  - Websites

# The Art of Leverage

- Do you have it and how much?
- How does it look from the other side?
- How to use it
- Current Trends

# The Process of Negotiating and Entering into a Contract

- Introductions
- Preliminary Discussions
- Basic Terms
- Proposals: Binding or Non-Binding
- What is a Contract?
- Documentation, Drafting and Redrafting
- Execution

# Employee / Service Contract Language Common Terms

- Pre-Conditions
- Term and Termination
  - Notice
  - Salary Continuation
- Compensation and Benefits
  - Base and incentives
  - Is it at risk?
  - Gaps in Benefits
  - Are all expenses covered?

# Employee / Service Contract Language Common Terms

## ■ Professional Liability Insurance

- Who Purchases/Who Pays?
- Sufficient Coverage Limits?
- Occurrence or Claims Made?
  - Tail Coverage – Who Pays?

## ■ Duties – Schedule

- Discretionary or Established?
- Clinical, administrative, teaching
- Coverage/Call

# Employee / Service Contract Language Common Terms

- Outside Activities
- Assignment of Revenues
- Provision of Resources
- Patient Dental Information
- Indemnifications
- Representations and Warranties
- Restrictive Covenants
- Other Boilerplate

# Contracts Are Essential But . . .

- The 5 Elements of a Successful Relationship
  - Trust
  - Transparency
  - Temperament
  - Tolerance
  - Team Approach

# Owning a Dental Practice Choice of Legal Entity

- Professional Corporation
  - S or C Corporation
- Professional Limited Liability Company
- Professional Limited Liability Partnership
- General Partnership
- Sole Proprietorship
- Non-Profit Organization

# Who Can Own a Dental Practice?

- All owners of the dental practice must be licensed dental professionals
- Non-dental professionals (e.g. office manager, investor)
  - Compensation arrangements
  - Management companies

# Dental Practice Legal Documents Checklist

- Articles or Certificate of Organization
- By-laws or Governance Rules
- Equity Holders Agreement
  - Redemptions/Buy-outs
- Employment Agreements
  - Buy-ins
  - Compensation Formulas
  - Benefits

# Dental Practice Legal Documents Checklist

- Pension Plans
- Employee Policies
- Dental information polices, procedures & forms
  - HIPAA Compliance Plan
  - Written Information Security Plan (WISP)

# Dental Practice Legal Documents Checklist

- Real Estate Leases or Ownership Agreements
- Leases, contracts with other providers to be anti-kickback compliant
- HIPAA Business Associate and Chain of Custody Agreements
- Information system hardware/software licenses and service agreements
- Billing Agent Agreement

# Compliance Areas

## ■ HIPAA

- Privacy
- Security

## ■ State Privacy Laws

## ■ Patients Rights

- Informed consent
- Incompetent and minor patients
- Anti-discrimination

# Compliance Areas

- Drug/Device Company Relationships
  - Gifts, Meals and Gratuities
  - Free Samples
  - CE Programs
  - Speakers Bureaus
  - Consulting
  - Advisory Boards
  - Convention receptions
  - Mass Law – public data base

# Commercial Leases

- Who is the tenant?
- Does it include a personal guaranty?
- Fair market value rent
- Triple net verse gross rent
- Option term and rent escalators
- Use, Subletting/Assignment clauses
- Leases with real estate holding company owed by dentists

# Buying Real Estate

- Offer
- Purchase and Sale Agreement
  - Purchaser (Real Estate LLC)
- Choice of Entity for Real Estate Holding Company
- Closing
- Lease

# Employment Issues

- Policies and procedures
- Personnel file
- CORI Check
- HIPAA
- Training
- Discrimination
- Sexual Harassment
- Termination
- Separation

# Hiring Dental Professionals

- Written agreement
- Employee or independent contractor
- Malpractice insurance
- Part-time verse full-time
- Outside activities
- Non-competes and non-solicitations
- Compensation
- Termination rights
  - For Cause
  - Not for Cause

# Hiring Staff

- Employees-at-will
- Offer letter with basic terms
  - Duties
  - Schedule
  - Compensation
  - Benefits
- Probationary period
- Employee handbook with receipt
- Disciplinary process

# Termination Rights

- Non-discriminatory
- Performance based decisions
- Disciplinary process
- Personnel File
- Notice period verse immediate termination
- COBRA
- Severance

# Patient Issues

- Record requests
- Record retention
- Complaints
- Terminating a patient
- Board issues

# Associate Buy-Ins

- Trend is still 2-3 years to buy-in eligibility in dental practices
- Associate employment agreements vary greatly as to terms on buy-in timing, eligibility, and terms
- Factors: professional supply, associate's prior experience, size of practice, age of senior owner(s), profitability of practice

# Associate Buy-Ins

- A/R and Goodwill often payable through income reduction for associate
  - Use of before-tax income for associate
  - Reduction of compensation or “income shift” can take many forms, including management fee, base salary and benefit differentials, seniority payments, bonus distribution formula, increasing percentage to full parity

# Buy-Ins

## ■ Tax Considerations

### – Payment for equity

- After-tax income
- Basis of capital
- Taxable as a capital gain to selling owner(s)

### – Shift of income

- Before-tax income
- Not included in capital basis
- Taxable as ordinary income to selling owner(s) and may be subject to payroll taxes unless shifted income is allocated to tax-exempt benefit plans

# Buy-Ins

## ■ Governance and Control

- Equal voting/control rights on decision-making?
- Post-Buy-in control mechanisms for senior owner(s)?
  - Reserved decision-making powers
  - Practice retention rights upon break-up or deadlock
  - Time limitations

# Buy-Ins

## ■ Asset Carve-Outs

- Will Buy-In be limited to professional practice assets?
- Establishment of separate entities to own other practice-related assets

- Real estate

- Practice management

# Compensation Arrangements

- How will owners compensate themselves
- How will owners divide “net income”?
- Net income=
  - Collections less expenses except
    - Owners’ salaries, bonuses and other benefits
    - Owners’ personal expenses
    - Residual practice profit distributed or retained
- General Approaches:
  - Percentage Division
  - Productivity Division
  - Hybrid blended formula

# Equity Holder Agreements - Redemptions

- All equity holders should be subject to an agreement on the terms of mandatory and optional redemptions
  - Triggering events
  - Price terms
  - Reductions
  - Forfeitures/Disqualifications

# Equity Holder Agreements - Redemptions

- State professional entity laws generally require redemption of Dentist's equity for fair value w/in 12 months if Dentist:
  - dies
  - is disqualified to render a professional service for 6 months or more
  - is incompetent or permanently disabled, or
  - transfers shares to a disqualified person

# Equity Holder Agreements - Redemptions

- Triggering Events to Address
  - Death
  - Permanent or long term disability
  - Retirement
  - Loss of Licensure
  - Practice withdrawal
  - Employment termination

# Equity Holder Agreements - Equity Holder Rights

- Options to purchase upon event triggering practice redemption rights
- Rights of first refusal to limit transferability
- Cross Purchase Agreements
  - Step-up in basis for acquiring equity holder(s)

# Equity Holder Agreements - Price Terms

- In the event of death and disability can and should the practice or remaining owner(s) be paid proceeds from insurance policies to finance buy-out?
- Established price in advance
  - Subject to periodic adjustment?
- Established methodology

# Equity Holder Agreements – Reductions & Forfeitures

- Phase-in after initial buy-in
- Reductions based on age of withdrawing owner
- Mandates based on age
- Forfeiture/disqualification based on competition after withdrawal

# Buy-Outs

- Will buy-out be paid through non-deductible equity acquisition or deductible deferred compensation or guaranteed payments?
- Will Selling owner “finance” acquisition?

# Buy-Outs

## ■ Solo Practice Issues

- Required Buy-out
- Restrictions against leaving and competing
- Payment to selling professional for goodwill

# Buy-Outs

- Anti-kickback issues for Dental Buy-outs When Medicaid Collections Are Involved
  - Sale of practice safe harbor/isolated transaction exception
  - Employment safe harbor/exception
  - Is price based upon FMV of Seller's interest in the practice?
  - Is price variable based upon the volume or value of referrals by seller?
  - Installment sales

# Buy-Outs

- Will buy-out price formula parallel buy-in formula?
- Cash flow caps
  - Deferral
  - Reduction
  - Concurrent departures
- How much of the price is based on a pro rata share of practice value and how much upon income assets (A/R, goodwill) determined by seller's individual productivity ?

# Dental Practice Sale

## The Parties and the Roles

- Buyer
- Seller
- Broker
- Lender
- Lawyer
- CPA / Valuation Expert
- Insurance Agent
- Landlord

# Dental Practice Purchase and Sale Issue Checklist

- Financing Options
  - Commercial Loan
  - Seller Financing
  
- Working Capital Needs
  - Commercial Loan
  - Purchase A/R

# Dental Practice Purchase and Sale Issue Checklist

- Sale of stock verse assets
- Will any liabilities be assumed?
- Allocation of Purchase Price
- Valuation Process – Fair market value standard  
– especially if intangible assets are included

# Dental Practice Purchase and Sale Issue Checklist

- Confidentiality Agreement/Letter of Intent
- Purchase Price
  - Requires Valuation: Must be Fair Market Value
  - Fair Market Value
    - Price Resulting from bona fide bargaining between well-informed buyers on date of purchase of the asset.
  - Does not take into account the volume or value of referrals by the referring dentist or other business generated between the parties

# Dental Practice Purchase and Sale Issue Checklist

- Acquisition Terms – Practice Value
  - Hard or Tangible Assets/Capital Value
    - Equipment
    - Furniture
    - Fixtures
    - Supplies
    - Dental Records
    - Cash
    - Real property

# Dental Practice Purchase and Sale Issue Checklist

- Acquisition Terms – Practice Value
  - Accounts Receivable
    - Practice-wide or individual
    - Aging
    - Collection rate
    - Accounts payable set-off?
    - Cash or accrual basis
    - Work-in-progress
    - Re-dos, re-makes
    - Lab fees

# Dental Practice Purchase and Sale Issue Checklist

- Acquisition Terms – Practice Value
  - Goodwill
    - A measure of ongoing earning capacity
    - Various formulas and approaches
    - Payable to Seller individually even if seller is a legal entity
    - Anti-kickback:
      - Independent Appraisal showing price = FMV
      - Volume or value of seller's referrals are not taken into account

# Dental Practice Purchase and Sale Issue Checklist

- Transition Period
  - Patient Letter
  - Training on dental equipment (CERAC, PAN)
  - Introduction to Referral Sources
  - Professional Service Agreement with Selling Dentist for a period of time
- Employees
- Lease or Purchase of Office Space
- Name, website, advertising

# *Questions & Thank You*

**William M. Mandell, Esq.**

Pierce & Mandell, P.C.

11 Beacon Street, Ste. 800

Boston, MA 02108

Tel. 617-720-2444

[www.piercemandell.com](http://www.piercemandell.com)

Email: [bill@piercemandell.com](mailto:bill@piercemandell.com)