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Regulatory Due Diligence – One More Seller’s Onus Nov 2018

In a previous article (Transition Choices and Options) there was a discussion of some of the factors that a general dental practice seller should consider when choosing a buyer for their general dental practice given the aggressive corporate push to buy practices.

The factors discussed concentrated on the financial and life-style decisions that should be examined in order to achieve the best possible outcome for the particular circumstances of the selling dentist.

In what could potentially be a game changer for some of the larger corporate groups who are buying multiple practices across Canada, in September 2018 the Alberta Dental Association and College (ADC&C) published a decision by their regulatory body that added a new area of concern for the seller of a dental practice, a potential threat that is not related to either financial or life style considerations. That area of concern deals with possible legal and regulatory violations that may develop after a practice sale as a part of the post-sale contractual arrangements that the former owner may have signed on for when he or she stays on as an associate in the practice.

Even before this decision we had an environment for the sale of dental practices where there existed a class of buyers who preferred to avoid competing in the open market where they would have to pay fair market value and have their offers to purchase exposed to the risk of being compared to other buyers. Instead, they have been going directly to practice owners, usually before those owners had listed or even considered putting their practice up for sale.

The ADA&C examined the contractual, healthcare information/chart responsibilities, and fee payment arrangements between a dentist (in this case,

the purchaser) who was the owner of multiple practices in Alberta and the non-dental corporation with which he was affiliated.

With the new reality of the recently published decision, there is now an added onus on the seller, and that is to ascertain that the post-sale arrangements that they are entering into, do actually conform to the regulatory requirements and legislation in your province.

The Alberta Hearing Tribunal found multiple breaches of provisions of the Alberta Health Professions Act that regulates their dentists. These breaches were in the areas of fee splitting with a corporation that was not a dentistry professional corporation or a member of the College; as well as in the area of a non-dental corporation being the custodian of patient charts without a proper contract in place.

Even though the purchaser was the subject of the investigation, this was problematic for the selling dentists as well because as part of the Purchase Agreements for the practices in question, the sellers had agreed to stay on as associates with the practice. Notably the Agreements provided that the selling dentist would be *responsible for liability post sale*, even though they no longer owned or managed the practice.

Why should this be of interest to you or dentists in your province?

When it comes to fee splitting and responsibility for patients' charts and health information all Canadian provinces have similar provisions.

Further, the corporation involved in the Alberta decision owns or is seeking to buy practices in every Canadian province.

It is unknown as to whether or not this corporation is using similar contractual arrangements outside of Alberta. However, in light of the Alberta decision, it would be prudent for sellers, as part of the pre-sale due diligence, to determine the post-sale contractual provisions that are part of the deal – especially with respect to ongoing liability post-sale. Some of the questions that might be considered are:

- What are the post-sale arrangements for chart custody?

- What are the post-sale arrangements for fee payment and fee sharing?
- Do those arrangements comply with my licensing body's regulations and the provincial legislation?
- What is my exposure and what are my responsibilities post-sale if there are legal/regulatory or other problems?

As mentioned at the beginning of this article, there is a push by large groups to buy general dental practices and this means that not only are there higher valuations for those selling a dental practice, it also means that there are more choices and options in regard to who they can sell to.

Now in addition to the informed decisions that a vendor should make about the sale, including financial/monetary factors, the life-style impacts, and the terms of staying on after the sale, there is also the need to carefully examine whether there exists the possibility of future problems with the licensing body regarding the legal regulations that govern how we practice.

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