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Will This Be a Game Changer?

In the article “A Very Bad Financial Decision” (*Ontario Dentist*, December 2018) there was discussion of some of the factors that a practice seller should consider when choosing a buyer for their general dental practice, given the very strong sellers’ market that exists in most of Ontario. The factors concentrated on the financial and lifestyle decisions that should be considered in order to achieve the best possible outcomes for the particular circumstances of the selling dentist.

In September 2018, in what could potentially be a game changer for some of the larger corporate groups that are buying multiple practices across Canada, the Alberta Dental Association and College (ADA&C) published a decision by its regulatory body (1) 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 lifestyle 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.

The ADA&C examined the contractual, health-care 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.

The ADA&C Hearing Tribunal found multiple breaches of provisions of the Alberta *Health Professions Act*, which 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. This is due to the fact that as part of the purchase agreements for the practices in question, the sellers had agreed to stay on as associates with the practice and, notably, the agreements provided that the selling dentists would be responsible for liability post-sale, even though they no longer owned or managed the practice.

The tribunal’s comments with respect to fee splitting, in particular, could be a game changer for dentists across the board — whether they are currently selling their practice or just starting out. The patients paid a single fee to the non-dentistry corporation, but in an internal bookkeeping transaction, the practices in question then split fees between two corporations: fees for professional services were allocated to the professional corporation, while fees for technical services were allocated to the second corporation.

The tribunal took the position that when a dentist supervises and directs the provision of dental services to patients, or supervises individuals assisting the dentist in the provision of dental services, then the dentist is engaged in the practice of dentistry, and these fees cannot be allocated to a non-professional corporation. Based on this decision, dentists should be very careful as to what fees are being ascribed to technical services — especially for services rendered by the dentist, rather than by their support staff. As well, the perception created by patients paying fees directly to a non-dentistry corporation is something that should probably be avoided.

Finally, it is important to note that the ADA&C finding is subject to possible appeal within 30 days of the decision, and as of publication, it is unknown if such an appeal was filed.

Why should this be of interest to Ontario dentists?

When it comes to fee splitting and responsibility for patients' charts and health information, Ontario's *Regulated Health Professions Act, 1991*; *Dentistry Act, 1991*, and *Personal Health Information Protection Act, 2004*, have similar provisions to Alberta's *Health Professions Act, 2000* and *Health Information Act, 2000*. The exception is that, in Ontario, dentists are permitted to fee-split with members of the College of Dental Hygienists of Ontario who engage in the practice of dental hygiene within the dentist's practice. Further, the corporation involved in the Alberta decision also owns multiple practices in Ontario, as well as other provinces. Thus, any member of the profession who is a potential practice vendor should pay attention to this decision.

It is not known if 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 all associated legislation?
- What is my exposure and what are my responsibilities post-sale if there are legal/regulatory or other problems?

Conclusions

As mentioned at the beginning of this article, we are in a very strong sellers' market 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 regarding who they can sell to. And now, in addition to the informed decisions that a vendor should make about the sale, including financial/monetary factors, lifestyle 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 practise. Finally, as previously noted, the ADA&C finding is subject to possible appeal, and the cautionary guidance to Ontario dentists provided here, reflects the current state of the legal landscape with reference to Alberta, even as that landscape may change on appeal.

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REFERENCE

1. Alberta Dental Association and College Hearing Tribunal Decision; in Accordance with Bylaw 20(7) of the Alberta Dental Association and College. Available at: <http://www.dentalhealthalberta.ca/index/Sites-Management/FileDownload/DataDownload/143497/A-Meikle-2018-Hearing-Decision/pdf/1/1033>. Accessed on December 10, 2018.



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