



Checklist for Physicians Selling a Practice

How to Use This Checklist

This checklist is intended to provide general information about some of the common issues and legal documents involved when a physician sells a practice to another physician, a group practice or a hospital.

This checklist is for general informational purposes only. It does not include or discuss each and every potential issue or task related to the sale of a medical practice. This checklist does not provide, and is not intended to provide, legal advice or legal opinions on any specific facts or circumstances, nor is it intended to substitute for legal advice. Physicians are urged to seek legal advice from their own lawyers specific to the physician's circumstances.

1. Pre-Purchase Agreement

Before the seller and buyer actually enter into a written agreement for the purchase of the practice, the parties will engage in several activities and may enter into several preliminary agreements.

Seller to Determine Target Sales Price/Worth of Practice

Before a physician decides to sell his practice and enter into preliminary discussions with a potential buyer, the physician can generally determine the worth of the practice and have a goal in mind regarding an acceptable range for the selling price. The physician can expect that the potential buyer may want an independent valuation of the practice, so the physician should do his homework and become knowledgeable about the various ways that a practice can be valued, as well as the companies that may perform the valuation services.

Confidentiality and Non-solicitation Agreement

In order for the potential buyer to determine whether it wants to purchase the practice, the potential buyer will likely want to review various aspects of the practice, including financial information and patient and employee lists. All of this information is valuable to the seller and would cause economic harm to the seller if the potential buyer decided not to purchase the practice and used the information for its own economic gain. Therefore, the seller can require a written confidentiality agreement which prohibits the potential buyer from using or disclosing the seller's information for any reason other than evaluating the practice and which requires the potential buyer to return all such confidential information if the parties decide not to proceed with the transaction. The agreement may also prohibit the potential buyer from soliciting any of the seller's employees and patients unless and until the sale is completed.

The confidentiality/non-solicitation agreement would be binding on both parties and could result in penalties if the potential buyer violated the agreement.

Letter of Intent

In some situations, the parties may want to enter into a non-binding Letter of Intent. A Letter of Intent can be beneficial for several reasons. It documents a list of those issues that have been preliminarily resolved by the

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parties, a list of the issues to be resolved by the parties and helps to ensure that the parties are "on the same page" as they approach the transaction. The parties may or may not have preliminarily agreed to the purchase price at this stage. A Letter of Intent often outlines the tasks that must be completed by the parties before a binding agreement is executed. In essence, it serves as a road map to both parties as they are working through the purchase process.

No-Shop/No Publicity Agreement

The parties may invest significant time and money in the negotiations and due diligence process prior to the sale. Because of this investment, a No-Shop Agreement may be requested by the buyer and requires that the seller take the practice off the market and not solicit or engage in discussions with other potential buyers during a defined time period. From the potential buyer's perspective, it may also prevent the purchase price from increasing due to the interest of other buyers. A No-Publicity Agreement provides that the parties will keep confidential the fact that they are engaged in discussions related to the purchase of the practice.

Determine the Structure of the Sale

The purchaser can either (1) purchase the assets of the selling physician's practice (i.e., the equipment, supplies and goodwill); or (2) purchase the stock of the selling physician's company. There are several legal and tax ramifications, depending on which structure is chosen. For example, generally when the buyer purchases the assets the buyer avoids acquiring any unknown liabilities of the seller. The selling physician should be knowledgeable about the legal and tax consequences of both types of acquisitions and how they would affect the physician's specific circumstances.

Due Diligence

During the due diligence phase, the potential buyer will likely want to conduct a review of the financial documents and other relevant documents to identify and evaluate the practice assets and liabilities. The due diligence process helps the potential buyer decide whether to proceed with the transaction and collects information that will ultimately be included within the binding Purchase Agreement between the parties.

- **Review of Financial Documents**

The potential buyer will likely want to review financial documents, including tax returns and financial statements. The buyer is attempting to ensure that the value and condition of the practice have been accurately presented.

- **Review of Assets**

The parties will want to identify all of the practice's assets, which can include the goodwill of the practice, patient lists or records (in some jurisdictions), supplies, equipment, accounts receivables, real estate, and prepaid expenses. Ultimately, when the parties enter into the Purchase Agreement the parties want a comprehensive list of assets and want to be sure to specify in the Purchase Agreement which assets are included in the purchase, and which assets are not included with the purchase.

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- **Review of Liabilities**

The potential buyer will want to discover all liabilities of the seller, including accounts payable, loans, leases, and any pending litigation (i.e., malpractice, employment) or government investigations. The potential buyer's goal is to determine which liabilities are acquired by operation of law, and which liabilities might be acquired if included within the Purchase Agreement.

- **Review of Existing Contracts**

The seller will likely be a party to many agreements with third parties that are necessary for the seller to operate its practice. For example, the seller may lease office space and equipment. During the due diligence process, the parties will identify and document all such agreements. The parties will also want to determine whether the seller can assign or transfer the agreements to the potential buyer, and if so, whether advance written notice and/or approval from the third party is required.

- **Determining the Purchase Price**

At some point, preferably prior to drafting the Purchase Agreement, the parties will agree upon the purchase price. As noted above, there are various methods to value a practice. There are also federal fraud and abuse laws that relate to the sale of a medical practice. These laws are beyond the scope of this Checklist, but generally may require that the purchase price be fair market value. For these reasons, many potential buyers may want an independent third party to value the practice in order to arrive at the purchase price.

2. The Purchase Agreement

Depending on how the parties structure the sale of the practice, there might be several different legal documents required. For purposes of this discussion, this Checklist will cover some of the topics likely addressed in the main agreement, which is referred to here as the Purchase Agreement. Unlike the Letter of Intent, the Purchase Agreement will be binding on both parties.

Tax Issues

As noted above, the structure of the transaction will have tax consequences to both parties. For example, the seller will want to determine whether it will be taxed on the purchase price as capital gains or ordinary income (usually a high tax rate). Depending on the structure, the Purchase Agreement may also address how the purchase price is allocated, which will again result in tax consequences for both parties. The physician would be well advised to seek the advice of a tax expert or accountant when considering these provisions.

Representations and Warranties

The Purchase Agreement will likely require the seller to make "representations and warranties" which can generally be described as statements of fact made to induce the other party to enter into the agreement. If the representations and warranties are determined to be incorrect, the buyer can back out of the deal. For example, it is common for the seller to represent and warrant that the seller's financial records and tax returns are true and accurate. From the buyer's perspective, the buyer reviewed the financial records during the due diligence

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phase, and the buyer should be able to rely on those financial records. In the event the financial records were false or inaccurate, the buyer is going to want the ability to walk away from the deal.

Indemnifications

It is not unusual for the buyer to require the seller to indemnify or reimburse the buyer for any costs and expenses incurred by the buyer in the event that the seller breached any of the representations or warranties or any other obligations in the Purchase Agreement. If the selling physician corporation does not have significant assets the buyer may request indemnification from the individual physicians who own the practice.

The seller may also request similar indemnification from the buyer.

Restrictive Covenant

The buyer will likely require the selling physician practice (as well as the individual selling physician) to enter into an agreement which prohibits the selling physician from competing against the buyer for a certain number of years within a certain geographic area. Each state law differs on whether restrictive covenants are permitted, and if so, what the terms of such restrictive covenant can include. The selling physician should be knowledgeable about the applicable state laws before agreeing to such a provision.

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