
CHAPTER 20

SALES AND ACQUISITIONS OF HEALTHCARE PRACTICES

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SCOPE

This chapter discusses the different types of transactions that exist for a physician who desires to buy or sell an ongoing medical practice. The advantages and disadvantages of each are discussed. Factors to consider in each type of transaction are reviewed. A sample form for a letter of intent which outlines the various issues that should be resolved in a transaction involving a sale or purchase of a practice is also provided by the authors

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§20.01 **Types of Practice Sales**

There are two major types of sales or purchases of physician practice.¹ The first is the asset sale in which the buyer purchases only the assets of the practice and none of the liabilities, picking and choosing those desired. The second is the stock purchase (or stock sale) in which the shares of stock in the existing practice² are sold, thereby keeping the same corporation in place operating. There are advantages and disadvantages in each, as we will discuss further below. By purchasing an existing medical practice, a physician may avoid the expenditure of money and time associated with starting a new business from the ground up.

The first step in either instance is for the buyer and the seller to come to an agreement on the general terms of the transaction. It is usually best for the buyer and seller to do this face-to-face, reducing the general terms agreed upon to writing in an outline form so that the details can later be documented by their attorneys or agents. The best vehicle for doing this is usually the letter of intent (LOI). A sample of a letter of intent for an asset sale of a physician practice is included in the Appendix to this chapter. A letter of intent also helps to ensure that both parties are actually in agreement on the basic terms of the sale, before the parties proceed any further.

[1] **Advantages of a Stock Sale**

The advantages of a stock sale in the sale or the purchase of a physician practice may include:

1. A stock sale usually favors the seller much more than the buyer.
2. Seller may avoid recapture of prior depreciation on the assets of the practice.
3. Profit from sale usually taxable as capital gains at a lower rate, an advantage for the seller.

4. The medical practice is kept operating in exactly the same manner as before the sale with no need to renegotiate existing leases, contracts, etc.
5. The mechanics of the transaction are simplified.
6. The corporation (or other business entity) remains in place to handle and resolve any later patient complaints, medical malpractice claims, reimbursements/ repayments to third party payers and other liabilities.
7. Taxes on the transfer of different assets may be avoided.
8. The medical practice may have certain licenses, certificates or approvals that the new owner would otherwise find difficult to obtain.

[2] Advantages of an Asset Sale

1. An asset sale usually favors the buyer more than the seller.
2. Liabilities such as malpractice claims, claims for overpayments (including alleged fraudulent billings) and other unknown liabilities are avoided.
3. Liability for Medicare or Medicaid payments erroneously made to the prior owners can be avoided.
4. Claims of any minority shareholders are avoided.
5. The buyer may receive tax advantages through the purchase of certain assets.
6. Unwanted assets do not have to be purchased.
7. Unwanted or undesirable employees do not have to be employed by the buyer.

[3] Warnings

1. As a buyer, it is recommended that you never accept assignment of or use the prior owner or corporation's Medicare Provider Identification Number (PIN). Always apply for a new PIN far enough in advance so that you do not have to use the prior number. Assignment or use of the previous PIN will always carry with it the liability for Medicare overpayments, false claims, etc.
2. We always recommend that the buyer demand that the transaction be structured as an asset purchase so that the buyer is not obligated for any prior liabilities.

§20.02 Sale of Corporate Stock

[1] General Considerations

As we discussed previously, a seller generally would prefer to sell the shares of stock in a medical practice rather than sell the assets of the practice. Because the sale of corpo-

rate stock is a simpler and quicker procedure than the sale of the business's assets, and it may also preserve the practice's goodwill, it also may be preferred by buyers in some situations. In most situations, however, a sale of assets is more advantageous to a buyer than a sale of the shares of stock in a medical practice.

Sellers prefer to sell their small business corporations through the sale of the shares of stock for the following reasons:

- a. A seller is able to leave from the sale without having to worry after the sale about establishing reserves for unknown liabilities, disposing of unsold corporate assets, or going through the procedures of dissolving a corporation or business entity.
- b. The sale of a capital asset such as stock will result in a capital gain or a capital loss. Capital gains are generally taxed at more favorable rates than ordinary income. The seller should consult an accountant or tax professional to determine the taxation of capital gains or capital losses in the sale of corporate stock.

A physician negotiating to buy an existing practice will usually oppose purchasing the corporate shares of a small business corporation for the following reasons:

- a. The buyer of stock will assume any unfavorable tax position of the seller. Although it is possible for the seller to agree to indemnify the buyer against any such undisclosed liabilities, an indemnification is not as valuable as the freedom from liability afforded by a sale of assets.
- b. If the seller does not own all of the outstanding shares of the corporation being sold, the buyer will have to deal with the leftover minority shareholders.
- c. In a sale of corporate shares, all of the assets of the corporation are conveyed. A buyer may be forced to take assets of the corporation that are unwanted and unusable.
- d. The buyer will not receive a stepped-up basis in the depreciable assets of the corporation after the purchase.
- e. The corporation will usually retain any liability that may exist for overpayments or fraudulent claims made to the Medicare or Medicaid Programs.

[2] **Compliance With Securities Laws**

Until recently, most federal circuit courts have held that sales of small business corporations in which all of the corporate stock was sold to a buyer who intended to run the business were not included in the definition of "security" contained in the Securities

Act of 1933, or the Securities Exchange Act of 1934, and, therefore compliance with these laws was not required.

As a practical matter, in the sale of a physician practice through the transfer of its corporate shares (as opposed to an offering to raise capital for the corporation), an exception will apply that exempts the seller from having to comply with the many burdens imposed on publicly offered stock. Therefore sellers should strive to bring the transaction within the exemption in §4(d) of the Securities Act of 1933.

However, there are no precise guidelines for complying with the statutory private offering exemption afforded by §4(d) of the Securities Act of 1933.

In order to fall within this exemption, the sellers usually try to show that there were only a small number of people to whom the business was offered, no broker was involved in the transaction, the buyer has a long-standing relationship with the seller and the seller's business, the buyer is experienced and sophisticated in the type of business being bought, the buyer is wealthy, and the buyer has used due diligence in the examination of the business property and records before the sale. Clearly, all of these circumstances will not be present in all sales of a medical group, especially if it is a large one. However, the more of these circumstances that are present, the more likely it is that the transaction will fall within the statutory exemption. In most cases, because the nature of the practice of medicine, the transaction will fall within the exception.

[3] **Stock Restriction Agreements and Limitations on Sale of Shares**

Frequently, when the shares in a small business corporation are owned by more than one person, there is some type of limitation on their sale. Usually, this limitation sets up a right of first refusal in shareholders, other than the one offering the shares for sale.

Limitations on the sale of shares, will usually be contained in a shareholders' agreement. However, limitations or restrictions may also be found in the articles of incorporation or the bylaws of the corporation. Sometimes, the limitation may be evidenced by "lettered shares" (i.e., stock certificates with a typed notice on the face of the certificate noting the existence of restrictions or limitations on the sale of shares. Because a shareholders' agreement limiting a shareholder's right to sell corporate shares may not be discovered in a diligent inspection of the books and records of the corporation, the attorney for the buyer of less than all of the shares of a small business corporation should require the seller to represent in writing that no such stock restriction agreement or other limitation exists. Always obtain written warranties regarding this from the seller.

Once a restriction on the sale of shares is discovered, the limitation either must be waived in writing by all of the shareholders or its provisions must be complied with.

Compliance frequently is lengthy and may delay the sale. Compliance with the limitations should be well documented to avoid litigation by a minority shareholder.

Because the provisions of a stock restriction agreement or a shareholder's agreement may vary significantly from corporation to corporation, it is not possible to prepare a form for waiver or for compliance. In documents prepared for this purpose, however, it generally is better to keep the waiver or compliance language of the documents to a minimum and to attach necessary details in the form of exhibits incorporated by reference into the body of the document.

[4] **Transfer Procedures**

The sale of corporate shares is mechanically much easier than the sale of assets for a corporation. The following steps should be followed in a sale of shares:

- a. A letter of intent (LOI) should be negotiated and signed containing an outline of all the significant terms agreed to by the parties.
- b. Execute a contract of sale.
- c. Endorse the certificates or execute a share power transferring title to the shares.
- d. Present the endorsed certificates to the secretary or transfer agent of the corporation for entry of the sale date into the corporate records. Cancel old shares.
- e. Issue new certificates to the buyer. Purchase documentary stamps for the new shares issued.
- f. Execute resignations of old officers and directors of the corporation.
- g. Hold a special shareholders' meeting for the election of new directors.
- h. Hold a special directors' meeting for the election of new officers.

§20.03 **Asset Sale**

[1] **General Considerations**

The sale of the assets by a corporation outside of the ordinary course of business must be approved by the appropriate corporate body (usually a majority of the shareholders). Unless the articles of incorporation or bylaws provide to the contrary, any sale, lease, exchange, or other disposition of less than substantially all the property and assets of the corporation may be approved by the board of directors without consent of the shareholders of the corporation. However, in most situations involving the sale of substantially all of the property and assets of a viable corporation, unless the articles of incorporation do not give the shareholders of the corporation the right to vote

on sales of assets, the transaction must be approved by the shareholders. The buyer should see sufficient corporate documentation to assure the buyer that the transaction has been conducted by the corporation in accordance with its bylaws and applicable statutory provisions.

Under Florida Law, if a sale of assets outside of the ordinary course of business is approved, shareholders who voted against the sale have special rights. Rights of dissenting shareholders, if there are any, should be investigated and resolved prior to concluding the transaction.

The acquisition of a physicians practice through the purchase of specified corporate assets is generally more advantageous to the buyer and less disadvantageous to the seller. The buyer usually prefers to purchase assets for the following reasons:

- a. The buyer can avoid assuming any of the liabilities of the practice.
- b. The buyer can avoid the purchase of unwanted assets by specifying only those assets the buyer wishes to purchase.
- c. A portion of the purchase price can be allocated to each of the assets being purchased.
- d. The cost a buyer pays for a business is directly reflected in the basis of the assets purchased. If a buyer pays more than the seller's basis for a particular asset, up to the fair market value of that asset, the buyer will obtain a stepped-up basis in that asset.
- e. In a purchase of assets, the buyer does not inherit any disadvantageous tax position the seller's corporation may have.

On the other hand, the seller generally does not prefer a sale of assets for the following reasons:

- a. The seller may have the problem of disposing of unsold assets.
- b. If the seller is a business corporation, gain on the sale of assets would be taxed to the corporation and any distributions of the proceeds to the shareholders would be taxed to the shareholders.
- c. The seller is faced with recapture provisions under which, in certain circumstances, the gain on the sale of depreciable assets is treated as ordinary income rather than as capital gain, under the existing tax laws.
- d. The seller may be faced with the recapture of investment credit on the early disposition of investment credit property under existing tax laws.

- e. To the extent that any gain on a sale of corporate assets is taxable income as defined in the Internal Revenue Code, that income is also subject to Florida tax.

Although sellers usually prefer to sell corporate shares and buyers usually prefer to purchase assets, this is not always the case. A buyer may prefer to purchase corporate shares to retain the goodwill of the corporate operation or to maintain secrecy in the change of ownership. A seller may prefer an asset sale to sell only part of the medical practice while retaining the existing corporate form for the remainder.

Because the decision to handle the sale of physician practice as a sale of assets or as a sale of shares has such a significant impact on the after-sale legal position of both the buyer and the seller, the form the sale takes is fundamental to the negotiation of the transaction. The implications of the form of transfer should be evaluated before a purchase price is agreed on. An attorney and an accountant or other financial expert should be consulted by each party making the decision.

[2] **Sale or Transfer of the Practice's Fictitious Business Name**

Occasionally the assets of a medical practice may include a fictitious business name associated with the business (sometimes referred to as a "d/b/a" standing for "doing business as"). The transfer of such a business name may require compliance with Florida's fictitious business name statute,³ or trademark and service mark laws. If the name being transferred is a fictitious name under which the corporation conducts business, the purchaser should make sure that the name is registered in accordance Florida law. The transfer of a fictitious name, like the initial registration of the fictitious name, must be advertised at least once in a newspaper of general circulation in the county in which the name is to be used and must be registered with the department. Registration forms may be obtained from the Florida Secretary of State's office.

The registration of a fictitious business name must make it clear that the owner of the fictitious name is a corporation or the individual signing the registration or transfer form may be personally liable for the actions of the business. Failure to comply with the statute will prevent the business from maintaining a lawsuit and also may require the noncomplying party to pay the opposing party's attorneys' fees caused by noncompliance. However, other than this, failure to comply does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state. Be forewarned, however, that failure to comply with the statute is a misdemeanor offense. Compliance with the fictitious name statute does not give any right or asset to the corporation.

[3] **Allocation of Purchase Price**

The buyer in a sale of assets will want to apportion most of the purchase price to items that can be “expensed” or depreciated for federal income tax purposes. Thus, the buyer wants as little of the purchase price as possible allocated to items such as goodwill that cannot be amortized. The IRS usually taxes capital gains at a lower rate than ordinary income. Thus, the allocation of the purchase price has increased importance to the seller.

The seller will want to allocate as much of the purchase price as possible to items that will be taxed as long-term capital gains rather than ordinary income. In such a case, the seller would want a minimum amount of the purchase price allocated to depreciated items to escape the ordinary income treatment of the recapture of depreciation. Similarly, because a profit made on the sale of goodwill is treated as a capital gain, the seller would want to maximize the amount received for this asset.

Many buyers attempt to allocate large amounts of the purchase price of the business to covenants not to compete, which can be depreciated in short periods of time. Large allocations to such restrictive covenants will probably not survive an IRS audit. The risk in an audit is that the IRS will find that the purchase of a covenant not to compete is actually a disguised sale of goodwill, which may not be depreciated.

To avoid this result, the cost of a restrictive covenant should be calculated according to some defensible formula. In addition, if part of the purchase price is being allocated to a covenant not to compete, another portion of the purchase price should be allocated to the value of the practice’s existing goodwill.

Under the current tax law, the buyer must be careful about the allocation of the purchase price. If the allocation of the purchase price is not negotiated between the parties and made part of the contract, the IRS may allocate the purchase price in the manner it deems proper. This may affect either party adversely.

§20.04 Form for a Sample Letter of Intent

OUTLINE OF LETTER OF INTENT FOR PURCHASE OF PHYSICIAN PRACTICE ASSETS (BY BUYER)

This Letter of Intent is being entered into this _____ day of _____, 2002,
by and between _____,
whose address is: _____
(hereinafter referred to as "Buyer"), and _____,
whose address is: _____ (hereinafter referred to as "Seller").

This Letter of Intent serves as a preliminary outline between Buyer and Seller. Their legal and financial advisors may be guided by this outline of basic areas of agreement when drafting and/or approving a comprehensive agreement for the purchase and sale of Seller's medical practice assets and related contracts, agreement and documents necessary to conclude the sale of the practice. This Letter of Intent is conditional on both parties agreeing to all the terms and conditions of a final agreement for the purchase and sale of the professional practice.

PRACTICE SALE TERMS AND CONDITIONS (ASSET PURCHASE)

1. PURCHASE PRICE:

The total purchase price for the practice assets described in Section 2 shall be:

_____ Dollars (\$ _____),

to be paid to Seller pursuant to the following terms:

_____ in cash, certified check or equivalent at closing or _____.

The allocation of the purchase price is to be mutually agreed upon by the parties prior to closing and included in the final purchase agreement.

2. ASSETS TO BE SOLD:

Included in the purchase price are all tangible and intangible assets currently owned and/or leased by Seller and used in the practice located at _____ including but not limited to:

- Equipment, furniture, fixtures and leasehold improvements
- Custody of patient records
- Goodwill, practice telephone numbers
- Supplies, contracts and agreements
- All other miscellaneous assets used in the practice

A list of included assets will be described in schedules provided prior to closing and shall be made a part of the final purchase agreement. Title to all assets conveyed to Buyer will be free of any liens and encumbrances.

Buyer agrees to accept the assets in an "as is and where is" condition. Buyer has thirty (30) days from the date of this Letter of Intent is signed by all parties to complete any inspection of the assets of practice and to give Seller written notice of any objection to the same. If Buyer fails to deliver to Seller Buyer's written objections within such time, Buyer will be deemed to have waived Buyer's right to object to the same. Seller, at Seller's sole expense, shall have the option to repair such asset in need of repair to working condition as of the date the final purchase agreement is signed. Buyer will be given the opportunity to re-inspect the premises and all assets to be transferred to be satisfied that the assets are on the premises and in working condition at least twenty-four (24) hours prior to closing.

Seller shall contract with Buyer to take possession and custody of and to maintain all of Seller's patients' records for Seller after the closing. Any required notices to patients will advise patients that Buyer will maintain custody of their records. Both Parties agree that a letter from Seller shall be sent to all patients of Seller (and signed by Seller) advising the patients that Buyer will be taking over the practice and taking custody of the patient records.

3. ASSETS EXCLUDED FROM SALE:

Unless specified in the final purchase agreement, this sale of Seller's assets does not include:

- Cash on hand, in banks or other cash assets
- Prepaid expenses or retirement funds
- Patient accounts receivable and other monetary obligations receivable
- Personal items including professional library and works of art
- Medicare or Medicaid provider identification numbers or contracts

A list of the excluded assets are to be described in schedules provided prior to closing and shall be made a part of the final purchase agreement.

4. TIME LINE FOR CLOSING:

- Letter of Intent to be accepted by all parties on or before _____
- Loan application to be initiated by _____
- Due diligence to be completed by _____
- Inventory inspection and valuation to be completed by _____
- Final purchase agreement to be signed by _____
- Non-refundable deposit in cash or demand note in the amount of _____ Dollars (\$_____) to be paid by Buyer upon signing the final purchase agreement
- Closing is to take place on or before _____

5. FINANCING:

Buyer's purchase of Seller's practice is contingent on Buyer securing financing in the amount of _____ Dollars (\$_____), at an interest rate not to exceed _____ percent (____%) for a period of not less than five (5) years. Buyer has thirty (30) days from the date this Letter of Intent is signed by all parties to secure a commitment for financing.

6. LEASE:

Buyer's purchase of Seller's practice is contingent on Buyer entering into or assuming the lease agreement for the professional office space occupied by the practice upon terms and conditions similar to Seller's current lease and for a term, including renewal options, of

not less than the period of any financing or acquisition loan. Seller agrees to assist Buyer in all ways to accomplish this.

7. DUE DILIGENCE:

Buyer has thirty (30) days from the date this Letter of Intent is signed by all parties to complete any due diligence. The purchase of the practice is contingent upon satisfactory evaluation and verification of financial statements, accounting and tax returns, inspection and inventory of equipment, supplies, and other assets of practice. Seller agrees to cooperate with Buyer and its advisors during the due diligence investigation and agrees to provide Buyer the opportunity to inspect the practice at a time mutually convenient to the parties so as not to interrupt the normal day-to-day operations of the practice.

8. PRACTICE EXPENSES:

Seller shall continue to operate the practice in the ordinary course of business. Seller shall pay all expenses associated with the normal operation of the practice until the date of closing, including but not limited to, rent, salaries and wages including all employment taxes, laboratory expenses, clinical and office supplies, insurance, malpractice insurance, taxes, telephone and utilities. Depending on the date of closing, these expenses may be prorated between Buyer and Seller and will be defined in the final purchase agreement.

9. ACCOUNTS RECEIVABLE:***SELECT AND MODIFY APPROPRIATE ONE:***

1. Seller's accounts receivable are (not) being transferred to Buyer as part of this transaction. Buyer/Seller shall retain all accounts receivable accrued to and including the date of closing. A detailed list of Seller's accounts receivable will be provided to Buyer at closing.

or

2. Buyer shall exert its best efforts in the normal course of business to collect Seller's accounts receivable and shall receive a fee equal to ten percent (10%) of all receivables collected by it following Closing, except for insurance payments and payments made directly to Seller for post-Closing deliveries.

10. TRANSITION:

Seller will assist Buyer with the practice transition with the scope of assistance to be mutually agreed to by the parties. Seller may agree to enter into an agreement with Buyer to provide professional services in the practice after closing, with the terms and conditions to be defined in a separate employment or independent contractor agreement to be executed at closing. Regardless, in aid of the transition Seller agrees that Seller will sign a letter to all of Seller's patients, the language of which both Buyer and Seller will agree to in advance, advising the patients that Seller is relocating to another state (or similar factual language) and that Seller has arranged with Buyer for Buyer to continue his practice and continue providing medical care for his patients.

11. TREATMENT REDO AND REMAKES:

Seller shall be responsible for all refunds to patients or payers, required remedial treatment, repayments or requests for reimbursements by insurers, Medicare/Medicaid or other payers, and any fines, penalties, interest etc. associated with any of the foregoing, attributed to professional services provided by Seller prior to closing.

12. RESTRICTIVE COVENANT:

Seller agrees to a restrictive covenant and will not practice medicine, directly or indirectly (other than providing professional services to Buyer), for _____ (_____) years following closing or the termination of any professional services agreement, whichever is later, and a radius distance of _____ (_____) miles from the practice location. Seller further agrees not to solicit, divert, or in anyway encourage patients or employees to leave the practice.

13. INITIAL DEPOSIT:

Buyer will provide a refundable deposit of _____ Dollars (\$_____) with this Letter of Intent. The deposit is to be made payable to Professional Transitions, Inc., Escrow Account, and will be held in a non-interest bearing escrow account. Buyer shall receive a complete refund of the earnest money deposit in the event Seller and Buyer do not agree to the terms of the final purchase agreement.

14. DOCUMENT PREPARATION AND ASSOCIATED EXPENSES:

Each party agrees to employ their own independent legal and financial advisors and to be responsible for their respective expenses whether or not the transaction is completed and the closing takes place.

The attorney for Seller/Buyer will prepare the purchase agreement and all related contracts, agreements and documents necessary to conclude the purchase of the practice. All documents are to be approved by Seller/ Buyer and its legal and financial advisors.

15. BROKERAGE:

No Broker was used by either Party and no brokerage fee, finder's fee, or commission of any kind is due or payable related to this transaction.

16. HEALTH TESTS:

Buyer and Seller agree to waive tests for Hepatitis B and HIV.

17. PRACTICE LIABILITY:

Seller assumes all liability for the practice Seller has conducted prior to the closing. Seller, at its own expense, agrees to maintain professional liability insurance and "tail" coverage to cover any professional liability arising after the closing. Regardless, Seller and Seller alone shall be responsible therefore and shall indemnify Buyer if Buyer is held to pay for any such liability or to defend any such liability claims.

18. NON-DISCLOSURE:

The parties agree not to divulge or disclose to anyone other than their advisors for any purpose whatsoever, information obtained concerning patient records, financial records or information about the practice, Buyer or Seller, the operational methods of the practice or the terms and conditions of this Letter of Intent or final purchase agreement.

19. ASSIGNMENT:

This Letter of Intent is not assignable by either party without the advanced written consent of the other party.

20. NO LIABILITIES PURCHASED:

The parties agree that this is a purchase by the Buyer of the Seller's practice's assets only and Buyer is not assuming or purchasing any of Seller's liabilities or debts.

21. NO ASSUMPTION/ASSIGNMENT OF MEDICARE PROVIDER IDENTIFICATION NUMBER OR CONTRACT

It is expressly agreed that there shall be no assumption of or assignment of Seller's Medicare or Medicaid provider's identification number or provider contract with the Medicare or Medicaid Programs, nor shall Buyer assume any liabilities whatsoever for these. Buyer shall apply for, obtain and use Buyer's own provider's identification number and contract(s), if Buyer so desires.

22. NON-BINDING:

This Letter of Intent contains the outline of a transaction that is under negotiation by the parties. As such it shall not be legally binding on the parties. The parties understand that the documents to be signed at closing will be the only legally binding agreements between them.

23. ATTORNEY'S FEES

It is agreed that Buyer's attorney's fees and costs associated with this purchase shall be paid by Seller at closing out of the proceeds of the closing. Any closing agent or attorney is authorized to withhold and pay such fees and costs.

24. IDENTITY OF BUYER:

The Buyer is to be:

" _____

_____";

a Florida professional service corporation to be formed by or which has been formed by

_____.

25. OTHER TERMS AND CONDITIONS

Any other terms and conditions are:

This Letter of Intent will remain open for Buyer's acceptance through 5:00 p.m., _____, 2002.

By signing this Letter of Intent, Seller accepts the foregoing offer from Buyer and agrees to sell the medical practice and associated assets and property described herein on the terms and conditions set forth.

FOR THE SELLER:

Signature Date

NAME (Print): _____

TITLE/POSITION: _____

FOR THE BUYER:

Signature Date

NAME (Print): _____

TITLE/POSITION: _____

§20.05 Retention of a Security Interest by the Seller

Sometimes, in the sale of assets of smaller medical practices, the entire purchase price is not paid in cash at the time of closing. The buyer may pay for the assets purchased in installments over a period of years and execute a promissory note at closing evidencing and detailing the installment payments. The seller in an installment sale is in a protected position by retaining a security interest in the assets conveyed.

The parties involved in such a transaction must take care to avoid violation of the Stark Act, the Federal Antikickback Act and other federal and state healthcare laws. If the seller retains a security interest, the impact of these healthcare laws must be closely considered.

A security interest in most types of personal property is perfected by the execution of a security agreement and the filing of a financing statement (Form UCC-1) with the Florida Secretary of State and (in certain instances) with the clerk of the circuit court in the county in which the secured personal property is located.

The method of obtaining a security interest depends on the nature of the asset being conveyed. A security interest in real property is perfected by a mortgage recorded with the clerk of the circuit court in the county in which the property is located.

In some situations, however, it is more advisable for the seller of a small business to lease the real property on which the business is located to the buyer rather than deed it to the buyer and take back a mortgage. Leasing the real property rather than selling it may enable the seller to lower the sale price of the business while still receiving a good return on the entire transaction. In addition, in a lease situation, a seller of a business can cure a default through eviction rather than through foreclosure. Again, existing healthcare laws must be closely examined for their applicability to any such transaction.

§20.06 Tax on the Sale of Assets by a Physician Practice

Most smaller corporations and physician practices are set up as subchapter S corporations to avoid the corporate income taxes. However in C corporations (corporations that have not elected S corporation status that allows them to be taxed as a partnership for federal income tax purposes), gain received on the sale of assets by the corporation is taxable to that corporation as capital gain or ordinary income. When money received by the corporation from the sale is distributed to the shareholders, it is ordinarily taxable to those shareholders as dividend income.

The taxable income to the shareholders may be reduced to some extent if the corporation is dissolved. In that case, only the shareholder's gain over his or her basis in the stock would be taxable to the shareholder.

Special tax problems will exist with respect to sales of assets of corporations that were originally C corporations but elected to be taxed as S corporations before the sale of assets, or corporations that were originally S corporations but elected to become C corporations before the sale of assets. The treatment of these problems is beyond the scope of this chapter. If such a situation arises, the attorney han-

ding the sale should consult the C.P.A. or tax attorney representing the seller before the contract is finalized.

§20.07 Use of a Broker or Agent in a Transaction

There may be many advantages to using a knowledgeable, reputable, experienced broker or agent in the sale or purchase of a practice. Often a good broker can perform many functions that will save the parties time, money and frustration. Most often, he or she will already have forms, agreements and contracts which can be used by the parties which will save time and legal fees. However, it is important to determine in advance which party the broker represents. Usually the broker represents the seller. Therefore, if you are the Buyer and you have retained a broker to represent you, you must obtain in writing an agreement from the broker that he or she is representing you and not the seller, regardless of who is paying the broker.

Also, you should ensure that your agreement with the broker:

- a. Specifies that the broker's fee or commission be earned, due and payable only in the event that there is a successfully concluded closing and transfer is completed for the transaction.
- b. You do not waive any rights you may have against the broker or release the broker from any liability or duty, which you may have against the broker.

If a broker, agent or attorney represents one side, it is strongly recommended that the other party retain the services of an attorney experienced with such health care business transactions.

§20.08 Considerations for New Physician Practices

There are many additional considerations that a physician must take into account when starting a new business. Please refer to the chapter in this book which discusses these.

§20.09 References

- ¹ We are assuming for this chapter that the physician's practice is owned and operated as a corporation, such as a personal service corporation (a "P.A.") or business corporation. However, the same principles would apply whether it is a sole proprietorship, a limited liability company (LLC), or some other type of business entity.
- ² This also applies to the membership interest in a LLC, the partnership interest in a partnership, or the purchase of the entire proprietor's interest in a sole proprietorship.
- ³ Section 865.09, Florida Statutes

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