Liability Lifeline
Winter 2016

Buyer beware:
Due diligence needed when purchasing a practice

There are many memorable firsts in life: Your first bike. Your first car. Your first home. Purchasing your first practice is also memorable. In fact, it can be the defining moment in your career.

The excitement that comes with buying a practice for the first time cannot be understated. After all, you've spent years preparing for the moment when you have the keys in your hand and your name on the door.

But before you sign on the dotted line, it is important you do your homework. Buying a practice is a complex process, and the more you know, the less likely you are to be faced with liability issues down the road.

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Buyer beware from page 1

The Dentists Insurance Company reports that too often, dentists purchase practices but fail to do their due diligence before their transactions are finalized. Days, weeks or months may go by before they realize there are problems. To combat this, TDIC recommends prospective buyers thoroughly examine practices before making offers. There are four main areas that should be inspected: finances, employment practices, patient care and equipment.

Finances

Ali Oromchian, attorney at Dental & Medical Counsel in San Ramon, Calif., notes it is essential to examine the financials when buying a practice. Elements such as fees charged, insurance, discounts and taxes should be carefully reviewed. Far too often, dentists are so eager to launch their new business, they overlook the details that can make or break their business.

"A lot of that gets ignored when buyers get excited about buying a practice," Oromchian said.

One common scenario is that buyers simply glance at the production numbers and assume they will continue at the same level under new leadership. But when taking a closer look at patient charts, it may be that the seller performed high-cost procedures that a newer dentist may not, such as implants or large restorative cases. Without performing those procedures as frequently, the new dentist may see a huge drop in revenue.

Oromchian also recommends a careful examination of the sales contract — preferably with an attorney. In one case, a dentist sold a practice, excluding one key detail: the practice's phone number. The new buyer discovered that every phone call was being routed to the seller's new location. In essence, the dentist bought nothing.

"A lot of that gets ignored when buyers get excited about buying a practice. Buyers assume a lot of things, which is why they need dental experts on their side. Otherwise, it's buyer beware."

Ali Oromchian, attorney at Dental & Medical Counsel in San Ramon, Calif.

"Buyers assume a lot of things, which is why they need dental experts on their side. Otherwise, it's buyer beware," Oromchian said.

Another area that is often overlooked by eager buyers is the lease. Sellers rarely own the property on which their practices operate; rather, they lease the office space from the building owner. But when selling their practice, it is important to determine whether the seller can assign the lease to a new owner — in other words, whether the lease can be transferred with the same terms and conditions. Otherwise, the buyer will have to re-negotiate the terms of the lease with the landlord.

According to Oromchian, the best way to mitigate risk is to enlist the help of professionals. Accountants, attorneys, brokers and other experts who specialize in dental practices will have your best interests in mind. While this may cost money up front, it usually pays off in the long run. For example, a CPA can go through tax returns and make sure everything adds up. A business consultant can examine processes and suggest ways to increase production and grow your practice.

"They need to engage a dental professional to help them review the practice financials and data, hiring a dental lawyer to review and negotiate their lease along with maybe a commercial broker, and also engage a dental HR company to help them hire their team," Oromchian said.

Employment practices

When purchasing a practice, a dentist not only inherits patients but staff as well. While a seamless transition is ideal, it is not always realistic. That said, it might be feasible that buyers keep current employees on board; however, it is recommended to meet with the staff to evaluate the team and determine whether to retain or not. The goal is for patients to feel as little change as possible, and the reality is, most patients have established relationships with staff as well as the dentist.

"I recommend hiring everyone back on," Oromchian said. "It reduces the risk of losing patients because of the allegiances they have to staff. Over time, if you see it is not working, you can always reconsider."

Keeping existing staff also reduces the risk of discrimination claims. For example, if a new owner terminates the employment of a pregnant employee or an older employee, those employees can — and have — sued the dentist for discriminatory practices.

It is also recommended to maintain comparable benefits, hours, bonuses and rates of pay — at least until a thorough evaluation of employee performance, job descriptions and salaries is conducted. Any changes should follow guidelines outlined in the employee handbook, if there is one, and should be thoroughly communicated to employees.

Reviewing compliance with employment law is also important. Buyers should confirm that the employer has been documenting overtime, meal breaks and rest breaks. If the previous owner failed to do so, it sets an expectation among staff to continue with the unlawful practices and raises a red flag as to the owner's overall approach to multiple areas in their business operations.

Patient care

TDIC recommends potential buyers carefully analyze patient care practices and processes before committing to buy. Some things to look for are the number of new patients, active patients (those who have been seen in the last two years), patients with and without insurance, and patients who have failed to comply with treatment recommendations. Potential buyers should also find out whether there is an unusually high number of patient disputes or conflicts, or whether there are outstanding claims or suits against the practice.

Remember, if you purchase a practice, you inherit all the patients, not just the ones who are compliant with treatment recommendations and current on hygiene and radiographs. If the seller allowed noncompliant patients to remain as patients of record, you could be liable if a patient alleges a case of supervised neglect.

TDIC recommends buyers review

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Selling a practice

It is not only buyers who should use due diligence when involved in a practice transaction. Sellers, too, must follow certain protocols to avoid risk. One of the most common areas of risk faced by those selling a practice is failing to disclose crucial information to the buyer. This can open up a seller to liability down the road, and what should have been an exciting occasion turns into a time-consuming, expensive battle between the buyer and seller.

"If information is withheld, then the problems start to occur after the buyer has purchased the practice and that's when we see lawsuits," Oromchian said.

Whether intentional or not, dentists have been sued for misrepresentation. Therefore, it is best to err on the side of caution and be completely transparent about all elements of the practice, especially with regards to financials. Overestimating production or cooking the books to justify a higher price tag can be considered fraud.

"Dentists have sued their practice's former owner because they felt they were handed a bad deal, as the practice wasn't worth as much as it was portrayed," Davis said.

Don't assume that once you sell a practice you are off the hook for regulatory violations related to employment law. The statute of limitations is 3—4 years, and employees can, and have, sued their former employers. In one case, a hygienist sued a retired dentist for failing to pay overtime and provide rest breaks. The dentist quickly exhausted his nest egg to pay out the claim, and he had no choice but to come out of retirement and rebuild his practice.

Notifying patients of your intent to sell is also essential. TDIC recommends sending a letter to all patients who were seen in the last two years at least 60 days in advance, specifying the date for transitioning of care with the new owner. This ensures that patients will have time to secure the services of another dentist, should they choose to leave the office.

Caution + control:

Reducing employment liability

The combination of changing employment laws and a litigation-conscious public can be intimidating. And, it's even more so when dental practice employees are prepared to take legal action if they feel an employer breached their rights. Our latest seminar, designed from TDIC's Employment Practice Liability (EPL) claims experience and calls to our Risk Management Advice Line, will show you how to handle employment concerns. Gain the caution and control to navigate past potential employment practice violations such as pregnancy discrimination, termination and sexual harassment.

Get expert advice while earning **C.E. credits** and a **5% Professional Liability premium discount** for two years.

After course completion, you will better understand how to:

- Establish effective hiring and performance review practices.
- Provide employees with a fair and rewarding work environment.
- Implement controls to prevent situations that lead to EPL claims.

Due to the sensitive nature of the issues being addressed and our employer-oriented approach, this course is available to dentists and their spouses only.

Protecting dentists. It's all we do.®

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Winter 2017 Risk Management Seminar Schedule

Thursday, Jan. 12 9:00 a.m. – noon	**The Hawaii Dental Convention*** Hawaiian Dental Association *Honolulu, HI* *Must register for the Hawaii Dental Meeting to attend this seminar. Visit hawaiidentalassociation.net for additional information.
Friday, Feb. 17 9:00 a.m. – noon	**CDA Headquarters – 1201 K Street** *Sacramento, CA* Call 916.443.1234 for guestroom reservations or visit sacramento.hyatt.com
Saturday, Feb. 25 8:00 a.m. – 11:00 a.m.	**152nd Midwinter Meeting*** Chicago Dental Society *Chicago, IL* *Must register for the Midwinter Meeting to attend this seminar. Visit cds.org to register or for more information.
Thursday, May 4 & Friday, May 5 9:00 a.m. – noon & 2:00 p.m. – 5:00 p.m. **Saturday, May 6** 9:00 a.m. – noon	***CDA Presents** — Hilton* *Anaheim, CA* *Must register through *CDA Presents.*

Reserve your space today at **tdicinsurance.com/seminars**

Unable to attend in person? Visit **tdicinsurance.com/eLearning** to explore convenient eLearning options.

Fees

- Dentist: **$50**
- Part-time*: **$25**
- New TDIC Policyholder: **Free** *(within the first policy year)*

*Must have a TDIC part-time Professional Liability policy to be eligible for this discount.

C.E. Details

- **20%** — 3.0 per session

To receive C.E. credit, registrants must be present for the entirety of the three-hour seminar. This seminar meets the Dental Board of California's requirements for 3.0 C.E. credits.

Special Needs

If you or someone in your group requires special assistance to fully participate in the seminar, please call TDIC at 800.733.0634 or email us at risk.management@cda.org.

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The California Dental Association is an ADA CERP Recognized Provider. ADA CERP is a service of the American Dental Association to assist dental professionals in identifying quality providers of continuing dental education. ADA CERP does not approve or endorse individual seminars or instructors, nor does it imply acceptance of credit hours by boards of dentistry. CDA designates this activity for 3.0 continuing education credits. This continuing education activity has been planned and implemented in accordance with the standards of the ADA Continuing Education Recognition Program (ADA CERP) through joint efforts between CDA and TDIC.

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Professional Liability premium discount effective their next policy renewal. To obtain the two-year, 5% Professional Liability premium discount, Alaska, Hawaii, Illinois, Minnesota, New Jersey, North Dakota and Pennsylvania dentists must successfully complete the seminar by Oct. 27, 2017. Arizona, California and Nevada dentists must successfully complete the seminar by April 28, 2017. Any eLearning tests received after the deadline will not be eligible for the discount. Nonpolicyholders who complete a seminar or eLearning option and are accepted for TDIC coverage will also be eligible for this discount.

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patient charts to get an idea of treatment practices and any potential issues that may become problematic. Randomly sample at least 50 patient records to analyze such elements as standard of care, recall compliance, periodontal charting and attrition. These documents can be redacted to ensure patient privacy.

"Buyers are given the opportunity to look at the details. They have a lot of access, but they don't always do it."

Ali Oromchian

"Unfortunately, many potential buyers simply look at the production numbers. They do not look at patient records in depth," said Sheila Davis, assistant vice president, Claims and Risk Management, TDIC. "But this can open them up to risk should there be issues with quality of care."

Another issue to address is how to deal with patients who are mid-treatment. Both parties, buyer and seller, should discuss how to handle billing and finishing the treatment plan. The same goes for retreatment; both dentists should have a mutually agreed-upon plan for addressing patients who have been identified as needing retreatment. It is recommended to have a third party involved to determine whether retreatment is needed.

"You can open yourself up to patient abandonment claims if the seller is in the middle of treatment but the buyer doesn't want to continue the treatment due to pre-existing issues," Oromchian said.

Becoming familiar with your new patients and understanding their dental needs and concerns is one of the best ways to prepare yourself for success in your new practice. Open communication with the seller about ongoing patient issues can protect both the buyer and seller from liability and ensure a smooth transition for all involved.

Equipment

One of the most common property claims handled by TDIC are those relating to failed equipment. Therefore, it is necessary to thoroughly inspect each piece of equipment prior to purchasing a practice. Not doing so can lead to major headaches and expense should the equipment need to be replaced.

"Buying a practice is similar to buying a home," Davis said. "You wouldn't purchase a home without a comprehensive home inspection, and you shouldn't purchase a practice without a comprehensive inspection either."

Sellers only need to disclose whether equipment is in working order. But that definition is murky, and it is in the best interest of the buyer to do an independent inspection to determine the exact condition of the equipment.

"Buyers are given the opportunity to look at the details. They have a lot of access, but they don't always do it," Oromchian said.

Buying a practice is a lot like buying a used car. You don't have to kick the tires or look under the hood, but if you don't, you may end up with a lemon. Arming yourself with as much information as possible, and hiring specialists to do the detailed work for you, can go a long way in ensuring your first dental practice is everything you dreamed it would be.

"Do your homework before buying a practice and make sure you rely on a team of dental professionals to help you through the process, as it is usually the biggest investment you'll make after your primary home," Oromchian said.

Buying a practice — do's and don'ts

Do:

- Hire experts for assistance
- Review patient charts thoroughly
- Carefully analyze the contract
- Assess employment practices
- Examine the lease in detail

Don't:

- Expect the same production numbers
- Assume the lease can be reassigned
- Fail to inspect dental equipment
- Automatically fire existing staff
- Proceed without professional help

TDIC Risk Management has developed a reference guide for policyholders that can help both buyers and sellers during the process of a practice transition. "Buying or Selling a Practice," available online at tdicinsurance.com/reference-guides, addresses contracts, employees, patients and other key information needed by each party.

Questions and Answers

Q. I was informed that one of my employees passed away suddenly over the weekend. She was not at work and her death was not work related. What are my obligations as an employer in this situation?

A. Unless otherwise indicated by your state's laws, consider the following:

If you are in contact with your employee's family, we realize that your first priority will be to send your condolences. Next, locate formal beneficiary designations for all available benefits as quickly as possible. Provide the former employee's final wages to the named beneficiary or her estate. Schedule to meet with the beneficiaries to discuss the benefits they are eligible to receive. Terminate health insurance according to the stated policy. If the employee had a spouse or dependents enrolled in the medical plan, notify them of their options to continue their coverage under COBRA. If applicable, determine the balance of the health care flexible spending account and notify the family about the process to access the funds. Refer to the normal termination guidelines to account for the return of any office property, keys and credit cards.

If the employee had a spouse or dependents enrolled in the medical plan, notify them of their options to continue their coverage under COBRA.

Q. I did a crown on my office manager while she was still employed by me. As a benefit of employment, I offer dental treatment at a reduced fee. We did not schedule her an appointment to deliver her crown because she had not paid her portion of the lab fee. In the meantime, I had to let her go due to her not getting along with the rest of my staff. She has been calling and wanting her permanent crown delivered. Do I have to treat her?

A. Yes. As a health care provider, you cannot refuse treatment in this situation. The best practice would have been to deliver the permanent crown prior to terminating her employment. Because she is mid-treatment, consider contacting her and offer to complete the treatment in progress without further delay to avoid any patient abandonment issues. Carefully document any discussion with the patient, including offering to permanently cement the crown, the risks of remaining in a provisional, and any remaining treatment that had been diagnosed but not started.

If you chose to offer dental treatment as a benefit of employment to your staff, approach the employee-patient the same way as you would approach any other nonemployee patient. Do not become lax and fail to follow certain protocols. Like any patient, employees should be required to update their health history forms, sign informed consent forms and take regular radiographs. They should not be allowed to dictate treatment.

Providing dental treatment to staff may appear to be a benefit to both the dentist and the employee. However, it can create problems for the employer dentist as they now operate in a dual role of patient and employee. Rather than treating your staff, one solution is to work out an arrangement with a colleague where the colleague treats your employees in their office and you treat their employees in yours.

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