Avoiding liability when selling a medical practice facility

By Jordan Fensterman

Practice tips for doctors and other medical providers who own their building and are planning on transferring or selling their medical practice, including limiting liability are set forth below:

Review contractual obligations

A must is to compile and comprehensively review all contracts involving the practice and facility. Often these contracts will terminate upon any sale of the business, but certain contractual agreements may remain in place. Agreements with malpractice carriers, insurance, fire, water, electric, gas, lab, toxic waste disposal and other vendors must be analyzed. Some of the agreements may survive the sale.

Often the purchasing physician or group will have their own vendors and relationships that they want to utilize and in that case the selling physician will want to ensure that their contracts are terminable upon a sale. However, on occasion assignable contracts exist which can be of value to the seller or the buyer. With the ever-increasing frequency of consolidation going on in today's healthcare environment solo practitioners and small group practices should be especially cognizant when selling their practice to a large conglomerate of protective measures to be taken when one elects to sell and become an employee of their prior practice.

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An often-overlooked step that the solo and small group practice doctor can take to add protection to their future under the circumstance where a sale to a mega conglomerate is imminent is to execute a long-term lease for their medical practice with the real estate entity they own well in advance of any sale. This affords the solo and small group physician the ability to assign the lease as a required part of any practice sale to have the assurance that 6 months to a year down the road the mega company cannot simply terminate their employment and leave them empty handed.


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Proper notification on all registrations, renewals, certifications and certificates

Physicians are required to register to practice in New York and to renew their registration every two years thereafter. Additionally, pursuant to 10 NYCRR 1000.5 physicians are required to report most changes in their employment status and practice of medicine to the Department of Health within 365 days of any change. Under Public Health Law §29-D, Title 1, Section 4, certain mandatory practice information is required to be reported to the Department within 30 days of any change. That law also requires that each physician licensed in New York shall create and maintain a Physician Profile and that every physician shall update the profile information within the six months prior to the expiration date of such physician's biannual registration period, as a condition of registration renewal under article 131 of the Education Law.

Failure to properly and accurately update and maintain Physician Profile information can result in charges of professional discipline being brought by the Office of Professional Medical Conduct ("OPMC"). This is true even when a physician is selling their medical practice and retiring because when a physician withdraws from the practice of medicine they are not required to pay the registration fee, but rather may notify the License Registration Unit that they wish to place their license in an "inactive" status. However, failure to notify the department of inactive status or failure to pay registration fees if one does not go "inactive" can itself result in professional misconduct charges. While an "inactive" physician is not required to pay the biennial registration fee they still must complete the biennial registration forms indicating their inactive status.

When a physician relocates due to retirement or sale of the medical practice, any change in mailing address must be reported to the department and must be indicated on the Physician Profile in order to avoid professional misconduct charges.

Controlled substances

The sale of a medical practice facility will never include the sale of any controlled substances, which are not considered assets that can be sold. Good practice is to properly destroy or discard any controlled substances pursuant to the then applicable laws, rules and regulations that apply to controlled substances. Physicians should maintain a complete written record concerning the disposition of the controlled substances. Doctors should contact the Department of Health regarding the specifics of the destruction protocol and written record requirements. Physicians retiring from practice should surrender their DEA Certificates and refrain from writing prescriptions after retiring.

Maintenance and access to patient records

Public Health Law §18.2 and its subsections discuss many, but not all, of the applicable laws regarding access to patient records. When selling a medical practice facility, issues involving complaints from patients and families about a doctor's failure to notify them of retirement and the subsequent inability to gain access to important medical records are prevalent. These issues are a frequent source of complaints on websites and to the OPMC and can have fiscal and lasting reputational consequences for the selling physician.

Patient abandonment claims constitute a form of professional negligence. These claims often result when a doctor does not properly disassociate oneself from the physician-patient relationship. When a doctor is selling a medical practice facility to a large group conglomerate it's often the case that a patient's insurance may not be accepted. Failing to provide adequate notice to a patient which would allow the patient to seek alternative care can be claimed to be (or may result in) causing an injury to a patient. The law mandates that adequate notification be given to patients although the laws are not entirely specific as to what that entails. A good standard of practice is that 30-day notice should

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A Not so Funny Thing Happened on My Way to the Closing

By Irwin S. Izen

For those of us who have been practicing in the area of residential real estate, the old proverb that you never leave a closing table without "closing" rings true for most transactions. But then again, most transactions are "routine," if not a pleasant experience, as sellers wish their purchasers nothing but health and happiness in their new home. However, even the most seasoned practitioner occasionally runs into the unexpected. How you address these unexpected problems and the impact your actions have on the closing will either make you a "hero" or a "zero" in your client's eyes.

The unexpected title continuation search

In the world of real estate and title insurance, a continuation is always performed on the day before or even the day of closing. The purpose of the continuation is to disclose objections or other concerns that have surfaced in between the issuance of the preliminary report and the time of the closing. While we can all identify that "red light" camera judgment that your client swears he/she knew nothing about, or that small claims judgment which now has to be paid, these unanticipated objections should not derail your closing efforts as an escrow can solve the issue and be negotiated along with your attorney's undertaking, provided the title company is satisfied.

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But what happens when your cell phone rings on your way to a closing and it's the purchaser's title company advising you that a Notice of Pendency has been filed on your client's property. Other than trying to avoid driving off the road, you ask the who, what and why of the filing.

A previous purchaser whose contractual changes were not agreeable to your client has filed a Notice of Pendency against the property. The mechanism for filing a Notice of Pendency is contained in CPLR §6501 and provides that a Notice of Pendency may be filed in any action in which the judgment demanded would affect the title to or the possession, use or enjoyment of real property. If the filing party does not assert a claim on title, then filing a Notice of Pendency is improper and under the statute can subject the filing party to pay any costs and expenses occasioned by the filing and cancellation.


IRWIN S. IZEN

Armed with the information of who was the filer, I conveniently stopped in on my way to the closing to discuss the matter and to advise the filer (no surprise he was an arrogant attorney) that he should remove it immediately. The dialogue on his wanting to be reimbursed for the cost of his engineer's report was short and not so "sweet" as the justification for filing when seeking simply monetary damages was not authorized under the statue. Despite this unanticipated dilemma, an escrow and undertaking were sufficient to proceed to closing.

Needless to say, CPLR §6501 cannot be used when the only claim (or cause of action) is for the payment of a sum of money and should never be used as "leverage" in a monetary negotiation. For an attorney to engage in such a filing can constitute unethical behavior and as the filer in this case eventually found out, a possible disciplinary inquiry.

A river runs through my basement

At the closing table, the purchaser objected to the condition of the "AS IS" premises. The heavy rain storm from the night before had flooded the basement. The parties were unable to negotiate and the purchaser, at the closing table, demanded back his contract deposit. The seller was happy to oblige and a check was cut thus deeming the contract null and void.

Substantively, the contract representations concerning the basement being free of leaks was breached. The measure of damages at this stage was difficult to assess and when the parties failed to come to an agreement on such, the offer to cancel was accepted and contract deposit was returned from the escrow on the spot. Had this condition not been exposed due to the heavy rain the night before, the usual contractual language stating that no "representations survive closing" would have made for one very unhappy client.

What do you mean the life tenant is still alive?

Clients come to you selling the home their father had lived in it for years. Dad now lives in an adult care facility and his kids are selling the property. Unbeknownst to you, Dad retained a life estate in

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The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our October issue.

SUPREME COURT- STATE OF NEW YORK
DIFFERENTIATED CASE MANAGEMENT PART- SUFFOLK COUNTY

Present: HON. PAUL J. BAISLEY, JR.
Justice

Index No.:

Plaintiff(s),

- against -

Defendant(s).

Attorneys for Plaintiff

Attorneys for Defendants

Upon conferencing this case with court personnel, this action is hereby referred to an early settlement conference to foster negotiation with a view toward settling the dispute, narrow the issues to be adjudicated, and/or help the parties to understand each other's positions and interests. Alternatively, the parties may mutually agree to proceed with Alternative Dispute Resolution in accordance with Rule 3(a) of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202. 70) and the Suffolk County Supreme Court Commercial Division Mediation Program.

Within 15 days of the date of this order, the parties must complete the discovery set forth below. On the date set forth below, which is within 30 days of the date of this order, the parties and their counsel must appear for and participate in an early settlement conference before the court, unless the parties have notified the court, in writing, of their election to proceed with Alternative Dispute Resolution in accordance with Rule 3(a) of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70) and the Suffolk County Supreme Court Commercial Division Mediation Program.

This order requires the early exchange of targeted, core discovery, and is intended to frame issues for resolution through an early settlement conference. All discovery produced in accordance with this order will be deemed part of discovery under the Civil Practice Law and Rules. The parties' discovery responses in accordance with this order are subject to the amendment and supplementation requirements of CPLR 3101 (h). Accordingly, it is

ORDERED that within 15 days of the date of this order the parties shall exchange all documents in their possession relevant to the claims or defenses asserted including, but not limited to, contracts, invoices, bills, receipts or other proof of payment, estimates, change orders, statements, emails, photographs and videos, and proof of damages; and it is further

ORDERED that within 15 days of the date of this order the parties shall exchange the names and contact information of all witnesses; and it is further

ORDERED that the parties and their counsel shall appear before this court's designated representative for a settlement conference on _____

Dated:

_____

Hon. Paul J. Baisley, Jr., J.S.C.

SUPREME COURT - STATE OF NEW YORK
DIFFERENTIATED CASE MANAGEMENT PART- SUFFOLK COUNTY

Present: HON. PAUL J. BAISLEY, JR.
Justice

Index No.:

Plaintiff(s),

- against -

Defendant(s).

Attorneys for Plaintiff

Attorneys for Defendants

Upon conferencing this case with court personnel, this action is hereby referred to an early settlement conference to foster negotiation with a view toward settling the dispute, narrow the issues to be adjudicated, and/or help the parties to understand each other's positions and interests. Within 90 days of the date of this order, the parties must complete the discovery set forth below. On the date set forth below, which is within 120 days of the date of this order, the parties and their counsel must appear for and participate in an early settlement conference before the court.

This order requires the early exchange of targeted, core discovery, and is intended to frame issues for resolution through an early settlement conference. All discovery produced in accordance with this order will be deemed part of discovery under the Civil Practice Law and Rules. The parties' discovery responses in accordance with this order are subject to the amendment and supplementation requirements of CPLR 3101 (h). Accordingly, it is

ORDERED that within 20 days of the date of this order the parties shall exchange the following, if applicable:

1. Accident reports (including police reports) regarding the underlying accident;
2. The coverage limits of any applicable insurance agreement(s);
3. All photographs and videos depicting the accident, damage to the vehicles involved, injuries sustained by the plaintiff(s), or the accident scene;
4. The names and contact information of all witnesses;
5. Statements of adverse parties;
6. Invoices, bills, or repair estimates for all vehicles involved in the accident, and it is further

ORDERED that within 20 days of the date of this order the plaintiff(s) shall produce to the defendant(s), if applicable:

1. Duly executed authorizations permitting defendant(s) to obtain copies of all medical records relating to the injuries sustained by the plaintiff(s) as a result of the underlying accident;
2. All medical reports in the plaintiff(s) possession relating to the injuries sustained by the plaintiff(s) as a result of the underlying accident;
3. Documents supporting any claim for lost income, and it is further

ORDERED that on or before _____ the plaintiff(s) shall be produced for deposition(s), and it is further

ORDERED that the parties and their counsel shall appear before this court's designated representative for a settlement conference on _____ , at which each party's representative shall be fully authorized to dispose of the case and/or enter into agreement(s) to narrow the issues in the case. In cases where parties are being defended and/or indemnified pursuant to insurance coverage, a representative of the insurance company with knowledge of the case and authority to settle shall be present for the conference or available telephonically during the conference, and it is further

ORDERED that no less than IO days prior to the settlement conference, plaintiffs counsel shall provide a copy the police/accident report and the bill of particulars to the ADR Part located at _____

Dated:

_____

Hon. Paul J. Baisley, Jr., J.S.C.

Avoiding Liability (Continued from page 10)

be given to the patient, the patient should be given an adequate supply of medication for that time period, the patient should be notified that their records will be made available to a subsequent treating provider of their choosing, and the patient should be notified that the physician remains available in case of an emergency circumstance. Notification of all patients by formal letter is highly recommended. This formal letter notification serves to insulate a selling physician from a claim of abandonment.

It is important to note that the sale of a physician's medical practice does not include the sale of medical records that would be legally impermissible. A doctor cannot sell medical records as the information contained therein is confidential. However, the selling physician must still ensure that the medical records are maintained, and patients have access, so it is often preferential to enter into a medical records retention agreement with the purchaser. This means that the transferred records will be retained by the purchaser for the relevant statutory period. In New York the records must be retained and made available to the patient or authorized representative and the failure to do so for the statutory period would subject the physician to disciplinary action by the OPMC.

Note: Jordan Fensterman is a partner in the Health Law, Corporate and Litigation departments at the New York law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP. For more information about Mr. Fensterman or the topic discussed in this article you may contact him at JFensterman@abramslaw.com.

Want to Be a Mentor?

SCBA members interested in acting as a mentor to middle school students through our newly formed Mentoring Program can contact co-chairs Debra Rubin at (631) 462-5888, drubin@rrmatlaw.com, or Cynthia Vargas at (631) 331-0077, Cynthiavargaslaw@gmail.com.