

Transitions Roundtable

We ask two experts the same question on a complex issue.

QUESTION:

What are the roles of a dental practice broker and lawyer, and how they can successfully work together?

WILLIAM P. PRESCOTT, JD, EMBA



THE BROKER'S ROLE

If the selling dentist hasn't found or can't find a purchaser for the sale of the dental practice, engaging a broker is important and well worth the cost.

Brokers typically charge 10% of the selling price, including any real estate, as a finder's fee for matching the purchaser with the seller. The broker does not need to attempt to prepare legal agreements to justify the brokerage fee, which can delay the transition and increase legal fees.

The broker generally prepares the practice valuation, as well as a confidentiality letter to be signed by the purchasing candidates prior to release of confidential practice information. In addition, the broker secures financing for the sale and purchase of the practice and

any real estate, which is more important than ever given the lending environment due to COVID-19. Fortunately, the selling dentist can still be fully paid for the sale of the practice in cash, but it takes effort on the part of the broker to secure the financing, subject to approval by the selling dentist's CPA. The broker may also delineate the business terms of the sale and purchase of the practice and any real estate. If the broker prepares the letter of intent, it should be carefully reviewed by the selling dentist's attorney before it's sent to the selling dentist.

The broker prepares a listing agreement, which is signed by the selling dentist, to enlist the broker's services. The listing agreement provided to the selling dentist by the broker is a contract that states the broker will locate a purchaser for the selling dentist's practice based on the broker's practice valuation in exchange for a specified brokerage fee.

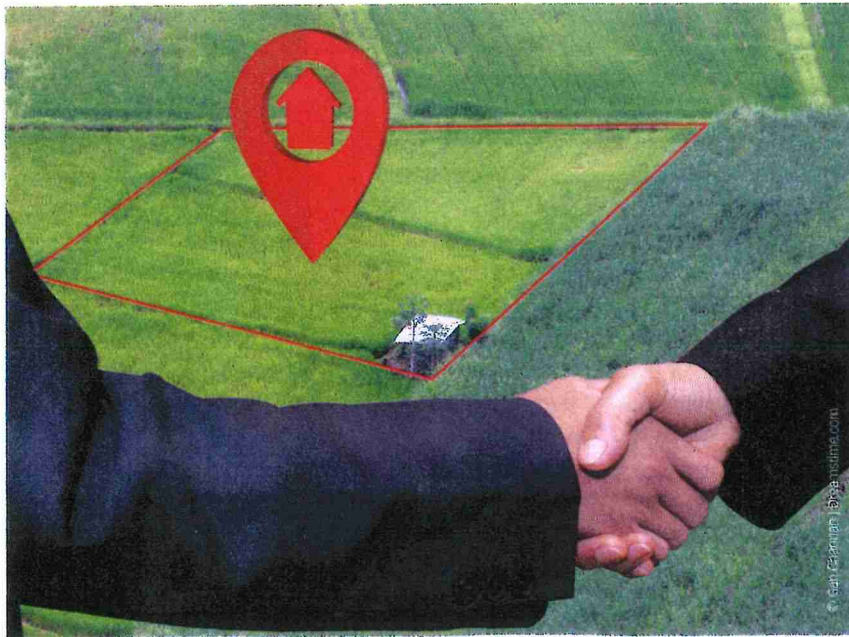
THE LAWYER'S ROLE

The lawyer reviews the listing agreement that the broker provides to the dentist. The listing agreement may contain exclusions of a brokerage fee paid by the selling dentist for candidates who have already been identified. In addition, the terms of the listing agreement should be for a specified period of time and contain termination provisions for nonperformance by the broker, subject to the selling dentist providing the practice information requested by the broker in order for the broker to effectively sell the practice.

The lawyer will either prepare or review and comment on or rewrite the letter of intent if prepared by the broker. The letter of intent should not be a one-size-fits-all agreement; this can take more time to rewrite than to prepare. For example, disagreement over some key terms have been failure to agree on the selling and purchase price, the restrictive covenant radius and duration, completion of unfinished orthodontic or other specialty cases, incorrect allocations to either tangible assets or goodwill, and continued full-time employment of the seller and possibly certain staff members; e.g., spouse. The lawyer should prepare the sale and purchase agreements from a thorough and complete letter of intent. The lawyer, in conjunction with the CPA and broker, deals with the tax issues and allocations for the sale and purchase.

SUCCESSFULLY WORKING TOGETHER

The broker prepared the practice valuation, letter of understanding, and confidentiality letter to be signed by the purchasing dentist prior to receiving confidential practice information. The lawyer for the selling dentist reviewed the letter of intent and revised it. The lawyer then prepared the sale and purchase agreements from the letter of intent. The sale and purchase went smoothly.



The broker should be able to help the parties arrive at a fair price and address the practical items that need to be completed for a **smooth closing** and **postclosing experience**.

UNSUCCESSFUL RELATIONSHIPS

Problems can occur when the broker prepares a letter of intent that is signed before the lawyers review it. In one case, the letter of intent stated that closing would take place in several months and that the practice would be taken off the market. However, the sum of the earnest money deposit, which was in a check, was insufficient for the selling dentist to do so. Had the earnest money been in the form of a promissory note, the sum could have been much larger. The letter of intent also did not state when the staff would be informed of the sale. It stated that the selling dentist would work for six months following closing, but did not delineate the postsale schedule, clinical and/or administrative details, or compensation. Thus, negotiations were necessary for the doctors to agree on what should have been previously agreed upon and contained in the letter of intent.

In another case of a sale to a corporate buyer, the letter of intent did not consider default on the payment of two holdback amounts due at the end of the first and second 12-month periods following closing. The holdbacks were based on practice performance. As well, the selling dentist was required to work for three years following closing for the corporate buyer with limited ability to leave, irrespective of management quality or non- or incorrect payment of doctor compensation and bonuses. Further, the broker prepared the sale and purchase agreements that were inconsistent with the deficient letter of intent. The lawyers had much to talk about!

CONCLUSION

It is important for both the broker and lawyer to work on behalf of the selling dentist's best interest, bearing in mind that if the sale and purchase is unfair to either the selling or purchasing dentist, sooner or later there will be a dispute. And remember, the broker's fee is worth the cost if the selling dentist cannot otherwise locate a purchaser.

THOMAS L. SNYDER, DMD, MBA



Since a broker is retained by the seller to find a suitable purchaser, he or she should have firsthand knowledge of all aspects of the practice. So it makes sense to have the broker take responsibility for negotiating and developing consensus on all business points of the transaction. The broker should be skilled and able to communicate to both parties the best way to handle accounts receivable, patient credit balances, work in progress, and any corrective dentistry (e.g., remakes).

The broker should also be able to help the parties arrive at a fair price and address the practical items that need to be completed for a smooth closing and postclosing experience—for example, getting the buyer up and running with a credit card machine and payroll service. Brokers should be able to map out the benchmarks that need to happen to reach the closing date, such as satisfying lender closing conditions in a timely manner, as well as coordinating the actual closing. The best brokers also can provide contract template agreements, which will help guide the parties through best practices for all business points.

The lawyer's role should be directed at advising the parties of their rights, risks, liabilities, and responsibilities under the sale agreement, which may be drafted by the attorney at the discretion of the parties. A seller's attorney will generally want to ensure that the seller can walk away from the transaction with as few strings attached as possible. Conversely, a buyer's attorney will want to try to attach strings, so if things don't go well or there have been misrepresentations, the buyer can have some recourse against the seller.

A large portion of the attorney's involvement should be developing terms for fair indemnification, or the contractual right of one party to have their costs covered by the other party should the party that is indemnified suffer any losses. Indemnification is the primary means lawyers have to try to ensure that liabilities that arise after closing are the responsibility of the buyer, and liabilities resulting from the seller's operation of the practice remain the responsibility of the seller. It is also possible for an attorney to engage in negotiating business terms, especially if the broker wishes not to be as engaged as mentioned above.

In the end, it's important that both broker and attorney communicate at the outset so they both understand their respective roles and avoid any duplication of effort. **DE**

WILLIAM P. PRESCOTT, JD, EMBA, of Wickens Herzer Panza in Avon, Ohio, is a practice transition and tax attorney, and former dental equipment and supply general manager and representative. His new book, *Joining and Leaving the Dental Practice*, is available through the American Dental Association Center for Professional Success. ADA members can download the e-book for free at ada.org/prescottebook. For this and Prescott's other publications, visit prescottdentallaw.com. Contact him at (440) 6958067 or wprescott@wickenslaw.com.

THOMAS L. SNYDER, DMD, MBA, is the director of transition services for Henry Schein Professional Practice Transitions. He can be reached at (800) 988-5674 or tom.snyder@henryschein.com.