

## Lease and Real Estate Matters

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### **Lease of Practice Facility**

When establishing by acquiring or relocating your dental practice, it is imperative to obtain a lease for the practice facility from the landlord, be it a third party, the selling dentist or family member — often the seller's spouse.

If you are acquiring your practice, you are typically planning to lease the premises where the seller's practice was located. Therefore, it is important for the purchaser to assess the practice facility in terms of the current or new lease prior to the acquisition taking place. This is a form of purchaser due diligence.

Usually, the seller's lease will be assignable in accordance with the seller's current lease terms and renewal option(s). However, the seller typically is responsible for the lease obligations for the "sublet" premises if the acquiring dentist does not live up to his or her lease obligations.

Alternatively, the landlord for the premises of the seller's practice may draft a completely new lease. In this situation, however, the rental rate and other terms are usually negotiated in favor of the landlord and you may not have a choice in the matter if you desire to remain in the premises rather than incur the costs of an expensive relocation.

Under usual circumstances, the tenant/acquiring dentist should

negotiate the right to record the lease or a short-term form of the lease (a statement of the lease terms other than rent). This is particularly important for leases with a long-term or in situations where the acquiring dentist makes extensive leasehold improvements, so that such tenant is protected from the possibility that the landlord will sell or encumber the premises in the future. In most states, the effect of recording a lease serves as notice to a third party that a lease exists and any purchaser or lien holder (unless otherwise agreed) must purchase or receive an interest in such property, subject to or subordinate to the lease.

*(Continued on page 22)*

(Continued from page 21)

## Acquiring the Practice Real Estate

### Options/Rights of First Refusal

Frequently, a dentist selling a practice will own the premises in which the practice is located. In this situation, the seller may desire to sell the practice real estate as a condition of selling the practice. However, the seller should anticipate a waiting period until the purchaser is in a financial position to acquire the practice real estate.

In this situation, the purchaser may be obligated to acquire the practice real estate. Alternatively, the purchaser may negotiate an option and/or a right of first refusal to acquire the practice real estate. Under an option to purchase, the purchaser has complete freedom to exercise or not exercise the option during the designated option period(s). Under a right of first refusal, the purchaser's right must be first triggered by an offer from a third party for the purchase of the real estate. The underlying theory is whether the option or right of first refusal is that the purchaser is provided with the ability to acquire the practice real estate at a future date. It should be noted that both the option and the right of first refusal may be utilized simultaneously.

The purchase price for the practice real estate may be agreed upon or may be determined by way of appraisal. In appraisal situations, the seller and or purchaser may select an appraiser and the two appraisals would be averaged and the purchase price determined. Another method would be for appraisers selected by the seller and purchaser to select a third appraiser, whose appraisal would be binding upon the parties. This method utilizes one appraisal rather than two or three. The point to remember is to agree (in writing) on the appraisal method at the time the option and/or right of first refusal is guaranteed.

Although the acquisition of the

practice real estate is and should be a separate transaction from the acquisition of the practice, the analysis of your obligation, option and/or right of first refusal to acquire the practice real estate for the practice premises is also part of the due diligence process or purchase investigation. This would be completed prior to your decision as to whether to acquire a particular practice.

### Environmental Considerations

As a cautionary note with respect to the acquisition of the practice real estate or any real estate, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CHURCHLY"), commonly known as the Superfund ACT, imposes strict, joint and several liability on various categories of responsible parties for the clean-up of hazardous substance contamination, subject to very limited defenses. One category of a potentially responsible party includes a

present owner of contaminated real property, as well as any individual or entity that was the owner at the time the hazardous substances were released (e.g., leaked or spilled) on the property.

For example, you acquire your practice and the practice real estate in a high-traffic area, which is ideal. You practice successfully for five years. In the sixth year, you decide to repave the driveway and parking lot, which includes the removal of the existing layers of asphalt and installation of a sound base of concrete. During excavation, decomposed storage tanks containing gasoline and a variety of hazardous substances are found buried on the site dating back ten years to when the site was used as a service station. The Environmental Protection Agency finds out about the past practices and determines that there is substantial contamination, and that you and previous owners are jointly and severally liable

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## Legal Issues...

under CERCLA. However, the previous owners of the property are found to be insolvent and uncollectible, and you are faced with having to pay substantial clean-up costs and fines attributable to the contaminated soil, even though you had nothing to do with the creation of the problem. Such costs could be substantial, running into hundreds of thousands of dollars.

This example illustrates the disastrous consequences which can and are associated with the acquisition of the practice real estate. One way to minimize potential risks associated with such an occurrence is to engage an engineering firm to conduct an environmental assessment or study, and to make the real estate acquisition contingent upon a satisfactory report. Environmental assessments are generally conducted in "phases." The initial phase should include an analysis of the previous owners and uses of the site, an analysis of the

surface soil conditions, a search of the records to determine the existence or removal of underground storage tanks, regulated electric transformers or other equipment which may contain PCB-contaminated oil and which may have leaked. If the environmental engineering firm finds sufficient cause after conducting an initial phase examination to conduct additional phases of investigation (such as soil sampling and lab work), the engineering firm would so advise.

While an environmental assessment is particularly desired by the purchaser of the real estate, the seller may be willing to share some portion of the cost of such an assessment by means of a closing cost reduction in the purchase price. The key regarding environmental problems, from a purchaser's standpoint, is their identification prior to the closing of the practice acquisition, even though the practice real

estate may not be purchased until a future date.

In summary, the following should be considered relative to the practice facility:

1. Negotiate the terms of any premises lease;
2. Consider recording any premises lease;
3. Consider granting or requesting an option and/or right of first refusal relative to a sale of the practice real estate;
4. Agree upon the method of appraisal or purchase price for the purchase and sale of any real estate; and
5. Complete the environmental assessment in the event that you are purchasing the practice real estate. ●