MULTIPLE EXAMPLES OF WHY A LAWYER CAN'T REPRESENT BOTH SIDES OF A TRANSACTION

By Patrick J. Wood, B.A., J.D.

As a law firm, Wood and Delgado has spent more than 35 years representing veterinarians and other medical professionals in business transactions, and we are often asked to represent both sides of a transaction. Our answer is always the same: "NO," because we cannot ethically look out for the best interests of both sides. Furthermore, the California State Bar Code of Ethics effectively makes it unethical to do so, if one follows the mandate and intent of such Code. Our advice would be to run as far and as fast from an attorney who attempts to represent both parties on a veterinary practice acquisition.

The following is a brief summary of some of the conflicts that occur in a simple veterinary practice sales transaction, but by no means is this article intended to cover every conflict that a lawyer (and a prospective client) should recognize when asked to represent both parties in a transaction. They include:

1. Purchase Price. If you have handled dozens of veterinary practice sales, you generally have a good idea on what they are selling for. Suppose a Buyer and Seller contact you, advising you that there is no broker involved. If your experience in these transactions tells you that the sales price is below or even substantially below market, don't you have the duty to advise the parties? Of course you do. However, by notifying one party (or keeping it secret) you have created an actual conflict which destroys your ability to represent both sides of the transaction.

2. Purchase Price Allocations. Although we urge the parties in a transaction to consult with their CPA's on this matter, they very often ask their attorneys for advice. The purchase price allocations are very important, in that the Seller wants most of the purchase price allocated to goodwill, a category that allows the Seller to be taxed at a much lower, capital gains rate, sometimes saving the Seller as much as $100,000 in taxes. Conversely, the Buyer wants to quickly depreciate the purchase price, as it could significantly reduce the Buyer's income tax liability from the income of the veterinary practice. This category currently allows a first year $100,000 write off on equipment alone, and equipment generally is written off for seven years, versus 15 years in the case of the capital gains-eligible goodwill category. How do you advise the parties when you are representing both sides? Answer: you can't.

3. Continuing Liabilities. Who should be responsible? For how long? Should the Seller pay the Buyer to perform "redo" work and other continuing liabilities? If so, how much? Depending on which side you represent, your advice might be substantially different. For instance, you might advise Seller that he or she should not be responsible for more than the generally applicable statute of limitations. Since a good portion of what the Buyer is paying for is goodwill, how do you think the owner will respond when the Buyer refuses to redo a procedure, and the Seller has been released from any obligation to redo pursuant to the purchase agreement?

4. Covenant Not to Compete. Another source of controversy. Should the covenant radius be 10 miles, 15 miles, 20 miles? Should it be for 3 years, 5 years, 7 years? What should the remedies be for a violation? For instance, should there be a monetary penalty? If so, how much? In one case that this author was involved in, a covenant violation provided that a judge could issue an order stopping the medical professional from practicing within the covenant area, but only if actual damages could be proven. Since the clients seen by the medical professional violating the covenant would not admit they paid the medical professional for his services, actual damages could not be proven and an injunction wasn't issued.Thus the violations were allowed to continue! The covenant language should have said that the judge could issue the order without proving the actual amount of damages (i.e., how much the owners paid to the veterinarian), but the attorney hadn't drafted appropriate language.

5. Covenant Not to Treat. Often times, a selling veterinarian will open a new office just outside a 15 mile covenant area and will advertise heavily, drawing many of the former clients to the new practice. This is particularly true when the respective practices are located just off a freeway, and it is a short commute between the offices. We would counsel the Buyer to have a covenant not to treat, but if we were representing the Seller, we would not want to limit his or her potential source of business. What should the attorney advise?

6. Contingencies to Closing. If you represent the Seller, you want few, if any, contingencies to closing the deal, and you want a substantial security deposit if the Buyer breaches the contract. If you represent the Buyer, you want many contingencies, and you want the Buyer to be able to back out of the deal up to the projected closing date, without penalty. What should the attorney advise?

Many of the clients we speak with hope that we will represent both sides of the transaction, as they see this as a way of saving money. Since the interests of the Buyer and Seller in many instances are diametrically opposed, how can an ethical attorney truly represent both sides of a deal when both parties best interests may be in direct conflict?

In most cases, the State Bar limits an attorney where such conflicts exist. For instance, under California Rules of Professional Conduct, Rule 3-310, a lawyer is not allowed to accept representation of more than one client in a particular manner where the interests of the clients potentially conflict without the "informed written consent of each client". Furthermore, if during the course of representation, it becomes apparent that the interest of the clients actually conflict, the attorney must again obtain an informed, written consent from each client. The key element in this rule is that the client must give an informed, written consent, specifying the nature of the conflict. However, it is almost impossible for a veterinarian to give an informed consent when so many different conflicts can arise in a simple veterinary practice sale. More importantly, if the attorney isn't even familiar with the few examples that the author has set forth above in this article, how well are your interests being represented?

It may seem attractive to a Buyer and a Seller to hire one attorney to try to save money in a veterinary practice sale, particularly when they think it's just a "simple transaction," or they are

getting along very well during this “courtship.” However, like so many courtships, differences later develop, and if the purchase document was drafted by one attorney trying to serve two masters, one or both of the masters would likely resent such dual representation at a later date.

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