John Smith, DO has decided to buy the medical practice of Dr. Robert Jones and they have agreed on a price. What documents should Dr. Smith expect to see at closing?

**What is being bought?** There are two basic ways to buy a practice: (1) purchase the stock if the seller is incorporated, or (2) purchase the seller’s assets. There are several considerations to this:

- If Dr. Smith buys Dr. Jones’ professional association stock, he buys not only the assets of the practice but its liabilities as well. Is that a good idea?
- Conversely, purchase of all assets does not necessarily mean purchase of all liabilities.
- If the seller is incorporated and doing business as Robert Jones, DO, PA, Dr. Smith is not likely to want to purchase that entity - even if no liabilities went with it.
- When stock is purchased, there are complicated tax rules. For example, Dr. Smith cannot deduct the stock’s price as an expense, nor can he depreciate it, while he may be able to depreciate the assets. Tax advice is desirable here.

For these reasons the typical practice sale involves only purchase of the seller’s assets. Even so, does Dr. Jones want to buy all the assets - such as accounts receivable? Dr. Jones’ representations about his A/R may be unrealistic, for example, amounts claimed may be “billed charges” not rationally related to “allowable amounts.” The claims could be mis-coded/upcoded, for services otherwise not originally billed timely, properly or for services deemed not medically necessary or within the scope of coverage. Thus A/R is not generally considered an attractive asset by the purchaser.

**Bill of Sale.** The primary document will be a Bill of Sale. In this document, the seller agrees to sell specified assets, warrants that he has title to those assets, and the purchaser agrees to buy those assets. The actual assets - examination tables, exam stools, equipment, trash cans and the like - will be listed, room by room, item by item, on an attached schedule.

If the purchaser is assuming any liabilities those be explicitly stated, and those liabilities, like the assets, will be listed on an attached schedule. For example, if Dr. Smith purchases financed equipment, he will agree to assume those financing obligations and to execute any new documents required by the financier. Other liabilities that Dr. Smith might assume may include telephone and utilities accounts, yellow pages listings, payroll during the transition, and the like.

**Seller’s Closing Certificate.** In this document, Dr. Jones states that (1) he is the owner of the assets transferred and has authority to execute the certificate, (2) all representations and warranties made in the Bill of Sale are true, and (3) the seller has performed all conditions to the closing. This could make the seller liable for fraud if things are found to be not as represented.
**Asset Purchase Note.** If bank financing is not obtained, Dr. Smith will execute a Promissory Note payable to Dr. Jones in the amount of the agreed upon sale price, with interest and payment terms specified. A description of the collateral securing the note, generally identical to the assets list under the Bill of Sale, will be attached.

**Security Agreement.** In this document, Dr. Smith - as a debtor - grants Dr. Jones - as a secured party - an interest in the collateral to secure the Note. Dr. Smith will agree not to sell, transfer or “encumber” the collateral except in the usual course of business. Thus, if an examination table wears out it can be replaced, but Dr. Smith cannot sell it to pay a personal debt.

Dr. Smith will also agree to not change the form or location of his business organization without advance notification. Thus, Dr. Smith cannot (1) associate two other partners in his practice the day after the closing, (2) merge his practice with another physician, (3) convert from a professional association to a professional limited liability company, or (4) move the practice to a different city without the seller/secured party’s permission.

In the Security Agreement, Dr. Smith will typically agree to insure all the purchased assets/collateral and in doing so, to name the seller/secured party as an additional insured, and provide copies of the insurance policy to the seller/secured party. Dr. Smith may also be required to obtain a separate “umbrella” insurance policy in a specified amount covering all of his practice assets and not cancel that policy without advance notice.

Default events will be specified. Dr. Smith may be in default if (1) he fails to pay the seller, (2) files bankruptcy, (3) breaches any provision of his written promises to the seller, (4) assigns the purchased assets/collateral for the benefit of his creditors, (5) dissolves his professional association, or (6) has his medical license suspended. In the event of default, the seller/secured party may demand payment of the entire Note, or may take control of the purchased assets/collateral and sell them to satisfy the debt. In doing so, Dr. Smith will grant the seller/secured party the explicit right to enter the office and seize the assets.

**Name Permission.** If Dr. Jones is incorporated as Robert Jones, DO, PA but doing business as Main Street Clinic, that name will likely have value to Dr. Smith. A document should be prepared to assign to Dr. Smith the right to use the name Main Street Clinic, and a new assumed name certificate prepared and filed at the county courthouse. Similar issues may arise with other forms of publicity, such as signage and advertising, website URLs and email accounts, that need to be addressed legally.

**Assignment of Lease.** Assuming the practice is located in office space Dr. Jones leases, it will be necessary for Dr. Smith to assume Dr. Jones’ lease obligations. This will be a fairly short document, with the underlying lease attached as an exhibit. The landlord will typically execute a document called “Consent to Assignment” that will be included as part of this package. On the other hand, if Dr. Jones is selling his practice at the end of a lease term, Dr. Smith may simply execute a new lease agreement.
Non-Competition Agreement. The last thing Dr. Smith will tolerate is for Dr. Jones to open up a new practice down the street, so a non-competition agreement is typically included. Like those in employment agreements, this will include a prohibited geographic area (e.g., 7 miles), a timeframe (e.g., 3 years) and a scope of activity (e.g., family practice) with exceptions (e.g., maintaining hospital privileges at a facility within the area). Although non-competition agreements are disfavored by Texas courts in employment agreements, they are generally upheld in sale-of-business settings. In fact, one of the first non-competition agreement cases ever decided in Texas (in the late 1800s) involved a physician who sold his practice and opened a new one - in the same town. The buyer physician won that case.

Payor Contracts. Dr. Jones cannot sell his Medicare or Medicaid provider numbers, so Dr. Smith must apply for and receive his own provider status. The same goes for commercial insurer contracts, which are typically associated with Dr. Jones’ tax identification number. Thus, assumption of payor contracts does not occur and Dr. Smith should plan to have his billing ability up and running the first day he enters the purchased practice.

Medical Records Issues. Without medical records, Dr. Smith has little to go on when he treats his first patient. But are the seller’s medical records “assets” that Dr. Smith can buy? One body of thought is that medical records cannot be “sold” but only “transferred” in a “side agreement,” but this seems disingenuous. After all, hospital medical records - which are subject to the same confidentiality rules as physician’s medical records - are usually sold as assets when a hospital is sold. Why are physician’s medical records no less subject to asset characterization? Texas Medical Board rules now state that “transfer [of] ownership” may occur, possibly ending the debate, since transfer of ownership usually equates with a “sale.”

Furthermore, obtaining written consent of all the seller’s patients to transfer records is impractical and probably impossible. Under HIPAA, if the purchaser “is a covered entity or, following completion of the sale or transfer, will become a covered entity” then the seller may use and disclose protected health information for “due diligence in connection with the sale or transfer of assets” to the purchaser. In other words, sale or transfer (however characterized) of medical records is permitted under HIPAA as part of “health care operations” without the necessity of written patient authorization.

But the asset value is not great. A patient may never seek care from the purchaser, or can make the purchaser copy their records and send them to another physician. In either event the purchaser must incur the costs of storage and maintenance, retain the record for a specified time (see below) or face being fined by TMB if a complaint is filed and no record can be produced.

The seller has obligations, too. Under TMB rules the seller must: (1) notify all patients of his departure that were seen within the last two years, (2) place a notice in his office, (3) publish notice in two newspapers, and (4) send a copy of the notice to TMB. Thus it may be wise to include in the practice sale documents a written agreement about (1) transfer of some or all of the records (for example, Dr. Smith legally needs to only have records of patients seen in the last seven years (and seven years from the date of last treatment if the patient is under twenty-one))
and so may only agree to purchase those specific records.), and (2) performance of the seller’s obligations imposed by TMB (and who will pay for it), including proof thereof.

**Conclusion.** Simply finding an attractive practice to buy at a fair price is only part of the task. Terms of the “deal” itself as reflected in the documents have to be considered and negotiated, and Dr. Smith should be represented by counsel to insure he fully understands his rights and obligations in what may well be one of the most important transactions of his lifetime.

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