



Letters of Intent: Why Use Them?[©]

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Letters of intent and related documents are used in veterinary business negotiations, more commonly for employment contracts and practice acquisitions, to put preliminary terms into writing. They are useful planning documents and focus the parties on discussing the salient terms of the transaction. Articulating the necessary ingredients of the business arrangement early in the negotiations, helps ensure that the parties and their advisors pursue the details of a transaction that is likely to being consummated.

There are several advantages to using letters of intent early in the negotiation process and one of the main advantages is they allow the parties to memorialize an understanding so as to continue pursuing the deal. They also generally are non-binding, allowing the parties the flexibility to adjust the terms when new information emerges, all while staying within the “theme” of the proposal. There are a few exceptions however, namely, the obligation to negotiate in good faith and maintain the information confidential; two provisions that are binding and enforceable. Finally, they may be required by lenders to assure them of the basis for the requested loan.

Letter of Intent Basics:

A letter of intent is a document describing preliminary terms in a complicated business negotiation. It usually is written in a letter format and provided by the party who is presenting the proposal. It is a useful tool, as it provides psychological comfort that a deal is moving forward, documentation necessary for lenders and consultants to formulate an opinion, and it can get the parties thinking about the specific details of the offer. In veterinary medicine these documents are often used to negotiate employment agreements, practice acquisitions and partnerships.

The letter of intent often includes some, *but never all*, specific terms of the potential business arrangement. Which terms are included vary with the purpose of the letter. Below are some terms that might be included in a letter of intent:

1. Offer of Employment
 - a. Approximate start date
 - b. Contract term
 - c. Working hours
 - d. Compensation
 - e. Benefits
 - f. Non-compete

2. Terms of Practice Acquisition
 - a. Percent ownership that is being considered
 - b. The purchase price if known
 - c. If the purchase price is unknown:
 - i. The date consultants, appraisers, or lenders would be hired
 - ii. The date the books would be closed for appraisers to examine
 - iii. The method by which a purchase price would be determined (fair market value, excess earnings, vs. feasibility analysis).
 - d. How the purchase price will be paid
 - e. Whether it is an asset or a stock sale
 - f. If it is a stock sale what kind of stock sale it is
 - g. Whether or not the real estate will be sold along with the practice
 - h. Whether a non-compete will be required of the parties
 - i. Approximate closing date
3. Partnership Terms
 - a. Percent of ownership being offered
 - b. Price and terms of payment
 - c. Options and/or right of first refusals to purchase add'l interests
 - d. Buy-out terms for death, disability, bankruptcy, divorce, loss of license, and retirement
 - e. Life and disability insurance requirements
 - f. Requirement for capital call
 - g. Non-compete
 - h. Terms of employment as co-owners

Usually the parties do not intend most of the terms listed above to be binding because they are still in the course of negotiating the terms of the deal. However, they may choose to include several types of binding clauses:

1. Exclusivity or “No Shop” Clauses – these keep the buyer from seeking out other sellers or the seller from seeking out other buyers.
2. Confidentiality Clauses – these keep employees from sharing the terms of their negotiations with other candidates or keep a potential buyer from using the information they learn through negotiations to help a competing practice.
3. Good Faith Negotiation Clauses – here the parties establish a “contract to bargain”, this does not guarantee a contract will be reached but it does keep each party from renouncing the deal, abandoning negotiations, or insisting on conditions that do not conform to the preliminary agreement. “Good faith” is largely an abstract, undefined concept but can be loosely defined as an honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled.
4. Expense Sharing – these will be included if the parties intend to split the cost of hiring appraisers or other professionals to help facilitate negotiations.
5. Contract Pre-Requisite Clauses – in these the parties may require one another to perform certain acts before the final contract can be drafted. These may include performing appraisals, releasing financial information, or signing a release for background checks.

Even without the above clauses, a letter of intent may still inadvertently create obligations on the parties. Whether explicitly stated or implied the letter may do the following:

1. The letter itself may imply a duty to negotiate in good faith even without a “good faith” clause. If this is so, then the parties then have to show that they made genuine efforts to negotiate over a reasonable period of time.
2. If the letter contains too many important terms of the final contract, then the courts may hold that any remaining details were a mere formality and that an enforceable contract existed. The courts may then penalize parties for not completing the contract terms.
3. One party may sue for damages if they heavily rely on the other party’s firm promise to make a deal and no deal is made. Examples might include someone relocating because of a letter of intent regarding employment or taking out a loan for purchasing a practice.

A disgruntled party might use any or all of the above to file lawsuit. When these cases come to trial, the courts do not clearly favor any particular party or rules of thumb. The courts’ decisions regarding vague letters of intent vary widely with the facts presented. This makes it difficult to anticipate how the court will find. It takes careful drafting to get the business planning benefits of the letter of intent and avoid undesirable and unintended consequences. In order to utilize the advantages of a letter of intent and minimize the risks of litigation, veterinarians who wish to use them, should consider the following:

1. Consult an attorney – because letters of intent must be balanced somewhere between no agreement at all and a full-fledged contract, precise drafting is required. A lot of heartache, time, and money can be saved by having an attorney draft the letter at the onset.
2. Don’t make the letter sound like a contract – the more the letter of intent looks like, sounds like, and has enough terms to make a contract, the more likely a court will hold it to be one.
 - a. Using the letter format and the right protective language makes it look less like a contract.
 - b. The letter should include:
 - i. Clauses, clearly, indicating whether each term is meant to be binding or not, so misunderstandings between the parties are minimized.
 - ii. A list of any and all steps that must be accomplished before the parties can consider a final, definitive agreement. Expressly state any issues that are still unresolved. This can be the purchase price or terms of the non-compete. This allows you to show, if the process is interrupted, that negotiations were not complete.
 - iii. Hypothetical language using words like “understanding” “would” “should” that will help give the impression that the current agreement is not definite and may change given additional information or events.
 - iv. A “drop dead” date, which is a date past which the negotiations automatically cease. This provides an pre-determined end point to the negotiations.
 - c. Do not include:

- i. Too many details of the material terms, which will appear in the final agreement. Otherwise, the court may determine the letter of intent to have sufficient information to be a binding contract. For example, you may stipulate that the value of the business will be determined through an evaluation process, but you would not stipulate the details.
 - ii. A deposit or fee to be paid before entering into negotiations because non-refundable fees tend to make writing binding.
 - iii. Definitive language including words like “agree”, “will”, “shall” which may imply that the referenced terms are definite and decided upon.
3. Match your actions to your words
 - a. Acting like the letter of intent makes the potential contract a “done deal” may indicate to a court that a contract already existed. The court may interpret fulfilling any of the parts of the agreement and indication that the parties intended the letter of intent to be binding obligation. For example, in the employment contract context: purchasing employee benefits by the employer or relocating to the place of employment, may be evidence to the court that there is a contract in place.
 - b. As you proceed with the negotiations, record your efforts to comply with the binding terms of the letter and any reasons that you decide to discontinue negotiations. This helps show that you were negotiating in good faith.
4. If things fall through, stay professional
 - a. This will likely be an emotionally charged time and you should resist the urge to take this negotiation failure personally. Avoid confrontations, have a neutral witness present if the parties do need to discuss the matter, and if the other party starts acting inappropriately or violently, disengage and do not respond in kind.
 - b. Don’t quickly reengage in new negotiations. Give a period of time between negotiations to allow the parties to think about and process the information exchanged. It also may be helpful to allow parties to “recover” from difficult, sometimes hurtful discussions.

Conclusion:

Letters of intent are important tools because they help veterinarians who are interested in business relationships lay down the foundations for subsequent negotiations. When using them, veterinarians should be aware of their consequences, consult with an attorney, and use caution and common sense. This way they can use letters of intent as vehicles for progress and avoid unexpected legal potholes. Veterinary Business Advisors assists veterinarians and their attorneys nationwide with developing letters of intent and planning negotiations for diverse areas of business, including, employment, partnerships, acquisitions and leases.