

PEARLS FOR DEVELOPING A PRACTICE
- GOOD ADVICE FOR THE YOUNG
PHYSICIAN:
LEGAL AND PRACTICE ISSUES

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FINANCIAL DISCLOSURES

- NO FINANCIAL RELATIONSHIPS WITH ANY PROGRAM SPONSORS
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Practice Options

- Clinical Practice
- Research
- Industry
- Administrative
- Government
- Insurance

Clinical Practice Settings

- Academic Medicine
- Community Hospital Affiliated Group
- Private Practice
 - Solo
 - Single Specialty Group
 - Multi-Specialty Group

Contract Negotiations

Preparation – Knowledge is Power

- What is the market for your services?
- What are physicians with comparable skills/training/specialty being offered for such positions in local area?
- Resources
 - Recruiters
 - Colleagues, Faculty and Senior Staff
 - MD Organization Surveys (AMA, MGMA)
 - Web Sites

The Art of Leverage

- Do you have it and how much?
- How does it look from the other side?
- How to use it
- Current Trends

The Process of Negotiating and Entering into a Contract

- Introductions
- Preliminary Discussions
- Basic Terms
- Proposals: Binding or Non-Binding
- What is a Contract?
- Documentation, Drafting and Redrafting
- Execution

Contract Language - Common Terms – What to Look For

- Pre-Conditions
- Term and Termination
 - Notice
 - Salary Continuation
- Compensation and Benefits
 - Base and incentives
 - Is it at risk?
 - Gaps in Benefits
 - Are all expenses covered?

Contract Language - Common Terms – What to Look For

■ Professional Liability Insurance

- Who Purchases/Who Pays?
- Sufficient Coverage Limits?
- Occurrence or Claims Made?
 - Tail Coverage – Who Pays?

■ Duties – Schedule

- Discretionary or Established?
- Clinical, administrative, teaching
- Coverage/Call

Contract Language - Common Terms – What to Look For

- Outside Activities
- Assignment of Revenues
- Provision of Resources
- Patient Medical Information
- Indemnifications
- Representations and Warranties
- Restrictive Covenants
- Other Boilerplate

The Ten Biggest Mistakes Physicians Make in Contract Negotiations

10. “I will definitely join your organization”
9. Know the market before you talk about compensation
8. “I didn’t think I needed to read it before I signed it”
7. Giving up Plan B (or C) too early

The Ten Biggest Mistakes Physicians Make in Contract Negotiations

6. Overestimating your leverage
5. Underestimating your leverage
4. Accepting vague and ambiguous language
3. Allowing the other side to set the time frame
2. Allowing the negotiations to get personal

The Ten Biggest Mistakes Physicians Make in Contract Negotiations

1. “I know it isn’t in the contract
but they told me they would do
it”

Contracts Are Essential But . . .

- The 5 Elements of a Successful Relationship
 - Trust
 - Transparency
 - Temperament
 - Tolerance
 - Team Approach

Compliance, or How I Stayed Out of Trouble and Had a Great Career

- Know when to ask and seek the answers, not the answers
- Seek guidance from reliable and knowledgeable sources
- Assess whether you need your own representative/advocate

Compliance Areas

- Billing
- Coding
- Medicare/Medicaid Reimbursement Rules
- Anti-Kickback laws
 - Hospitals and other providers who benefits from your referrals
 - Intent must be proved
 - Violated if any purpose of solicited or received remuneration was to induce referrals
 - Federal safe harbors
 - Failure to meet does not render relationship “per se” illegal

Compliance Areas

■ Self-Referral Laws (Stark)

– Stark Law

- Medicare and Medicaid designated health services
 - Includes clinical lab, radiology, DME, prescription meds, some injectibles, hospital services, PT and OT, and other ancillaries
- Prohibits MD (and immediate family) financial relationships within group practices and with outside entities that furnish “designated health services” and the billing for such services unless an exception is applicable
- “Zero tolerance” law

Compliance Areas

- Drug/Device Company Relationships
 - Gifts, Meals and Gratuities
 - Free Samples
 - CME Programs
 - Speakers Bureaus
 - Consulting
 - Advisory Boards
 - Research
 - Inventor royalties/stock grants & options

Compliance Areas

- EMTALA
- HIPAA
 - Privacy
 - Security
- State Privacy Laws
- Patients Rights
 - Informed consent
 - Incompetent and minor patients
 - Anti-discrimination

Associate Buy-Ins

- Trend is still 2-3 years to buy-in eligibility in medical practices
- Associate employment agreements vary greatly as to terms on buy-in timing, eligibility, and terms
- Factors: professional supply, associate's prior experience, size of practice, age of senior owner(s), profitability of practice

Associate Buy-Ins

- A/R and Goodwill often payable through income reduction for associate
 - Use of before-tax income for associate
 - Reduction of compensation or “income shift” can take many forms, including management fee, base salary and benefit differentials, seniority payments, bonus distribution formula, increasing percentage to full parity

Buy-Ins

■ Tax Considerations

– Payment for equity

- After-tax income
- Basis of capital
- Taxable as a capital gain to selling owner(s)

– Shift of income

- Before-tax income
- Not included in capital basis
- Taxable as ordinary income to selling owner(s) and may be subject to payroll taxes unless shifted income is allocated to tax-exempt benefit plans

Buy-Ins

■ Governance and Control

- Equal voting/control rights on decision-making?
- Post-Buy-in control mechanisms for senior owner(s)?
 - Reserved decision-making powers
 - Practice retention rights upon break-up or deadlock
 - Time limitations

Buy-Ins

■ Asset Carve-Outs

- Will Buy-In be limited to professional practice assets?
- Establishment of separate entities to own other practice-related assets
 - Real estate
 - Practice management
 - Products (e.g. hearing aids)
 - Facilities (e.g. ASC)

Compensation Arrangements

- How will owners compensate themselves
- How will owners divide “net income”?
- Net income=
 - Collections less expenses except
 - Owners’ salaries, bonuses and other benefits
 - Owners’ personal expenses
 - Residual practice profit distributed or retained
- General Approaches:
 - Percentage Division
 - Productivity Division
 - Hybrid blended formula

Compensation Arrangements

- Regulatory Restrictions - Medical Practices
 - Anti-kickback laws (federal and state)
 - Generally prohibits any form of remuneration in return for referrals
 - Can apply within a group practice
 - Failure to meet a safe harbor does not render transaction per se illegal

Compensation Arrangements- Stark

- Groups that furnish a Stark “designated health service” are subject to the following restrictions:
 - Group must be one legal entity
 - Expenses and income must be distributed according to methods established in advance
 - Compensation must be based on FMV and may not vary based upon volume or value of DHS referrals
 - Productivity bonuses and profit sharing are only permitted if certain income division standards are satisfied
 - The Stark service must be rendered by a group MD or a qualified individual under proper supervision of a group MD at the practice office or a remote location meeting strict standards and billed by the group or its wholly-owned subsidiary

Equity Holder Agreements - Redemptions

- All equity holders should be subject to an agreement on the terms of mandatory and optional redemptions
 - Triggering events
 - Price terms
 - Reductions
 - Forfeitures/Disqualifications

Equity Holder Agreements - Redemptions

- State professional entity laws generally require redemption of MD's equity for fair value w/in 12 months if MD:
 - dies
 - is disqualified to render a professional service for 6 months or more
 - is incompetent or permanently disabled, or
 - transfers shares to a disqualified person

Equity Holder Agreements - Redemptions

- Triggering Events to Address
 - Death
 - Permanent or long term disability
 - Retirement
 - Loss of Licensure
 - Practice withdrawal
 - Employment termination

Equity Holder Agreements - Equity Holder Rights

- Options to purchase upon event triggering practice redemption rights
- Rights of first refusal to limit transferability
- Cross Purchase Agreements
 - Step-up in basis for acquiring equity holder(s)

Equity Holder Agreements - Price Terms

- In the event of death and disability can and should the practice or remaining owner(s) be paid proceeds from insurance policies to finance buy-out?
- Established price in advance
 - Subject to periodic adjustment?
- Established methodology

Equity Holder Agreements – Reductions & Forfeitures

- Phase-in after initial buy-in
- Reductions based on age of withdrawing owner
- Mandates based on age
- Forfeiture/disqualification based on competition after withdrawal [not always enforceable against MDs (e.g. non-competes are void in Mass.)]

Buy-Outs

- Will buy-out be paid through non-deductible equity acquisition or deductible deferred compensation or guaranteed payments?
- Will Selling owner “finance” acquisition?

Buy-Outs

■ Solo Practice Issues

- Required Buy-out
- Restrictions against leaving and competing
- Payment to selling professional for goodwill

Buy-Outs

- Stark & Anti-kickback issues for MD Buy-outs
 - Sale of practice safe harbor/isolated transaction exception
 - Employment safe harbor/exception
 - Is price based upon FMV of Seller's interest in the practice?
 - Is price variable based upon the volume or value of referrals by seller?
 - Installment sales

Buy-Outs

- Will buy-out price formula parallel buy-in formula?
- Cash flow caps
 - Deferral
 - Reduction
 - Concurrent departures
- How much of the price is based on a pro rata share of practice value and how much upon income assets (A/R, goodwill) determined by seller's individual productivity ?

Choice of Legal Entity

- Professional Corporation
 - S or C Corporation
- Professional Limited Liability Company
- Professional Limited Liability Partnership
- General Partnership
- Sole Proprietorship
- Non-Profit Organization

MD Practice Legal Documents Checklist

- Articles or Certificate of Organization
- By-laws or Governance Rules
- Equity Holders Agreement
 - Redemptions/Buy-outs
- Employment Agreements
 - Buy-ins
 - Compensation Formulas
 - Benefits

MD Practice Legal Documents Checklist

- Pension Plans
- Employee Policies
- CLIA, OSHA compliance documents
- Fraud & Abuse Compliance Plan
- Medical information polices, procedures & forms
 - HIPAA Compliance Plan

MD Practice Legal Documents Checklist

- Real Estate Leases or Ownership Agreements
- Leases, contracts with other providers to be anti-kickback/Stark compliant
- HIPAA Business Associate and Chain of Custody Agreements
- Information system hardware/software licenses and service agreements
- Billing Agent Agreement

Medical Practice Purchase and Sale Issue Checklist

- Sale of stock verse assets
- Will any liabilities be assumed?
- Allocation of Purchase Price
- Valuation Process – Fair market value standard
– especially if intangible assets are included

Medical Practice Purchase and Sale Issue Checklist

- Confidentiality Agreement/Letter of Intent
- Purchase Price
 - Requires Valuation: Must be Fair Market Value
 - Fair Market Value
 - Price Resulting from bona fide bargaining between well-informed buyers on date of purchase of the asset.
 - Does not take into account the volume or value of referrals by the referring physician or other business generated between the parties

Medical Practice Purchase and Sale Issue Checklist

- Acquisition Terms – Practice Value
 - Hard or Tangible Assets/Capital Value
 - Equipment
 - Furniture
 - Fixtures
 - Supplies
 - Cash
 - Real property

Medical Practice Purchase and Sale Issue Checklist

■ Acquisition Terms – Practice Value

– Accounts Receivable

- Practice-wide or individual
- Aging
- Collection rate
- Accounts payable set-off?
- Cash or accrual basis

Medical Practice Purchase and Sale Issue Checklist

■ Acquisition Terms – Practice Value

– Goodwill

- A measure of ongoing earning capacity
- Various formulas and approaches
- Payable to Seller individually even if seller is a legal entity
- Anti-kickback/Stark:
 - Independent Appraisal showing price = FMV
 - Volume or value of seller's referrals are not taken into account

Medical Practice Purchase and Sale Issue Checklist

- Seller financing terms with installment payments may violate Stark/Anti-kickback
 - Practice acquisition anti-kickback safe harbor(1 year to close and end seller's ability to refer)
 - If Stark applies - needs to meet an exception:
 - Isolated transaction
 - Bona-fide employment
 - Personal services

Questions & Thank You

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