Physician Practice Issues

Presented by:

Stephanie T. Eckerle  
Krieg DeVault LLP  
seckerle@kdlegal.com

Ashley Osak  
Faegre Baker Daniels  
Ashley.Osak@FaegreBD.com
Practice Formation

- Does the physician need to use a separate legal entity for the practice?

- What type of entity is best?

- Does the physician need to trademark the practice name?
Practice Formation

- Do I need a separate legal entity for the practice’s real estate and building?
- Does the practice need a buy–sell agreement?
Buy–Sell Agreements

- A must have for practices with two or more owners.
- Assume there will be a dispute among the owners.
Buy–Sell Agreements

- Restricts all transfers, including transfers to family members, competitors, and unknown third-parties.
- Certain exceptions may be appropriate.
- Doesn’t permit pledges or other security interests in the shares.
- Include both “good actor” and “bad actor” triggering events.
- Examples include breach of non-compete, loss of license, felony conviction, death, bankruptcy, etc.
Buy–Sell Agreements

Rights of First Refusal

• First option to practice, second to other owners.

• Special circumstances for death and divorce.
Buy–Sell Agreements

Purchase Price

• Purchase price for the shares should be subject to much analysis and discussion.

• Qualified financial advisor should be consulted for “fair market value” considerations and tax consequences.

• Payments may be made in one lump sum or paid over a period of time with interest or paid when collected if based on AR.
Buy–Sell Agreements

Deadlocks

- Define the existence of a deadlock.

- Set procedures for resolving any such dispute, often involving a mutual third party decision maker.
Buy–Sell Agreements

Non–Competition; Non–Solicitation

- Consider having in both the buy–sell, as well as in the employment agreements.

- Consider liquidated damages, but it may not be appropriate in current hospital recruitment environment.
Employment Agreements

• Need agreements with owners and non-owners.

• Form of agreement will differ based on position and/or tenure at the practice, but certain provisions should be standard.
Employment Agreements

Services

• Make certain the services are clearly stated.

• Consider a job description.

• Be sure agreement includes hours and days per work week, holidays, etc.

• Address call schedule.

• Be clear on part–time and reduced schedule arrangements.
Employment Agreements

Duties of Parties

- Agreement should state that the physician will be provided reasonable space, equipment, and personnel.
- If you have specific needs, they must be in the agreement.
- Physician is responsible for bills submitted under his provider number, even if those bills are prepared by office staff.
- Avoid phrases like “Physician shall provide and perform services using the highest standards of care.”
Employment Agreements

Termination

- Consider both “for cause” and “without cause” termination provisions.

- Objective vs. subjective grounds.

- Can the physician still provide services?

- Is the reputation of the practice at risk?
Employment Agreements

• Non–Competition
  • Although non–competition covenants are generally disfavored at law, certain states will enforce a reasonable covenant so long as an employer can show a protectable interest.
  • Must be reasonable in geographic scope and time; depends on specialty.
  • Blue pencil doctrine
  • Liquidated damages vs. injunctive relief

• Non–Solicitation – patients, co–workers.

• Confidentiality – trade secrets, patient lists, financial info.

• Patient Records – Understand that the records belong to the practice.
Employment Agreements

- Compensation methodologies include:
  - Flat salary
  - Flat salary with bonus
  - Collections-based
  - Productivity-based compensation
  - Varieties of the same

- Expenses:
  - Journals
  - Continuing medical education (including travel and accommodations)
  - Auto allowance
  - Pager
  - Mobile phone
  - Other
Insurance (Other Than Med Mal) – Who pays for health, dental, vision, group term life, and group disability insurance?

Employment Agreements

- Professional Liability Insurance

  - If the insurance is on a “claims made” basis (as opposed to an “occurrence–based” basis), the agreement should also state who shall pay for the necessary tail coverage.

  - Who pays for tail insurance may also vary depending on whether the termination of physician was “for cause” or was “without cause.”

  - The Physician should also be named as an “additional insured” on the Practice entity’s professional liability policy, and should also be added to any relevant automobile policy.
Employment Agreements

- **Time Off**
  - The agreement should state how much time off for vacation, CME, and otherwise or for PTO.
  - How is it scheduled?
  - Carry over benefits year-to-year?
Employment Agreements

• Address how you will handle teaching, lecturing, and clinics, and who keeps any compensation for same.

• Address how patents and other intellectual property developed by the physician will be handled.

• What is the plan regarding partnership?
Supervision of Midlevel Providers

- Employment agreement
- Nurse Practitioners = Collaboration Agreement
- Physician Assistants = Supervision Agreement
- Your scope of practice
- Prescriptive authority
- Medication dispensing
- Physician oversight requirements
NPs in Indiana are an independent and interdependent member of the health care team

Collaborating Agreement required for prescriptive authority

Scope of prescriptive authority

Physician overview requirements
  ◦ Review of prescriptive practices
Supervision of Physician Assistants

- PAs in Indiana are required to have a supervising physician
- Supervision Agreement required
- Scope of prescriptive authority
- Physician overview requirements
  - Chart review
  - Review of prescriptive practices
Recruitment Arrangements

- Generally between a hospital and a recent physician graduate or other physician currently not located in the service area.

- May also include an existing medical practice, although such an arrangement increases the regulatory complexity of the arrangement.
Recruitment Arrangements

- Assistance
  - Assistance can include moving and occasionally house hunting expenses, student loan repayments, malpractice subsidies, etc.
  - Substantially all arrangements include a pre-determined minimum net income level that the physician can expect to receive for some limited period of time.
Forgiveness

- If physician agrees to stay and work in the community after the guaranteed income period ceases, any outstanding amount due will be forgiven on a pro-rata basis.

- Typically, mandated service period for forgiveness is double (2x) the duration of the guarantee period.
Rehabilitation Arrangements

Cautions

- Relocation issues
- “No referrals” statement
- Recruitment to existing practice can be tricky
- Both the Anti-Kickback Statute and the Stark laws have specific requirements for recruitment agreements.
- Is there a real need?
Managed Care Contracts

- What are managed care contracts?
- Why do physicians need to sign them?
- How much are they negotiated?
- What are the pitfalls? Rates, most favored nation provisions, claw back provisions, etc.
Outside Activities / Transparency

- Types of Activities
  - Professional Service Arrangements
  - Ownership or Investment Interests
  - Appointed or Elected Officers
  - Recipients of Gifts, Gratuities, and Other Remuneration
Outside Activities / Transparency

• Examples:

• Payment from pharmaceutical company for medical directorship.

• Payment in cash, royalties, and/or ownership interests from medical device manufacturer for consulting and contribution of intellectual property.

• Gifts like spousal travel, expensive meals and gifts, and other entertainment.
Outside Activities / Transparency

- Concerns:
  - Did physician provide real and needed services as a director?
  - Did physician contribute real intellectual property and was it assigned a fair market value?
  - Was there any legitimate purpose for the travel and meals and gifts?
Outside Activities / Transparency

• Rules apply to physician and their immediate family members.

• Consider conflicts of interest.

• Consider relationships with competitors.
Outside Activities / Transparency

- Relevant laws include the Anti–Kickback Statute and Stark Law

- Relevant guidance includes AMA and Other Professional Standards

- Industry guidance includes PhRMA for pharmaceutical (www.phrma.org) companies and AdvaMed for medical device companies (www.advamed.org)

- New “Sunshine Laws”
Outside Activities / Transparency

• Tools to Manage Outside Activities

• Organizational documents of practice

• Policies and procedures of practice

• Code of Conduct

• Conflict of Interest Disclosure Statements
Reasons for physician practice sales:

- Decreasing reimbursement
- Increasing operating costs
- Lifestyles
- Retirement
- Physician supply
Practice Sale and Hospital Employment

- Reasons for physician practice sales:
  - Call coverage
  - Regulatory environment
  - Security
  - Quality initiatives
  - Economic environment
  - Cost of technology
• Transaction is typically structured as stock purchase or asset purchase, coupled with a 3 to 5 year employment agreement.

• Transaction where buyer purchases certain designated assets of practice.

• Liabilities can be excluded from transaction.
Practice Sale and Hospital Employment

- Purchase can include both tangible and intangible assets.

- Buyer will have to obtain new provider number in most cases which may not be available on closing date.

- Need permission to assign existing agreements.

- Buyer will not be responsible for any liabilities or overpayments due back to any payor due to buyer’s new provider number.
Practice Sale and Hospital Employment

- Consider compensation methodologies and levels.
- Consider purchase price for practice – likely no goodwill and just a payment for FF&E.
- Consider non-competition and non-solicitation provisions.
- Consider unwind provisions.
Practice Compliance

- Privacy and Security
  - HIPAA/HITECH
  - Mental health records
  - Drug and alcohol abuse records
- Record Retention
- Fraud and Abuse
  - Physician self-referral (Stark)
  - Anti-kickback
  - False claims
- Patient Abandonment
Privacy and Security

- HIPAA/HITECH
  - Reasonable safeguards
  - Patient authorizations
  - Patient requests for medical records
    - Requests to amend
    - Request for accounting
- Mental Health Records
  - Indiana State law requirements
- Drug and Alcohol Abuse Records
  - Definition of a “program”
Record Retention

- Medical Records
  - Indiana: 7 years
  - Federal requirements can be up to 10 years
  - 8–9 years for best practice
- Business Records
  - 7 years
- Accident/Injury Reports
  - 10 years
- Sale of practice considerations
The Stark Law

Prohibits a physician from referring a Medicare/Medicaid patient to an entity providing designated health services if the physician (or an immediate family member) has a financial relationship with that entity.

Indiana disclosure requirements

What are designated health services?
Anti-Kickback Statute

- Criminal statute that prohibits the exchange (or offer to exchange), of anything of value, in an effort to induce or reward the referral of federal health care program business
  - Conviction for a single violation under the AKS may result in a fine of up to $25,000 and imprisonment for up to five (5) years

- Indiana prohibition on referral fees
False Claims Act

- Federal law that imposes liability on persons and companies who defraud the government
- “Whistleblowers” or “qui tam” provision
- Audit examples
Patient Abandonment

- Leaving employment
- Discontinuation of practice
- Leaving or moving from the community
- Retirement
Questions?

Stephanie T. Eckerle  
Krieg DeVault LLP  
(317) 238–6373  
E–mail: seckerle@kdlegal.com

Ashley N. Osak  
Faegre Baker Daniels  
(317) 569–4694  
E–mail: Ashley.Osak@FaegreBD.com