

All in the Fine Print

Contracting and Valuation Considerations for Physician Arrangements

November 12, 2020

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There's Something Strange...

Who you gonna call?

Jeanna Gunville

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Physician alignment strategies for quality
and cost efficiency

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Valuation – Healthcare transactions,
Physician arrangements



Goal of Session

Create awareness for key regulatory, contractual and valuation considerations when evaluating arrangements involving physicians

Let's talk about...



- Types of Physician Arrangements
- Economics of Arrangements
- Key Legal Issues
- Key Contractual Provisions & Relevance of FMV
- Case Studies
- Adding Value

Types of Physician Arrangements



Types of Physician Arrangements

Between

- hospital and physicians
- corporate entity and physicians
- physician to physician



Types of Physician Arrangements

Physician services

- Clinical services (professional services)
- Call coverage
- Medical directorship
- Physician leadership
- Clinical program establishment



Types of Physician Arrangements

Hospital/corporate entity providing services to physicians

- Administrative services (e.g. billing and collections)
- Leasing of equipment
- Rental of space
- License technology
- Leverage staffing
- Turnkey services



Types of Physician Arrangements

- Employment agreements
- Professional services agreements
- Management/administrative services agreements
- Clinical co-management agreements
- Leasing agreements



Types of Physician Arrangements

Agreements should

- Specify services
- Specify expectations
- Specify compensation
- Align goals of physicians and hospitals
- Be compliant from a regulatory angle

At Fair Market Value

Economics of Arrangement



Economics of the Arrangement

Why?

- Avoid gaps in services
- Have ready access to physician resources
- Balance demand and supply
- Improve quality of service line
- Establish new services
- Transfer risk



Economics of the Arrangement

Pay for

- coverage
- performance
- quality
- outcomes
- resources
- assumption of risk
- upfront investment



Economics of the Arrangement

Payment in the form of

- Direct compensation
 - hourly, daily, annual
 - wRVU
 - Achievement of metrics
 - Bonuses
- Subsidies/Financial assistance



Key Legal Issues



Key Legal Issues



Corporate Practice of Medicine Laws

- Prohibitions on the “corporate practice” of medicine, dentistry, nursing and other “licensed professions”
- Found in a majority of states
- Extent of restrictions vary
- Corporate practice doctrine - generally prohibits a business corporation or LLC from
 - **Owning** a dental, medical or other practice
 - **Operating/managing** the clinical side of the practice
 - **Employing** licensed professionals to practice their licensed profession

Key Legal Issues



Corporate Practice of Medicine Laws

- In most states, the law requires a physician practice to be organized as a professional entity (e.g., PC, PLLC) and/or require ownership by a licensed individual
- In many states, an exception allows for employment of physicians by certain entities (i.e., hospitals)
- State law doctrine found in:
 - Statutes and regulations
 - Case law
 - Attorney General opinions
 - Medical Board guidelines/opinion

Key Legal Issues



Federal Anti-Kickback Statute (42 U.S.C. § 1320 A-7B(B))

- The Anti-Kickback Statute (AKS) provides criminal and civil penalties for individuals and entities that knowingly and willfully offer, pay, solicit or receive remuneration to induce or in return for:
 - Referring an individual to a person for the furnishing or arranging for the furnishing of any item or service payable in whole or in part under federal or state health programs or
 - Purchasing, leasing, ordering or arranging for, or recommending, purchasing, leasing or ordering any good, facility or item payable under a federal or state healthcare program

Key Legal Issues



- AKS Safe Harbor Regulations (42 C.F.R. 1001.952)
 - Compliance with safe harbors is recommended when feasible
 - Arrangement can be legal even if it does not fit within a safe harbor
- Employment Safe Harbor
 - The employee has a bona fide employment relationship with the employer

Key Legal Issues



- Personal Services Safe Harbor
 - Written agreement with term of at least one year
 - Aggregate payment is set in advance
 - The services covered must be specified
 - If not full-time services, agreement must specify schedule of intervals/part-time
 - Compensation must be fair market value and not vary based on volume or value of referrals or other business
 - Terms must be commercially reasonable

Key Legal Issues



Stark Law (42 U.S.C. § 1395nn)

- A physician may not refer Medicare or Medicaid patients for designated health services (“DHS”) to an entity with which the physician (or immediate family member) has a financial relationship unless an exception applies
- In addition, an entity may not present, or cause to be presented, a claim for payment for services provided as a result of prohibited referral
- DHS includes inpatient and outpatient hospital services
- Financial relationship includes a direct or indirect compensation relationship with such entity

Key Legal Issues



Employment Exception

- Employment is for identifiable services
- Remuneration is consistent with FMV and **MUST NOT** reflect Volume/Value of Patient Referrals
- Productivity bonuses for personally performed services are OK
- Commercially reasonable even if no referrals were made to the employer

Key Legal Issues



- Personal Services Compensation Exception
 - Arrangement must be in writing, signed by all parties, and specifies services
 - Reference master list of contracts
 - Services are reasonable and necessary
 - Term of at least 1 year
 - Specifies the compensation
 - Must be supported by a FMV determination
 - Set in Advance
 - MUST NOT reflect Volume/Value of Patient Referrals

Key Legal Issues

- AKS Criminal and Civil Penalties
- Stark Law Civil Penalties
- False Claims Act Prosecution or Civil Penalties

Jail



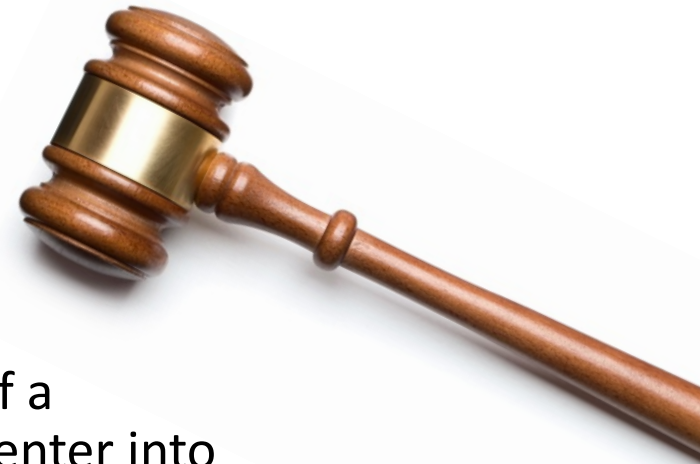
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Exclusion



Key Legal Issues



What is Commercially Reasonable?

- Considered to be commercially reasonable if a reasonably prudent business person would enter into a similar arrangement, even in the absence of referrals or potential additional business
- Separate from determining FMV
- Arrangement must make business sense absent considering referrals

Key Legal Issues



What is Fair Market Value (FMV)?

- The value in an arm's length transaction for what a reasonably prudent person would expect to pay (or “expect to earn”) for services as the result of bona fide bargaining between well informed parties to an agreement when both parties are provided an objective opportunity to evaluate the terms and obligations of the transaction and who are not otherwise in a position to generate business for the other party at the time of the agreement
- Governmental guidance through settlements, OIG opinions, and government's experts' reports on how FMV should be determined

Key Legal Issues

Common to cases with unsupportable FMVs

- Facts are under scrutiny
- High settlements common
- Inaccurate assumptions
- Valuation does not match agreement
- Economic and operational reasonability of an arrangement unclear
- Opinion shopping



Key Contractual Provisions & Fair Market Value



Key Contractual Provisions



A simple handshake is
not sufficient



Even if you have a contract in
place, on renewal, important
to review it for consistency
with current needs

Key Contractual Provisions

Key contractual provisions, when enforced, ensure that desired services are received, and payment is consistent with services and agreed upon terms



Key Contractual Provisions

- Who – Specialty
- When – Specific hours/FT/PT
- Why – To fill gaps in service
- What – Type of service
- Where – At hospital, practice location,
- How – Hourly rate, compensation per wRVU, base compensation, financial subsidy, etc.



Key Contractual Provisions

- What services are needed
 - Hospitalist, Nocturnist, Tele-hospitalist
 - ED coverage, Medical director, mid-level supervision
- Who needs to perform them
 - Physicians of a specific specialty
 - Mid-levels
 - Support staff (Scribes, RNs)
- How many service providers are needed
 - FTE, hours of coverage



Key Contractual Provisions

- How performance will be measured
 - Quality metrics –
 - need to be relevant, measurable
 - need to compensate for improvements to status quo
- How performance will be compensated
 - FMV compensation
 - Subsidies
 - Compensation at risk for quality



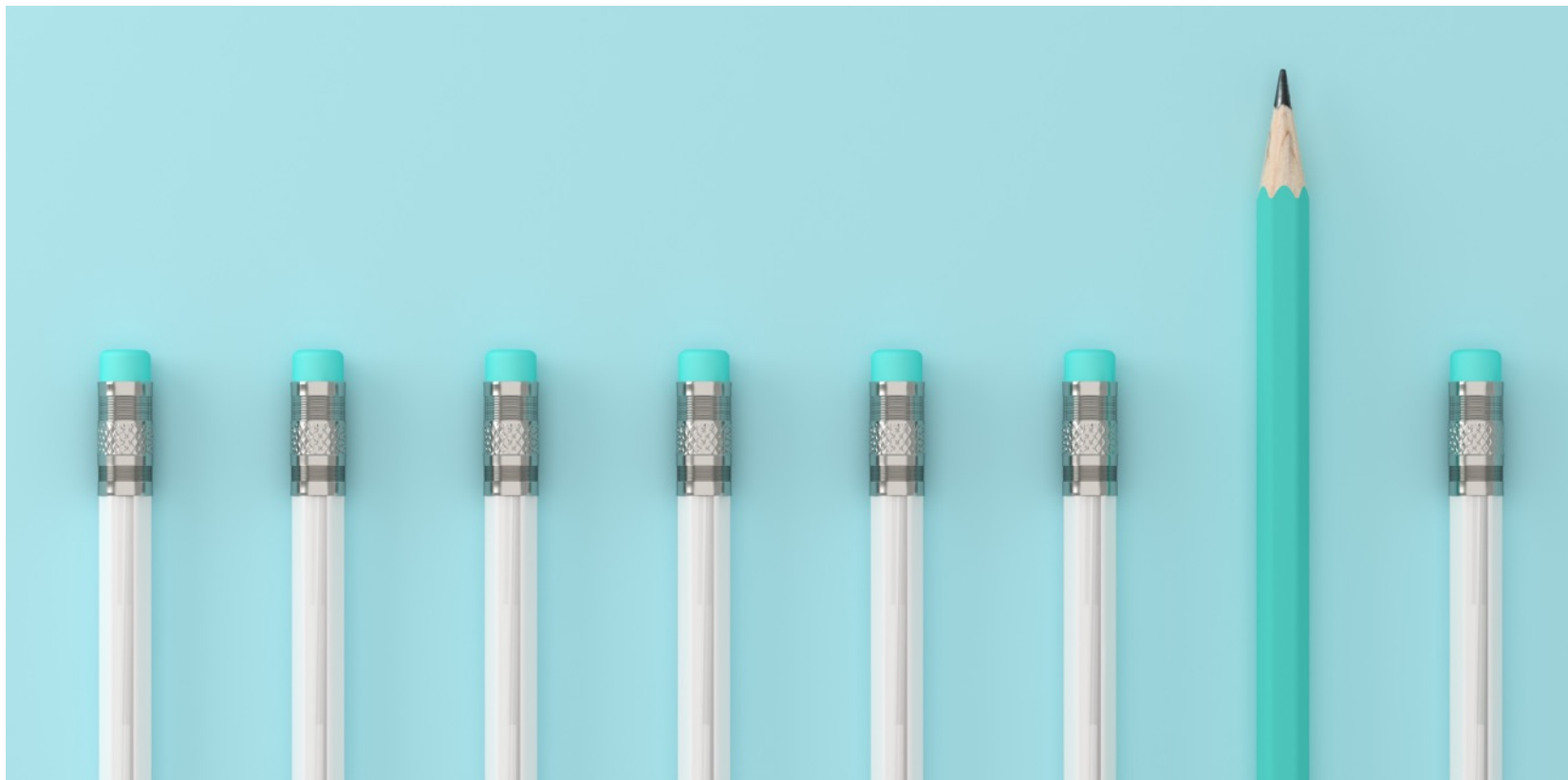
Key Contractual Provisions

Other information required for contracting:

- Term of agreement
- Bill and collect
- Assignment of collections
- Reconciliation process
- Insurance
- Indemnification



Case Study



Case Study Background



- PSA between Large Hospital System (LHS) with multiple hospitals within a 20-mile radius and National Hospitalist Group (NHG)
 - LHS requires 24/7 hospitalist coverage
 - Relatively higher self pay and Medicaid payer mix
 - Collections anticipated to be below cost of providing the services
- Need a contract that can ensure service integrity and regulatory compliance

Case Study - PSA



- PSA
- 24/7 coverage
- Hospitalist, Nocturnist, Advanced Care Providers
- Patient information coordinator services and management services
- Clinical and Medical Directorship Services
- Physician Group to bill and collect and retain
- Poor payer mix resulting in collections below cost
- Coverage subsidy/financial assistance required
- Performance tied to quality metrics

Case Study - PSA

- Projected/Historical

- Specifics of required coverage (specialty, hours, provider type, coverage type)
- Anticipated performance metrics and measurement thresholds
- Volume statistics
- Billing, collections – very important in subsidy calculations
- Payer mix
- Provider costs
- Cost of operations (from the group)
 - Expenses include discussion of logistics necessary to meet service demands (i.e., courier needs)



Employment Term Sheet/LOI

- Health System Party(ies)
- Other Party(ies)
- Other Arrangements and Compensation with this Physician
- Location of Practice
- Medical Director – Specify Department or Service
- Exclusion Checking for Office of Inspector General (OIG) and Government Services Administration (GSA)
- Proposed Term
- Termination Time Frame

Compensation Elements

Base Compensation

CME/Education

Dues and Subscriptions

Expected Annual Productivity Compensation

Retention Bonus

Phones/Cell/Network Card

Travel Expenses

Income Guarantees

Sign-On Bonus

Relocation

Medical Director

Coding Bonus

Patient Satisfaction Bonus

Expected Total Compensation

FMV Range for Total Compensation (e.g., MGMA)

Adding Value



Adding Value

In-house and outside counsel are critical to bringing together stakeholders:

- Help educate all parties on the critical components of an arrangement
- Provide context for the fair market value analysis
- Specifically, help parties understand the need for well thought out assumptions and accurate data for the valuation analysis
- Time valuation analysis correctly and manage expectations on timing
- Anticipate and address potential roadblocks



Adding Value

Coordinate between Provider Group, the Chief Medical Officer (rep of the business group), and the valuation consultant to confirm anticipated duties and other key contractual terms

Facilitate business teams' discussion of legal terms to ensure consistent interpretation

- Hospital and Physician Group agree on what is in and out of scope after multiple phone conferences
- Use e-mail correspondence to memorialize agreements made throughout the process



Adding Value

- Best Practice – have internal policies for compliance
 - Internal thresholds to trigger 3rd party appraisal
 - Monitor to ensure services were performed
 - Review agreement to verify the need for services still exists
 - A consistent process to determine FMV, including written agreements
- Understand Current Guidance

