

Emerging Issues in Healthcare Law

Manchester Grand Hyatt
San Diego, CA

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24th Annual Conference

Leveraging Brand Assets

Revenue opportunities for healthcare providers

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Jeanna Palmer Gunville



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Experience

Jeanna's practice focuses on corporate health care transactional work and regulatory matters. She counsels hospitals, health systems, academic medical centers, surgery centers, post-acute care providers and provider organizations on matters including:

- Mergers, acquisitions, strategic alliances, joint ventures and affiliations
- Provider alignment and clinical integration
- Cost savings initiatives
- Purchased services and outsourcing arrangements (e.g., laboratory, medical supply distribution, transportation, transcription, hotel services, medical devices)
- Anti-kickback and Stark Law compliance
- Corporate practice of medicine
- Licensure requirements
- Governance

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Annapoorani Bhat

Principal, PYA, P.C.

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Charlotte, NC

Experience

Annapoorani specializes in valuation and related consulting services for companies in the health sciences sector, including providers, payers, and pharmaceutical companies. Her experience includes valuation of entities, and services including physician compensation arrangements for purposes such as mergers and acquisitions, joint ventures, affiliations, and hospital-physician alignment arrangements.

Annapoorani works with a broad range of provider entities including academic medical centers; health systems; cancer centers; and outpatient facilities such as surgery centers, radiation therapy centers, home health providers, and urgent care facilities. Additionally, she has experience with valuation of payer entities, clinically integrated networks, and arrangements that involve intellectual property. Annapoorani specializes in valuing intangible assets and is focused on assisting provider organizations, especially academic medical centers, with their data and brand valuation needs.

Outline of Presentation

- Brand Use in Healthcare
- Leveraging Brand Assets: Brand Value in Healthcare
- Legal Framework
- Brand Valuation – Why and How
- Protecting the Brand

Polling Questions

- How many of you have worked on a healthcare transaction where Brand Name is called out specifically as an asset being contributed?
- Of these, how many of you have seen \$\$ value assigned to these assets?

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Brand Use in Healthcare



Brand Use in Healthcare



- Formidable brand names in healthcare
- Well recognized at the local and national level for capabilities and quality

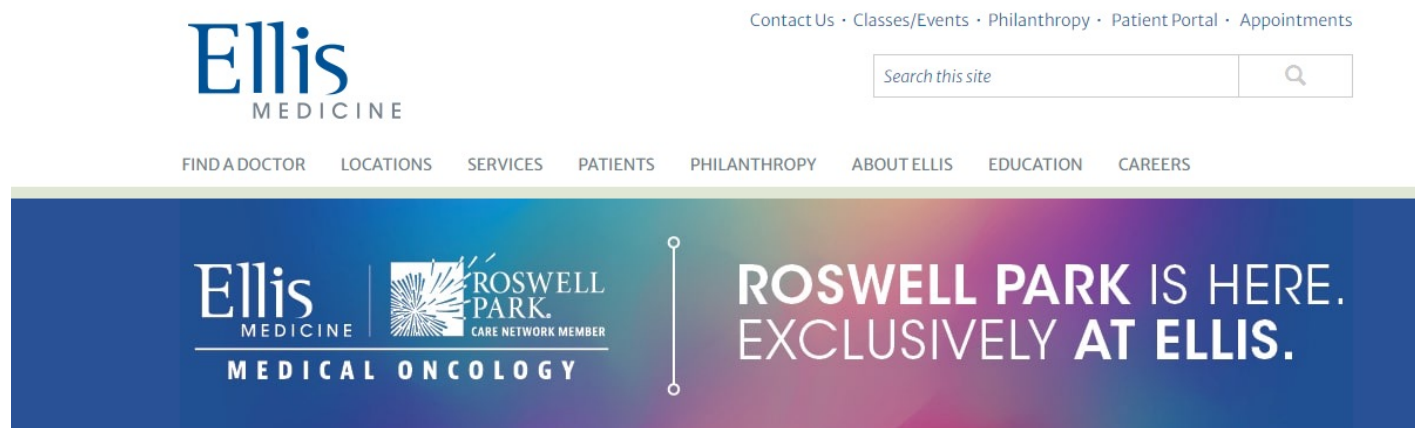
Brand Use in Healthcare



- At the regional level, there are many more well-recognized brand names.
- Significant investments have been made by health systems to create top of mind awareness.

- Brand Extensions - Help expand the application and value of well-established brands.
- Co-branding in healthcare is a common brand extension methodology.
- Can be performed at the local, national or international level.

- Co-branding opportunities: **Network Alliances**
 - Formal relationships between hospital networks to share resources



Memorial Sloan Kettering
Cancer Alliance
MEMBER



Brand Use in Healthcare

- Co-branding opportunities: **Affiliations**
 - An alignment between larger health systems or academic medical centers and smaller, most often community hospitals



Grand View Health and Penn Medicine Strategic Alliance

A strategic alliance between Grand View Health and Penn Medicine strives to create easier access to care in two ways:

- By expanding programs in Bucks and Montgomery Counties supported by both organizations
- By connecting patients to advanced care when appropriate for services provided by Penn Medicine

The alliance includes relationships between the two organizations for the treatment of cancer, orthopaedic and trauma patients. Additionally, Penn Medicine supports Grand View Health's Primary Stroke Center with its telestroke and teleneurology programs.

Penn Medicine | **GVH GRAND VIEW HEALTH**

STRATEGIC ALLIANCE

An Affiliate of Penn Medicine Orthopaedic Surgery

If expertise for a unique surgery requires more complex treatment and care than is available locally, Grand View Health providers will refer patients to the specialists at Penn Orthopaedics. Surgeons from Penn Orthopaedics will perform these specialty procedures, while Upper Bucks Orthopaedics at Grand View Health will coordinate the care so patients can receive post-surgery treatment, such as physical therapy, close to home.



News Release

Grand View Health and Penn Medicine Extend Strategic Alliance Until 2027

June 07, 2022

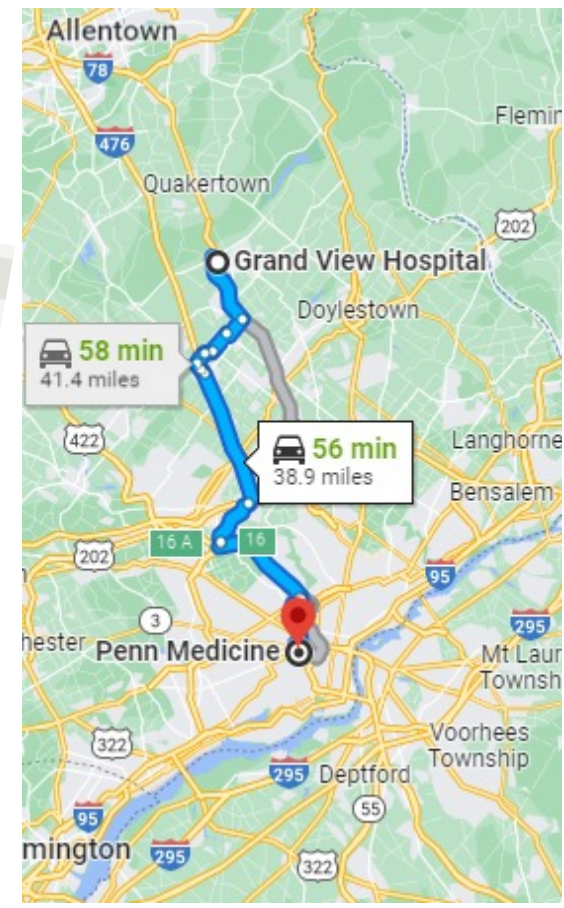
SELLERSVILLE, PA. – In August 2018, Penn Medicine and Grand View Health set a vision to develop collaborative services at Grand View Hospital in an effort to provide comprehensive care that kept patients closer to home. Four years later, the relationship is flourishing, with programs in Cancer (including Radiation Oncology), Trauma, Neurosciences, and Orthopaedics. Early this month, the two organizations signed a renewal of their strategic alliance for five more years.

"The world has changed considerably in the four years since the inception of our strategic alliance," said Douglas Hughes, RN, BSN, MBA, president and CEO at Grand View Health. "Our community is growing, and we are expanding to meet their needs. We're exploring every avenue possible to ensure we are always ready to deliver the highest quality of care close to home and our alliance with Penn Medicine is one more way we're making good on that promise."

Most recently, the two health systems came together through the Penn Trauma Network, earning Grand View Health accreditation as a Level II Trauma Center. Since opening last September, the center has provided trauma care for nearly 700 patients, including 67 who received critical care transportation to Penn via the PennSTAR program.



Grand View Hospital will open a new six-story pavilion in early July 2023, located adjacent to the existing hospital in Sellersville.



- Co-branding opportunities: **Joint Ventures**
 - Agreements between two or more parties to pool resources

UChicago Medicine, AdventHealth Launch Joint Venture to Expand Health Services in Chicago's Western Suburbs

January 10, 2023 | AdventHealth



The University of Chicago Medicine and AdventHealth have closed on a transaction to form a joint venture called UChicago Medicine AdventHealth (healthychicagoland.org), which will combine the expertise and resources of both organizations to bring academic medicine to the western suburbs of Chicago.

Brand Use in Healthcare

- Co-branding opportunities: **Mergers**
 - Where co-branding is retained though control is transferred to one party.

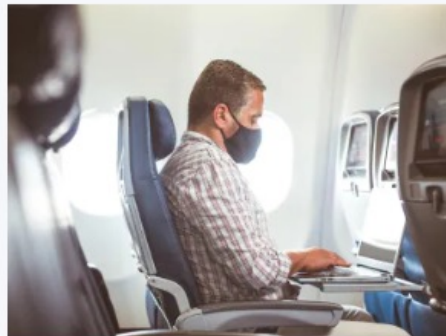


- Co-branding opportunities: **Other commercial applications**

KNOW BEFORE YOU GO

Our Cleanliness and Safety Partnerships

As part of the **Delta CareStandardSM**, we're partnering with trusted experts from the medical field and leaders in disinfection and sanitization to help us revolutionize a safer and cleaner travel experience for all customers and our employees.



EMORY HEALTHCARE

Helping advise on best practices and provide guidance to create a safer travel experience for everyone, we're continuing to work with Dr. Carlos del Rio from Emory School of Medicine and others from **Emory Healthcare**.

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Leveraging Brand Assets: Brand Value in Healthcare

- How do Health Systems apply/leverage brand assets?
 - Non-contractual
 - Allow for the use of brand by community partners, though not formally agreed upon within a contract.
 - Contractual
 - Provide a contractual right to apply the brand name as appropriate for a pre-determined term without financial consideration
 - Provide a contractual right to apply the brand name as appropriate for a pre-determined term with financial consideration

- With financial consideration, a valuation analysis/opinion may be necessary.
 - Legal/Regulatory considerations
- In fact, a fair market value analysis of a healthcare brand may be sought for a range of reasons.

- Why do health systems/providers need to understand the value of their brands?



Baseline Understanding of Value

- Health system / entity is interested in understanding the value of their organization's brand, for internal planning purposes.

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Affiliation Arrangement

- Health system / entity is contemplating an affiliation arrangement with another organization where its brand is to be applied, and seeks to understand the brand value in the context of the specific affiliation.

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Joint Venture / Other Transaction

- Health system / entity may be entering a joint venture or other transactional relationship which requires a valuation opinion for the application/contribution of the brand within the JV.



BRAND VALUATION FOR BASELINE UNDERSTANDING OF VALUE

- 01 The Ask**
- Provide a baseline value of the AMC brand in its current clinical enterprise.
 - Additional focus on key service lines.

- 02 Project Purpose**
- Initiated by Client's marketing department.
 - Strong support from senior management.
 - No transactions in the horizon.
 - For internal decision making.

- 03 The Deliverable**
- FMV Range for Overall Enterprise - \$X million to \$Y million
 - Indicative royalty rate for overall enterprise and each service line as a percent of revenue.
 - Royalty rate to be used within specific agreements as a guide to determine contractual fees or FMV payments.



BRAND VALUATION FOR A CANCER NETWORK ALLIANCE – NETWORK FEE FOR BRAND

01

The Ask

- Provide a baseline value of health system brand name in its current clinical enterprise.
- Provide a framework for determining the fair market value fee for the use of the health system brand by the affiliates of its cancer care network.

02

Project Purpose

- Initiated by Health System's business development team.
- Strong support from senior management.
- Current agreement up for renewal.

03

The Deliverable

- FMV fee range for each affiliate – Annual fee of \$X to \$Y.
- Baseline value of brand.



BRAND VALUATION FOR AN AFFILIATION ARRANGEMENT

01 The Ask

- Provide a baseline value of AMC brand name in its current clinical enterprise.
- Provide a framework for determining the fair market value fee for the use of the AMC brand in any affiliation agreement.
- Determine a specific flat fee for the application of the AMC brand in the Proposed Affiliation with a Community Hospital.

02 Project Purpose

- Initiated by AMC marketing and business development teams.
- Pending transaction.

03 The Deliverable

- FMV fee Range for use of name on affiliate's building, etc.
- Indicative royalty rate as a percent of revenue for use in future transactions.
- Baseline value of brand.



BRAND VALUATION FOR JOINT VENTURE AND/OR OTHER TRANSACTIONS

01

The Ask

- To utilize brand value framework developed by PYA in prior years to determine the value of the AMC brand if it were to be applied in a JV for the construction of a micro-hospital.

02

Project Purpose

- To determine AMC equity contribution towards the JV in the form of brand value.

03

The Deliverable

- Calculated brand value as of the valuation date based on future revenue projections and selected royalty rate. Lump sum amount.

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Legal Framework

Trademark 101

To qualify for a federal trademark registered with the USPTO (Lanham Act):

- you must use or intend to use the mark in commerce
- the mark must be distinctive to your business

Can trademark the following as long as they relate to commerce:

- names of companies or products
- words or slogans that relate to brands or marketing campaigns
- logos or symbols identifying your brand
- sounds, colors and scents specific to your brand

Trademark 101

- Trademark defines the source of products, their manufacturer, seller and sponsor
- Lasts up to 10 years, renewable, apply for incontestable status after 5 years

Benefits of registering a trademark:

- Exclusive right to use the mark in commerce
- Use the registered trademark symbol®
- License our intellectual property
- Defend your mark from dilution
- Protect your mark from consumer confusion
- Defend your mark from cases of unfair competition

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.

Anti-Kickback Statute

- Prohibition on “taking into account” volume or value of referrals
- Valuations

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

Anti-Kickback Statute – Safe Harbors

- Large entity investment interest safe harbor
- Small entity safe harbor 60/40 tests
- Facts and circumstances analysis

Anti-Kickback Statute – other considerations

- OIG Advisory Opinions and Fraud Alerts
- “Suspect” joint ventures
- Differential Pricing (existing venture)

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, clinical laboratory services, radiology and certain other imaging services
- Financial relationship includes an ownership interest in such entity

Stark Law

- For DHS Entity, Physicians
- Co-investing and side agreements
- Every financial relationship must meet an exception
- Isolated transactions exception
 - Remuneration is FMV and not determined in a manner taking into account volume/value referrals or other business generated between the parties
 - Arrangement is commercially reasonable even in the absence of referrals by physician to the entity
 - No other transactions for 6 months unless meet other Stark exceptions

Stark Law

- Indirect compensation exception
 - Indirect financial relationship exists when there are one or more intervening persons or entities in an unbroken chain between the physician (or family member) and the DHS entity
 - Remuneration is FMV and not determined in a manner taking into account volume/value referrals or other business generated between the parties
 - Does not violate the AKS or any other Federal or State law governing billing or claims submission

Tax Laws

- Inurement/Excess Benefit
- Unrelated Business Income and royalties
- International transactions
 - Section 482 re-pricing
 - Tax in licensee's domicile

Risky Business

- Global increase in payment rates
- Minimal investment by licensor
- Potentially duplicative payments
- Not aligning the deal with FMV



- ✓ Important to ensure all arrangements are at fair market value
- ✓ Understand if you need to seek a commercial reasonableness opinion

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Brand Valuation Why and How

Brand Valuation – Why and How

How much should I pay/receive for the use of the brand in the context of the arrangement?

How should the payment be structured?

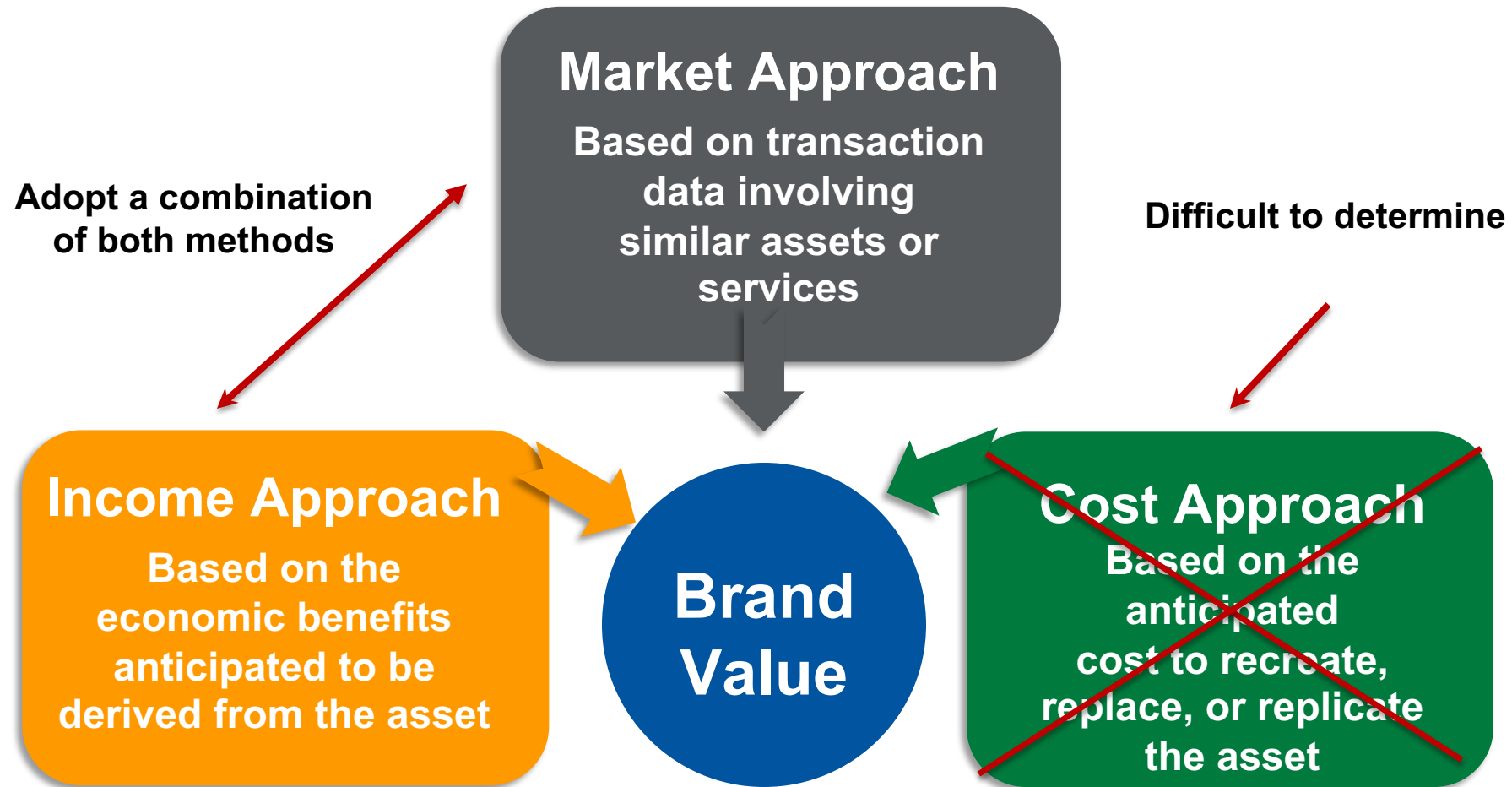
- A well-established brand impacts operations positively as follows and hence results in higher value in use.
 - Increase patient/physician awareness
 - Enhance perceptions around quality, etc.
 - Increases patient volume/utilization of resources
 - Creates efficiencies

Brand Valuation – Why and How

- Value of a brand is dependent on its application in the context of the arrangement.
 - Co-branded, sole branding
 - For specific service lines?
 - For how long?
 - Where will the branding appear?

- Contractual payments can be structured in many ways.
 - Upfront lump sum payment (Acquisition)
 - Ongoing fee (Licensing)
 - Combination
 - Component of larger arrangement

Brand Valuation – Why and How



- **Pitfalls to avoid**

- Relying on insufficient data regarding market pricing for similar assets
- Not considering the brand asset's ability to generate cash flow
- Structuring the fee to change based on volume or value
- Not considering other assets/services that are integral to the branding process

Brand Valuation – Why and How

PYA's Phased Approach to Healthcare Brand Valuations:



PHASE I

- Perform qualitative evaluation of brand strength within primary and secondary service areas and across the country (as applicable).
- Evaluate relevant market data and hold interviews with key stakeholders.
- Apply appropriate valuation methodologies and develop a Brand Value framework.



PHASE II

- Evaluate economic, financial, and operational impact of proposed co-branding arrangement.
- Apply Brand Value framework developed in Phase I to relevant metrics.
- Provide a fair market value fee range specific to the proposed agreement.
- Document and present to key stakeholders.

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Protecting the Brand

- What is being licensed?
- How will it be applied/used in the arrangement?
- The term of the arrangement
- Exclusivity and other restrictions
- Will there be any performance criteria?
- Will there be an investment in the form of an equity or membership interest?
 - If so, how will the investor earn a return on investment?

- Scope of due diligence
- Data sharing and continuing disclosure
- Insurance and Indemnification
- ROFR, ROFO, Exclusivity and Restrictive Covenants
- Term/duration and exit/unwind rights and obligations
 - Steps and timeline for unbranding

- Conditions of Use
 - Guidelines for appearance of marks
 - Use by affiliates
 - Licensure and accreditation
 - Exclusion from a Federal Health Program
 - Fraud, conspiracy, corruption, criminal charges
 - Minimum, objective quality metrics
 - Financial distress (e.g., bankruptcy, insolvency)
 - Material breach of agreement
 - Others based on due diligence

- Where is brand addressed?
 - Definitive agreements (e.g., purchase agreement, operating agreement, affiliation agreement)
 - Tied to conditions cross-referenced in a license agreement
 - Professional services and administrative services agreements
- Seek consistency across documents and across present and future transactions

Protecting the Brand

- Royalty payments cannot vary based on referral volume or value
- Exit rights cannot be based on financial, volume, patient acuity factors

- Key Takeaways
 - Brand has value
 - It is contextual (depends on how it is going to be used)
 - Regulatory/legal framework needs to be considered when brand is contractually applied
 - Always protect the brand

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Questions