“UNDER ARRANGEMENT” HOSPITAL-PHYSICIAN VENTURES: STILL ANOTHER WAY TO COOPERATE?

Michael F. Schaff, Esq.  Peter A. Pavarini, Esq.

Wilentz, Goldman & Spitzer  Schottenstein, Zox & Dunn Co., LPA
A Professional Corporation 250 West Street
90 Woodbridge Center Drive P. O. Box 165020
P.O. Box 10 Columbus, Ohio 43216
Woodbridge, New Jersey 07095 Telephone No. (614) 462-5016
Telephone No. (732) 855-6047 Mobile No. (614) 329-5016
Fax No. (732) 726-6552 Fax No. (614) 462-5135
E-Mail: mschaff@wilentz.com E-Mail: peter.pavarini@szd.com
Background of Hospital-Physician Relationships

Are physicians the hospital’s “partners” or its “customers”?

- Hospitals and physicians are competing for the same sources of inpatient and outpatient revenue.
- Equity joint ventures often don’t always satisfy the business objectives of the parties.
- Even financially successful equity joint ventures do little to align the parties’ interests in improving the quality of care, reducing waste, and coordinating care.
Background of Hospital-Physician Relationships

- **Description:** Non-equity models of cooperation are beneficial from a clinical and operational perspective but are unfamiliar to many lawyers and their clients.

- A variety of non-venture equity models have:
  - improved the quality of care
  - reduced inefficiency
  - allowed for shared decision-making
  - permitted investment in costly new technologies
  - enhanced physician income without eroding the hospital’s financial base
  - resulted in greater patient satisfaction.

- Some of these alternative models were first used in the 1980s and 1990s but recently have been given a more contemporary spin.
Background of Hospital-Physician Relationships

Non-equity models are not risk free and may not be for everyone.

- Some joint ventures serve no legitimate purpose and are merely thinly-disguised attempts to get paid for the referral of business.

- Without a sense of shared destiny and without open, honest communication, any hospital-physician relationship is at risk of failure.

- Each party must reasonably believe that the other party’s involvement is needed to make the venture successful for all stakeholders, including patients.
MedMAX Health System operates 6 hospitals in a state with no Certificate of Need Law. MedMAX’s flagship hospital is Franklin Medical Center (“FMC”), a tertiary care facility that is nationally ranked in a number of specialties including cardiovascular care.

FMC’s service area has been experiencing a “medical arms race” which has caused its governing board to put the brake on new capital expenditures, particularly expensive diagnostic equipment.
Radiological Imaging Professionals, P.C. ("RIP") is a group of nearly 50 radiologists who serve several MedMAX hospitals and a few of MedMAX’s competitors including St. Mary of the Springs Hospital (less than a mile from the FMC campus).

RIP has aggressively developed imaging centers in addition to investing in several hospital sponsored joint ventures.

RIP has interests in MRI, PET and older CT technology but not a 64 slice CT.

RIP’s president Dr. Jason Fleece has urged his fellow radiologists to order a 64 slice machine for their imaging center near St. Mary’s but RIP’s lender Knox Bank has been slow to issue a financing commitment.

Knox wants RIP’s physicians to either personally guarantee the loan for the CT or obtain a corporate commitment from one of the local hospitals.
Fact Pattern

- Having recently been elected to FMC’s board, Dr. Fleece approached FMC’s CEO Darla Shopright after last month’s meeting and asked whether she could get the hospital to lease a 50% block of time on RIP’s proposed 64 slice CT for the hospital’s outpatients.

- Fleece indicated that in connection with the block lease, RIP would require an agreement restricting competition for certain referral sources and allocation of patients requesting screenings with no referral.

- Shopright replied that, subject to working out the legal details, she liked the idea and would recommend it at the next board meeting.
Fact Pattern

- Shopright called her outside counsel Peter Pavarini to run Fleece’s idea by him. Pavarini replied that it sounded like another “screwy” RIP deal but that he would talk to RIP’s counsel Michael Schaff and figure out a way to make it work.
- Pavarini and Schaff spoke by telephone last week and both agreed that a block lease tied to a non-competition agreement may be problematic.
- Schaff suggested that FMC and RIP should instead form a joint venture that would own the new CT.
- Pavarini said that may only work if the joint venture entered into an “under arrangement” relationship with FMC. That contract would give the joint venture an exclusive right to serve both inpatient and outpatients, allow FMC to bill the service at hospital rates, and allow RIP to be the manager of the service as well as share in the technical income from the CTs.
Fact Pattern

- When Pavarini called Shopright to explain this alternative arrangement, she said she liked it but wanted to know whether the cardiologists on the FMC medical staff could also get into the deal.
- Pavarini said it would make things more complicated but that he would try to convince Schaff when they negotiate the “under arrangement” contract.
- Dr. Fleece has told Schaff to give Pavarini the impression that St. Mary’s will take the deal if FMC does not.
Discussion of Integration Alternatives:
What is a Joint Venture for Discrete Services?

- **Description:** The physicians and the hospital jointly invest and participate in an outpatient “ancillary service” that is related to the physicians’ specialty, like a free-standing diagnostic imaging center.
- The joint venture entity funds the service and obtains and holds any licenses to operate.
- Profits and losses are allocated between the investors in accordance with their investment.
- The ancillary service may include
  - new modalities or services that were formerly not provided by the hospital, or
  - upgraded versions of modalities or services that the hospital already provides.
Discussion of Integration Alternatives: What is a Joint Venture for Discrete Services? What are the legal concerns?

- **Tax Exempt Hospital Qualification Issues.** Hospitals that are §501(c)(3) tax exempt organizations must comply with the prohibition against *Private Inurement* and the requirement that their activities are exclusively for *Public Benefit*.

- **Unrelated Business Income Tax.** Tax exempt hospitals must pay income tax on “unrelated business taxable income.”

- **Excess Benefit Excise Tax.** If any of the physician participants in the joint venture are “disqualified persons” under the Excess Benefits Tax regulations, care must be taken to avoid a transaction that results in “excess benefits.”
Discussion of Integration Alternatives:
What is a Joint Venture for Discrete Services? What are the legal concerns?

- **Anti-Kickback Law.** Profit distributions to the owners in a joint venture health care facility may be suspect as a means of *remunerating the referrals generated by the owners* (i.e., by the physicians or by the hospital), in violation of the Anti-Kickback Law.

- **Stark Law.** Since hospital-based physicians typically do not generate referrals to the hospital, a joint venture between a hospital and hospital-based physicians may not raise concerns under the Stark Law. However, further care in structuring may be required if the hospital-based physicians are in groups that include physicians whose practices are not purely hospital-based and who do generate referrals.
Discussion of Integration Alternatives: What is a Service Line Lease?

- **Description.** Hospital rents space, equipment, personnel and/or services to physicians for fixed periods of time.
- Physicians operate clinical service from the leased space.
- Useful if Hospital has unused capacity and physicians seek to expand ancillary services, or if both hospital and physician are considering a new service.
- Typical leases are for imaging services, outpatient surgical suites, cardiac labs and physical therapy facilities.
Discussion of Integration Alternatives:

What is a Service Line Lease?
What are the legal concerns?

- **Anti-Kickback Law.** A service line lease will be structured, if possible, to fit within the equipment rental and space rental safe harbors. The OIG issued a Special Advisory Bulletin in 2003 and an Advisory Opinion in 2004 that must be carefully considered by parties contemplating a service line lease arrangement.

- **Stark Law.** If the service line is a designated health service under the Stark Law, physicians who will refer patients to the joint venture will generally not be able to invest, except in situations where all of the physician investors are in a “group practice” within the Stark Law definition. For services that are not designated health services the parties should be able to structure the arrangement to meet the rental of office space and rental of equipment exceptions.
Discussion of Integration Alternatives: What is Clinical Co-Management?

**Description.** Essentially a series of contracts between the hospital and one or more groups of physicians

- Physicians provide medical management services for a specific hospital inpatient or outpatient service line
- Compensation paid to physicians is partly performance-based and tied to achievement of specified quality improvement objectives
- Compensation is also subject to a predetermined annual cap.
- These agreements are typically used to improve and manage a specified hospital service line, such as cardiology, oncology, orthopedics, gastroenterology or emergency medicine, and can be combined with gainsharing activities
Discussion of Integration Alternatives:

What is Clinical Co-Management?
What are the legal concerns?

- No issues associated with the formation of a new provider entity and unlikely to be seen as a “contractual joint venture.”

- The biggest hurdle with respect to the Anti-Kickback Law safe harbor is the requirement that aggregate compensation be set in advance. Parties will likely want to include incentive compensation (which, if included, will not meet a safe harbor).

- Incentive or hourly compensation can be allowable under the Phase II Stark Law regulations, so issues there or in the tax area are generally limited to establishing fair market value and reasonableness.
Discussion of Integration Alternatives:
What is an Income Stream Joint Venture?

- **Description:** The hospital forms a joint venture with physicians, such as a partnership, where the hospital generally retains at least 50% equity. The hospital sells the net revenue stream from a line of service for a defined period of time to the joint venture for fair market value.
Discussion of Integration Alternatives:

What is an Income Stream Joint Venture? What are the legal concerns?

- **The Stark Law.** No Stark exception applies, so they are generally prohibited unless they do not involve designated health services. If the joint ownership of the venture is not precluded by Stark, any direct or indirect compensation arrangements involving the joint venture still must be separately structured to comply with the exceptions for compensation relationships.

- **Anti-Kickback Law.** An income stream j. v. will rarely be able to satisfy each requirement of an Anti-Kickback Law safe harbor. In addition to operating outside a safe harbor, income stream j. v. are problematic because the OIG has flagged core elements of the model as being indicative of abuse.

- **Tax-Exempt Hospital Issues.**
  - Private Inurement & Private Benefit.
Discussion of Integration Alternatives: What is an “Under Arrangement” Venture?

- **Description.** In an under arrangement relationship, the hospital contracts with another entity, generally a physician entity or a hospital-physician joint venture, to provide services to hospital patients.
- Because the Stark Law permits physician ownership in an entity that provides services to a hospital under arrangement if the compensation relationship with the hospital meets an exception, physicians often find participation in these ventures attractive.
- Physicians are given a way to share in the technical component of DHS in certain limited circumstances.
Discussion of Integration Alternatives: What is an “Under Arrangement” Venture

- **Description.** Under arrangement deals should be limited to situations in which cost-effectiveness or clinical considerations necessitate the provision of services by the contracted party rather than by the hospital itself.

- Though the technical component is provided by the contracted entity, the entire service is treated as a hospital service and billed by the hospital.

- The contracted entity’s sole payment is a fee, paid by the hospital, usually on a “per service” basis.
“Under Arrangement” Ventures: Coverage and Payment Conditions

- Payment to the hospital must discharge the liability of the beneficiary or any other person to pay for the service.

- The hospital retains responsibility for the services and must exert a significant degree of control over the provision of the services, so that it is not merely a “billing service” for the contractor.

- Hospital registers patients according to its policies and procedures.
“Under Arrangement” Ventures:
Coverage and Payment Conditions

- Hospital maintains complete medical record on patient, including diagnoses, medical history, physician’s orders and progress notes relating to all services received.
- Hospital credentials physicians and maintains communications with attending physician concerning patient’s progress and need for revised orders.
- Hospital’s utilization review and quality assurance programs apply to the service.
- Note that there is no requirement that the entity that provides services under arrangements be Medicare certified.
“Under Arrangement” Ventures: Coverage and Payment Conditions

- Medicare Conditions of Participation require the hospital’s governing body to be responsible for services furnished to its patients under arrangements.
- “The governing body must ensure that a contractor of services (including one for shared services and joint ventures) furnishes services that permit the hospital to comply with all applicable conditions of participation and standards for the contracted services. (1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner. (2) The hospital must maintain a list of all contract services, including the scope and nature of the services provided.” 42 C.F.R. 482.12 (e).
“Under Arrangement” Ventures: Provider Based Regulations

- Provider-based status is not permitted for any facility or organization that provides all of its patient care services under arrangements. This is intended to prevent hospitals from using under arrangements coverage provisions to circumvent provider-based requirements. Hospitals may not contract out entire departments and claim them as provider-based. 42 C.F.R. §413.65(i); See 65 Fed. Reg. 18518-19 (Apr. 7, 2000).

- Because under arrangement relationships may be located either on the campus of a hospital or at a satellite facility, it is important that the provider-based regulations be given careful attention when the service is not in the hospital or on its campus.
“Under Arrangement” Ventures: Areas of Overlap and Confusion

- Management contracts vs. under arrangement relationships (UAR).
- A management contract is used “to obtain some or all services needed to operate a health care facility, including not only management but professional and other staffing, security, maintenance and other support services…” Thus, a management contract could result in virtually all operations being contracted out so that the facility has only a nominal connection.
“Under Arrangement” Ventures: Areas of Overlap and Confusion

- Management contracts vs. UAR.
  - An UAR is used by a provider to obtain specialized health care services it does not itself offer but are needed to supplement the services that the provider does offer its patients.
  - CMS made this distinction in response to a concern that management contracts for on-campus facilities, while permitted under management contract principles, could be viewed as prohibited because the management contract would result in all services of the facility being furnished under arrangement.
  - In CMS’ view, “provision of services under arrangement is only allowed in situations where cost-effectiveness or clinical considerations, or both, necessitate the provision of services by someone other than the provider’s own staff”
“Under Arrangement” Ventures: Areas of Overlap and Confusion

- A facility or organization cannot provide “all patient care services” under arrangements. How extensive must the services furnished directly by the facility or organization be?
- CMS has noted that “where a facility offers a variety of services, provision of a single type of service under arrangement would not prevent the facility from meeting this criterion.” The criterion is not met by a facility that furnished only a specific type of service (such as physical therapy), and provided that service only under arrangement.
“Under Arrangement” Ventures: Areas of Overlap and Confusion

- May technical component services required to be performed in a hospital setting for Medicare coverage purposes be performed by a freestanding supplier and properly billed by a hospital under arrangements?
- Does it matter where the freestanding supplier is located?
- Is it appropriate for an entity to exist solely to furnish services under arrangements to a single hospital?
- Does it matter if the hospital previously provided these services directly?
- Does it matter if the hospital is an owner of the entity in a joint venture with physicians?
“Under Arrangement” Ventures: Regulatory Issues: STARK LAW

- A “per service fee” can be allowable under the Stark Law if the arrangement meets the exception for indirect compensation relationships, and the per service fee does not vary during the arrangement in a way that takes into account referrals.

- **Indirect Compensation Concerns**
  - Physician ownership of an entity that provides services “under arrangements” with a hospital is not treated as an investment interest in the hospital, but is treated as a compensation relationship. See 42 C.F.R. §§ 411.354 (b)(3)(iv), (c).
“Under Arrangement” Ventures: Regulatory Issues

- **Indirect Compensation Concerns**
  - Because payment for the services is made on a “per service” basis, an “under arrangements” contract with a physician-owned entity will create an indirect compensation relationship between the hospital and the physician, which will need to meet the exception for indirect compensation relationships.
  
  - Because the indirect compensation rule was heavily criticized, CMS created an exception in the Stark II Phase 1 rules allowing physician compensation to be conditioned on referrals if the compensation arrangement met a series of requirements in addition to the basic requirements of the compensation exception, including that the aggregate compensation be set in advance.
“Under Arrangement” Ventures: Regulatory Issues: Anti-Kickback Law

- The per service fee prevents the availability of any Anti-Kickback Law safe harbor, and CMS has noted that “under arrangements” relationships can raise “significant issues” under the Anti-Kickback Law, so the parties will need to ensure that the model is created with care and supported by a strong business justification, and there is no intent to make payments to the physicians in exchange for referrals.

- CMS is suspicious of “under arrangements” used to circumvent the prohibition against physician ownership of parts of hospitals. Scrutiny may also be heightened where a significant portion of the investment opportunities is reserved for referring physicians, or where the service is based on an existing hospital service line.
“Under Arrangement” Ventures: Regulatory Issues

- **Contractual Joint Venture Concerns Under OIG’s Special Advisory Bulletin, April 2003**: Questionable contractual arrangements implicate the anti-kickback statute.

- **Problematic arrangements typically exhibit common elements:**
  - A health care provider in one line of business (the “Owner”) expands into a related line of business, which is dependent on referrals from the Owner’s existing business.
  - The Owner neither operates the new business itself nor commits substantial financial, capital or human resources to the venture. Instead, it contracts out substantially all the operations of the new business to an existing provider of a related item or service (the “Manager/Supplier”).
“Under Arrangement” Ventures: Regulatory Issues

- Problematic arrangements typically exhibit common elements:
  - The Manager/Supplier is an established provider of the same services as the Owner’s new line of business, i.e. otherwise a potential competitor.
  - The Owner and Manager/Supplier share in the economic benefit of the Owner’s new business.
  - Aggregate payments to the Manager/Supplier typically vary with the value or volume of business generated for the new business by the Owner.

- Safe harbor protection may be unavailable.
“Under Arrangement” Ventures: Regulatory Issues: IRS ISSUES

- Hospitals that are §501(c)(3) tax exempt organizations must comply with the prohibition against Private Benefit/Inurement and the requirement that their activities are exclusively for Public Benefit.

- The activities of a joint venture partnership are considered to be activities of the hospital. A tax exempt hospital can avoid conferring impermissible Private Benefit on the for-profit partner if the purpose and activities of the partnership further the hospital’s tax exempt purpose, and the partnership arrangement gives the hospital sufficient control.

- No part of the exempt organization’s net earnings may inure to the benefit of private individuals, often referred to as “insiders” (the prohibition against “Private Inurement”), and the exempt organization must be operated for public benefit, rather than for the benefit of any private interest (the “Public Benefit” requirement).
“Under Arrangement” Ventures:

Regulatory Issues: IRS ISSUES

- By operating the joint venture in a manner consistent with its exempt purpose any Private Benefit conferred to the hospital's for-profit partners will be considered incidental to the achievement of the hospital's exempt purpose. Private benefit which is merely incidental (in both a qualitative and quantitative sense) to the achievement of exempt purpose will not affect a hospital's tax exempt status.
Under arrangement joint ventures typically involve only a small segment of a tax exempt hospital's total activities and, thus, will be considered "ancillary" in nature. Because the hospital likely carries on substantial charitable activities outside of the joint venture, loss of tax exempt status is not the primary concern. Rather, in ancillary joint ventures, a hospital's failure to exert sufficient control to ensure the venture operates exclusively for exempt purposes will most likely result in the hospital's income from the venture being treated as unrelated business taxable income ("UBTI").
“Under Arrangement” Ventures: Regulatory Issues: IRS ISSUES

- The "control" a tax exempt organization should exercise over a joint venture to prevent loss of exempt status and/or the attribution of UBTI can vary. Ideally, the exempt organization has majority control of the joint venture's governing body. However, if the joint venture is 50/50, other measures can be incorporated into the partnership or operating agreement to ensure that achievement of the exempt organization's charitable purposes overrides profit motives. For example, the agreement could include binding charitable purpose provisions and grant the exempt organization certain reserved powers.
“Under Arrangement” Ventures: Regulatory Issues: IRS ISSUES

- Private Use Rules for Tax-Exempt Bond-Financed Property
  - To the extent an under arrangement joint venture provides services through the use of a facility financed with tax-exempt bonds, the under arrangement services agreement between the joint venture and the hospital should be structured to avoid "private use."
  - The IRS has issued guidance in the form of Revenue Procedure 97-13 ("Rev. Proc. 97-13") which sets forth certain "safe harbors" for how a “management” contract between the owner of a facility financed with tax exempt bonds and a private service provider may be structured to avoid a private use.
“Under Arrangement” Ventures:

Regulatory Issues: State Law Concerns

- **State Self-Referral Laws.** In addition to the federal Stark Law, there are state laws restricting referrals of a patient to a health care service in which the physician has a significant beneficial interest. Some states even expand the federal prohibitions to include all patients (not just Medicare and Medicaid patients) and all services (not just designated health services).

- **State Anti-Kickback Laws.** Many states have anti-kickback laws comparable to the federal anti-kickback statute in which it is a violation of law for any person to offer, pay, solicit, or receive anything of value, in cash or in kind, directly or indirectly, overtly or covertly, to reward or to induce a referral of patient whether or not the patients are covered under a government assistance program.
“Under Arrangement” Ventures: Regulatory Issues: State Law Concerns

- **Certificate of Need.** If the under arrangement venture is classified under a state’s Certificate of Need law as the addition, acquisition or replacement of health care facilities and equipment, prior approval may be required. Prior approval is also required for the initiation of certain new medical services.

- **Licensure.** Licensure is the primary mechanism used by states to regulate health care facilities. States typically set minimum quality standards for the operation of facilities, such as adequacy of buildings, equipment, maintenance and sanitation. In an under arrangements relationship, who has to apply for the license?
“Under Arrangement” Ventures:
Regulatory Issues: State Law Concerns

- **Antitrust Laws:** Although generally not a major issue, compliance with federal and state antitrust laws may be a consideration where the under arrangement relationship impedes competition within the market. This could be the case when the hospital and the physicians use this model to keep others from competing for the same patients or for setting a floor on the pricing for the service being offered.
“Under Arrangement” Ventures: Private Payers

- Unlike Medicare, private payers including managed care organizations, may not be familiar with the under arrangement model and consequently are often reluctant to pay for these services at hospital rates.

- To avoid being challenged, hospitals and their physician partners should anticipate this issue by making clear to the payer that the service is indeed a hospital service and may be billed as such.

- Care should be given that any associated claims for professional services clearly state that they are exclusive of any technical or ancillary services being billed by the hospital.

- Although not always possible, some under arrangement services should be billed by the hospital as a "global" fee inclusive of both the professional and technical components.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

The following are key negotiation terms when drafting contracts for an under arrangement transaction:

I. Duties of the Hospital

a) What are the Hospital’s obligations to its patients?

b) What are the Hospital’s obligations regarding the services provided?

c) What are the Hospital’s obligations to the physicians?
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Sample Provision

In addition to such other duties and obligations as may be imposed upon Hospital pursuant to this Agreement, all patients for which a Hospital requests Services pursuant to this Agreement shall be registered as a patient of the Hospital in accordance with the Hospital's admission policies. Hospital will monitor the provision of the Services pursuant to this Agreement in accordance with Hospital's applicable policies, processes and procedures and maintain professional responsibility for the Services provided to its patients. Hospital shall maintain frequent communication with the individual physicians responsible for providing the Services being administered to Hospital's patient with respect to the progress of the patient and the need for revised orders and/or follow-up treatment. Hospital will monitor the provision of the Services pursuant to this Agreement in accordance with Hospital’s quality assurance and utilization review processes and procedures.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

- Duties of the Provider

  a) Provider’s responsibilities to the Hospital?
  b) Provider’s responsibilities to the patients?
  c) Provider’s responsibilities for the services provided?
“Under Arrangement” Ventures:
Contract Provisions / Negotiation

Sample Provision

Provider hereby acknowledges Hospital's obligation to oversee and maintain responsibility for the Services provided to its patients pursuant to this Agreement. Therefore, in addition to such other duties and obligations as may be imposed upon Provider hereunder, Provider hereby agrees to take such actions as Hospital may reasonably request to enable Hospital to maintain such oversight and responsibility, including, but not limited to, following and adhering to Hospital's applicable patient care policies and procedures with respect to the Services provided. By way of illustration, but not by limitation, Provider shall provide the Services in accordance with Hospital's quality assurance and utilization review policies, processes and procedures and shall complete and maintain medical records of patients in accordance with Hospital's policies including, but not limited to, diagnosis, medical history, orders and progress notes.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

- Staff, Equipment, and Supplies
  a) Who selects?
  b) Who provides?
  c) Payroll and Benefit Issues
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Sample Provision:

In consideration of the compensation provided pursuant to this Agreement, Provider shall, at its sole expense, provide such personnel, supplies, utilities, Equipment, and other support services required for the provision of the Services contemplated hereunder.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Compensation

a) How is compensation determined?
b) What is the time of the payments?
c) What are the conditions and limits on compensation?
d) How do changes in reimbursement affect compensation?
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Sample Provision

In consideration of the provision of the Services hereunder, Hospital shall pay the Provider per procedure as set forth in the Fee Schedule attached hereto as Exhibit __. The fees payable to the Provider under this Agreement represent payment in full to the Provider for the Services. The Provider will invoice Hospital on a monthly basis for the Services, and such invoices shall be payable consistent with Hospital’s regular payment practices without regard to the collection of the bills submitted to patients, patients or other responsible parties. The fees set forth in Exhibit __ shall not be changed or modified during the initial one-year term of this Agreement. Thereafter, the fees set forth in Exhibit __ may be adjusted by mutual agreement of the parties, not more frequently than once annually, and in a manner that is both consistent with the fair market value of the Services and without regard to the volume or value of referrals or other business generated between the parties.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Billing and Collection:

a) Who shall be responsible for billing and collection?
b) Who can provider look to for payment?
Sample provision:

Hospital shall be responsible for the billing and collection of all fees generated from the Services Provider provides to Hospital's patients at the Facility, regardless of whether such bills are submitted to private or governmental payors or patients. Provider agrees to look solely to Hospital for payment for the Services provided hereunder and neither Provider nor any of its employees or contractors shall bill or seek to collect any amounts from patients and/or third party payors for the Services provided pursuant to this Agreement or any item associated with the Services (including any separate charges for professional services, technical services or supplies). Excluding Provider’s compensation, Provider assigns to Hospital any and all of Provider’s rights to bill to, collect from or receive payment from any source of payment, including but not limited to governmental payer sources, for Services rendered by Provider under this Agreement. Provider further agrees to cooperate, assist and comply with all legal or other requirements of any third-party payor or Hospital to effectuate the intent and meaning of the foregoing assignment and this Agreement.
Control of management:

a) Who chooses the Medical Director(s)?
b) Who does the Medical Director report to at the Hospital?
Sample provision:

Hospital shall contract with a medical director to oversee the clinical operations of the Services provided at the Facility (the "Medical Director"). The Medical Director shall be chosen in consultation with and with input from Provider. The Medical Director shall maintain a reporting relationship with the chief medical officer or similar official of Hospital and shall adhere to the same requirements and standards adhered to by the medical directors of Hospital's other departments.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Physician Credentialing

a) What qualifications should physicians have in order to provide services at the hospital?

b) Should the physicians be required to maintain staff privileges at the hospital?
Sample provision:
The Services required of Provider pursuant to this Agreement shall only be performed by appropriately qualified and licensed technical personnel and Physicians who shall have and maintain unrestricted medical staff privileges at Hospital during the term of this Agreement. All Physicians providing any Services pursuant to this Agreement shall maintain a current, unrestricted and valid license to practice medicine in the State of __________.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Non-competition Covenants
a) What are the geographic and time restrictions of the restrictive covenant?
b) Are the physicians permitted to solicit hospital employees?
c) Are the physicians permitted to solicit hospital patients?
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Sample provision:

The parties represent and warrant that each has not entered into other agreements which would interfere with the performance of their respective duties under this Agreement. Further, during the term of this Agreement and for a period of two (2) years thereafter, no individual Physician or entity who directly or indirectly holds an ownership interest in the Provider shall provide either directly or indirectly services of the type customarily provided at the Facility to any corporation, partnership, limited liability company, proprietorship or other business enterprise that provides, contracts for the provision of, or holds itself out to the public as a provider of professional medical services at any location within a ___ mile radius of the Facility and is either (i) a hospital, health system or similar institution that competes with the Hospital or any other affiliate of the Hospital (“Competing Institution”) or (ii) any other business enterprise that controls, is controlled by or is under the common control of a Competing Institution.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

Legal Jeopardy Provisions:

a) What happens if the law changes and renders the Under Agreement or any portion of the deal illegal?

b) Sample provision:

The parties recognize that this Agreement is at all times to be subject to applicable federal, state, and local law and shall be subject to amendments in such laws and enactment of new legislation, rules, and regulations. Any provisions of law that invalidate or otherwise are inconsistent with the terms of this Agreement or that would cause any of the parties to be in violation of law shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of law.
Sample Provision
Notwithstanding any other provisions of this Agreement, if the governmental agency (or its representative) administering Medicare or Medicaid, or any other federal, state, or local government or agency passes, issues or promulgates any law, rule, regulation, standard, or interpretation at any time while this Agreement is in effect which prohibits, restricts, limits, or in any way materially changes the method or amounts of reimbursements or payment for services rendered under this Agreement, or which otherwise materially affects either party's rights or obligations hereunder or is reasonably expected to result in a material adverse effect upon either party, the affected party may give the other party notice of intent to amend this Agreement in a fashion that is equitable to both parties considering such prohibition, restriction, limitation, or change, and the parties shall negotiate in good faith to accomplish such amendment. If this Agreement is not so amended in writing within thirty (30) days after said notice is given, either party shall have the right to terminate this Agreement immediately with written notice.
“Under Arrangement” Ventures: Contract Provisions / Negotiation

- Term and Termination Provisions
  a) Events of Default
  b) Post Termination Obligations
  c) Sample provision:
     If this Agreement is terminated for any reason prior to the end of a 12-month period as measured from the Effective Date, the parties shall not enter into another agreement for the provision of the Services at a different compensation level until after the expiration of that 12-month period.

Other Drafting Concerns
QUESTIONS?