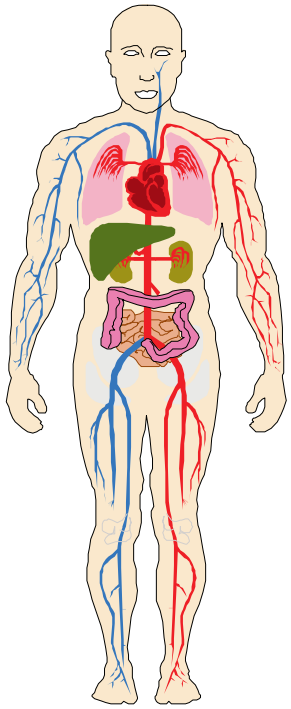
Representing Physicians: Life Cycle of a Physician-Practice & Physician Integration Options



Fundamentals of Health Law

Chicago

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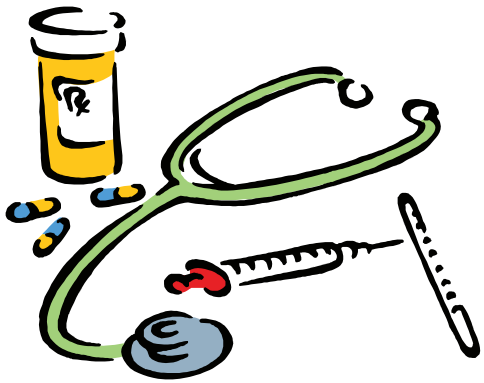
Overview

- General Considerations
  - Who is Your Client?
  - Who Can Employ a Physician?
- Basic Issues in Employment Contracts
- The Buy-In: Becoming an Owner in a Medical Practice
- Retirement Issues
- Sale of Practice
- Post Termination Restrictions
- Physician Statistics
- Physician Practice Mergers
- Physician-Hospital Integration Models



Who Is Your Client?

- The medical practice itself (“Practice”)
- The physician being admitted to the Practice
- A younger owner
- An older owner
- The President of the Practice

Understand Your Client

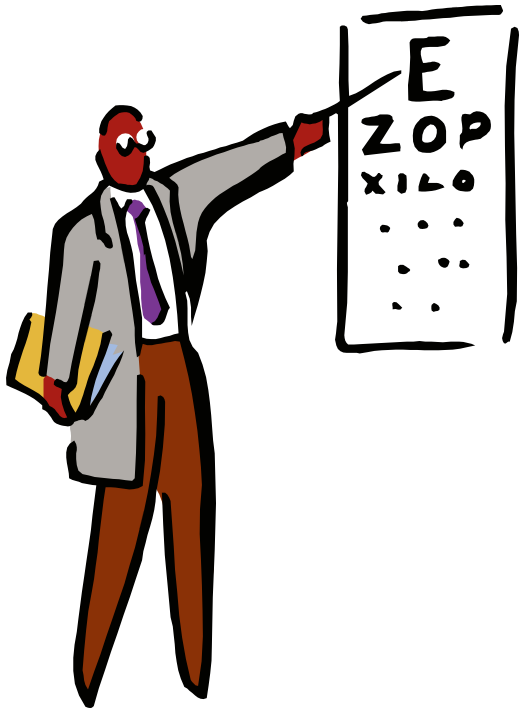
- Advise each owner to have his or her own counsel, accountant and other necessary professional(s)
- Know who you are dealing with *"Who are the parties and the professionals?"*
  - Accountant
  - Attorney
  - Outside practice management consultants
- ***What are your client's goals?***

Who Can Employ A Physician?

- Corporate Practice of Medicine Doctrine
  - Prohibits ***unlicensed*** individuals or entities from practicing medicine or employing healthcare professionals
  - Regulates who can employ physicians in ***some states***

Who Can Employ A Physician?

- Check Current State Laws
  - Physicians cannot be employed by unlicensed entities, general business corporations, or general business limited liability companies (LLCs)
  - Many states allow physicians to form a professional corporation or LLC



BASIC ISSUES IN PHYSICIAN EMPLOYMENT CONTRACTS

Term

- Commencement Date: ***When does employment start?***
  - Conditions Precedent vs. Conditions Subsequent
    - Examples:
      - Receipt of State License
      - Receiving Hospital or other privileges
- "The Employee's first day of employment is contingent on the Employee's receipt of his/her [State] medical license and obtaining [provisional or attending] staff status at _____ hospital(s), however, the actual first day of the Employee's employment shall be the "Commencement Date." If the Commencement Date has not occurred by _____ ___, 201_, the Employer may terminate this Agreement."

Termination Date

Renewal Terms: A*utomatic Renewal* (Evergreen Clause)

" The Employee's employment under this Agreement shall commence as of _____ , 201_ (the "Commencement Date") and shall continue thereafter until _____ __, 201_. Thereafter, this Agreement shall automatically renew itself for successive _____ (__) year terms unless either party gives the other party at least ___ days notice of its intent not to renew. This Agreement may be terminated prior to the end of its terms pursuant to the provisions of Paragraph __ below."

Duties

- Time Commitment
  - Full time? *Define?*
  - Part time?
  - Work schedule (days/hrs)
  - Night, weekend and holiday ***call schedule***

Duties

- Locations (limit?)
- Time Commitment for Administrative Matters
- ***Moonlighting*?** Ability to work outside Physician Organization
  - Practice may want to restrict since it may affect Group Practice definition under Stark (75% test)
  - Does Practice's Malpractice Insurance Cover?

Duties

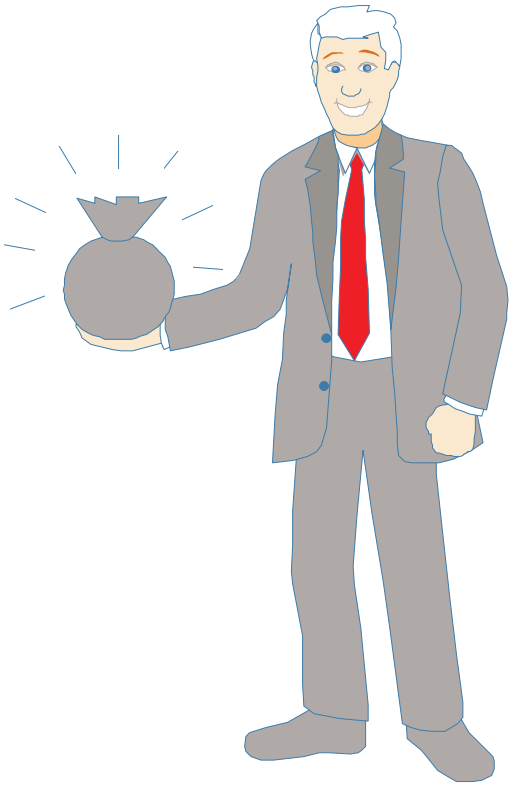
- Compliance with Ethical Standards of Medical Profession
- Compliance with Other Documents of the Practice, including:
  - **Employers':** Ownership Agreement, Bylaws, Rules and Regulations, Compliance Plans, HIPAA
  - **Hospitals' or other Facilities' where Physician is on staff:** Bylaws, Rules and Regulations.

Duties

- Required Licenses, Hospital Privileges and Board Certification
- Requirement for Continuing Medical Education

Duties

- ***Inclusion or exclusion*** of income/revenue generated from sources “outside” practice
- Define outside sources, *i.e.,* expert testimony, lectures, medical director fees, other…..



Duties: Billing Issues

- Fee schedules
- Assignment of fees
- Completion of medical records and reports
- Responsibility for accuracy in billing

Compensation: Overview

- What does the Practice wish to reward?
- Reward should encourage specific behavior

Compensation: Overview

1. Equal Compensation

2. Productivity Formulas: must understand

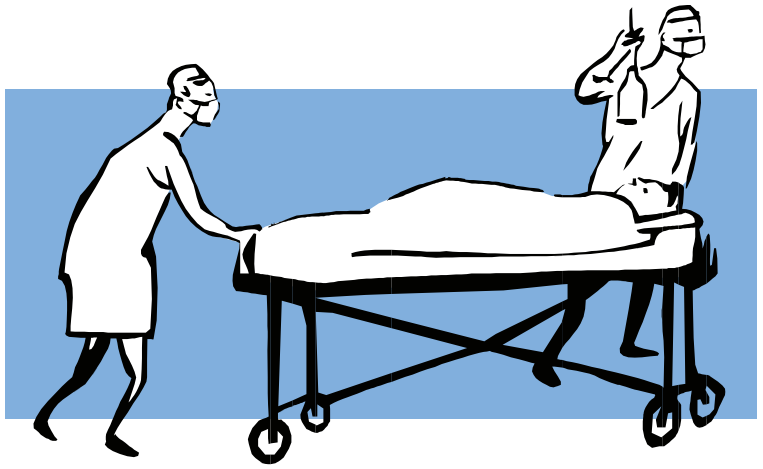
- Stark Law
- Fraud & Abuse Laws
- Applicable State Laws
- Medicare Reimbursement Rates
- IRS Unreasonable Compensation Issues

Compensation: Overview

3. Combination of Equal and Productivity

4. Point System (or Relative Value Method ("RVUs"))

5. Fixed Base Periodic Salary + Bonus



Other Compensation Issues

- Severance/Deferred Compensation on termination
- Disability Compensation
  - Definition of disability
  - Offset for disability insurance payments
  - Accrual of time off during disability?

Benefits

- It's not all about money
- Vacation (scheduling issues)
- Sick days
- Seminars, conventions, and continuing medical education

Benefits:
Expense Reimbursement

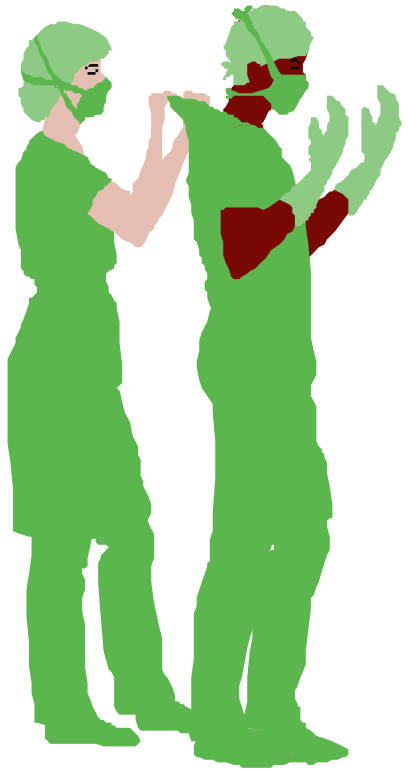
- Automobile payments, gas, tolls & parking
- Cell phone & beeper, dues & staff fees (hospital, MCOs, IPAs, ACOs, societies)
- Moving expenses
- Maternity leave
- Subscriptions and journals
- Pension plan & 401(k)
- Entertainment & other fringe benefits

Benefits

- Disability Insurance
- Medical Insurance
- Dental Insurance
- Vision Insurance

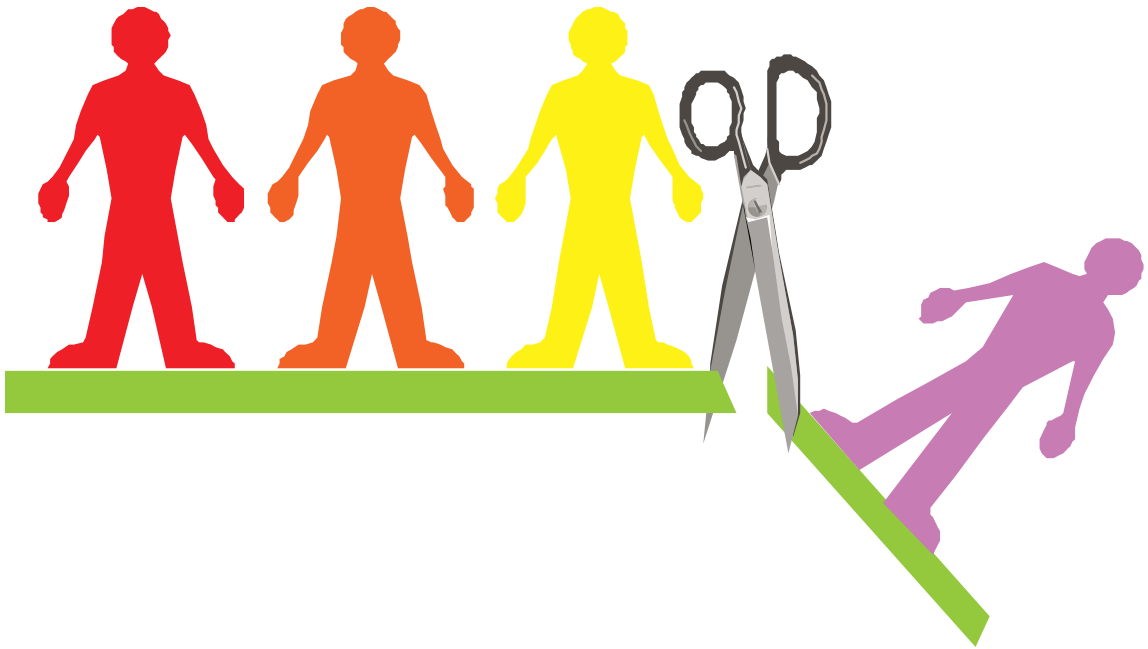
Malpractice Insurance

- Malpractice Insurance Crisis?
- Occurrence Policy vs. Claims Made Policy (Need for Tail)
- Amount?
- Cancellation of policy, refund entitlement



Termination

- Mutual Agreement
- Death
- Disability
- Breach



Termination: Without Cause

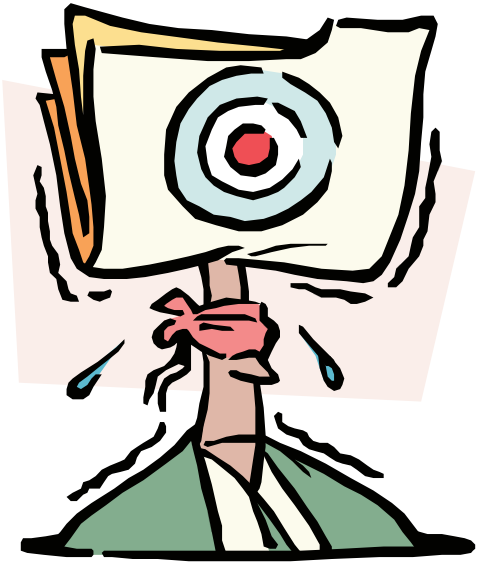
By the Employee or the Employer **without cause (for any reason or no reason)** on at least _____ (___) days advance written notice to the other party, provided that upon receipt of notice by the Employee, *the Employer shall have the right to terminate the employment of the Employee prior to the expiration of the notice period and pay the Employee only through his/her last day of employment.*

Termination: With Cause

- Recurring absence
- Failure to abide by the terms of employment, after notice and a ten (10)-day opportunity to cure
- The loss of license or suspension or the right to dispense or prescribe narcotic drugs
- The suspension, revocation, or curtailment of privileges to practice at necessary facilities

Termination: With Cause

- Fraud, misappropriation, embezzlement, theft, dishonesty or similar actions
- Intoxication while on duty
- Illegal use or possession of drugs
- Act or omission constitutes an indictable criminal offense



Termination: With Cause

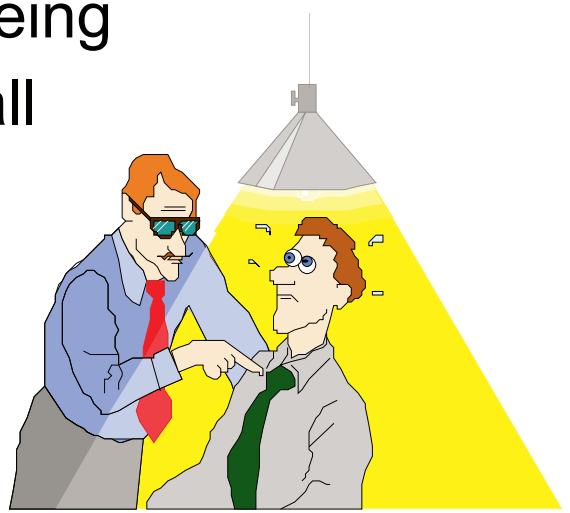
- Sale of [stock / membership interests] of the Employer, if an owner
- Failure to maintain or qualify for malpractice insurance at standard rates (Malpractice Insurance Crisis?)
- Failure to obtain (or maintain) board certification within the time period
- Exclusion from Medicare, Medicaid and other federally funded healthcare programs
- Violation of AMA Code of Ethics

Termination: With Cause

- If a hospital-based practice (*i.e.,* radiology, anesthesia, or pathology), the termination or non-renewal of the exclusive agreement with Hospital.

Termination: With Cause

- ***Catch all provision:*** "any other conduct of Employee which the Employer deems detrimental to its practice or which constitutes cause for termination in the Employer's reasonable discretion, it being impossible to specifically enumerate all events, conduct, and occurrences which would be injurious to the Employer and which would constitute cause"



Restrictive Covenants: Prohibited Activities

- State specific
- Post-employment practice of medicine
- Solicitation of:
  - Patients
  - Employees
  - Referral sources
- Conflicting economic interests
  - Medical directorships
  - Investments
  - Moonlighting

Restrictive Covenants: Reasonableness/Three-Pronged Test

1. **Restrictive covenant must be necessary to protect a legitimate business interest of the employer**.
   - Patient lists
   - Ongoing patient relationships
   - Value of physician's training and experience

Restrictive Covenants: Reasonableness/Three-Pronged Test

2. **Restrictive covenant must not impose an undue hardship on the employee**.

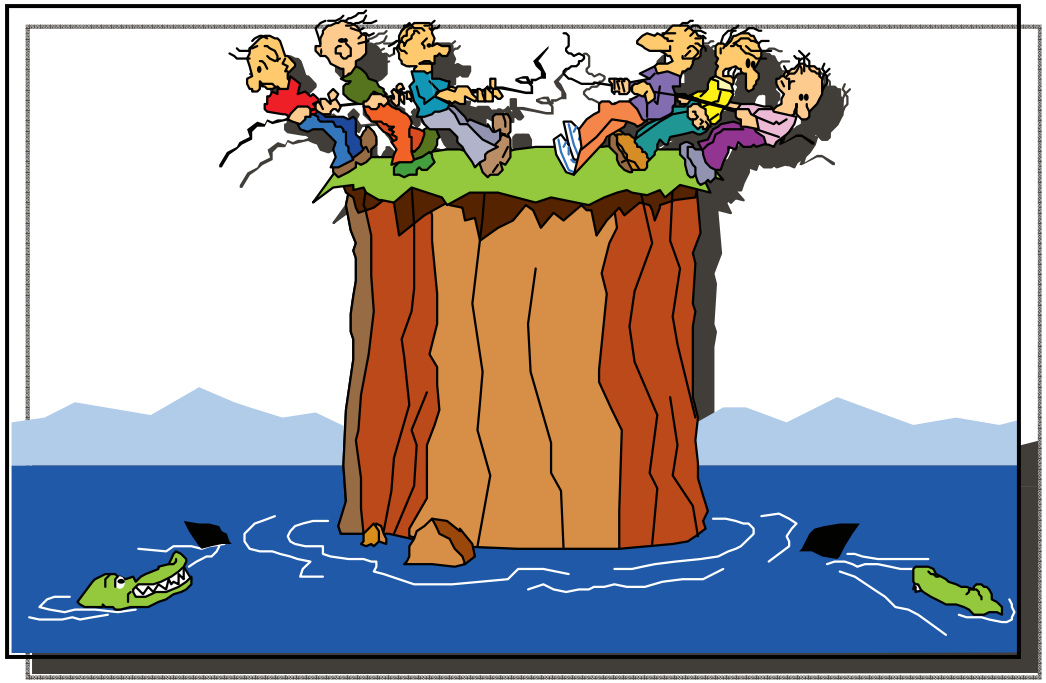
   - Cannot deprive an employee/member from earning a living in his/her profession
   - Mere adverse financial consequences or personal hardship imposed as a result of a restrictive covenant do not rise to level of undue hardship

Restrictive Covenants: Reasonableness/Three-Pronged Test

3. **Restrictive covenant must not be injurious to the public at large.**
   - Right of public to consult physician or health care professional of choice
   - Cannot prohibit patients from independently seeking out employee's services
   - Cannot restrict so as to cause a shortage of medical professionals in either a particular area of specialty or geographic region

Restrictive Covenants

- Liquidated damages vs. injunction



Patient Records and Files

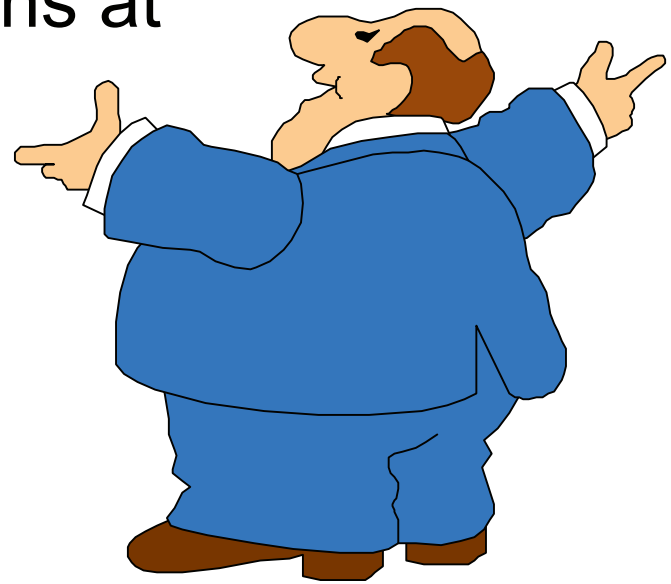
- Ownership of Patient Records by Employer
- Right to Copies of Patient Records and Charts
  - Local Laws
  - Costs

Ownership Opportunity

- When will Employee **be eligible** to be an Owner?
  - Firm Offer
  - Nonbinding Intent

Ownership Opportunity

- Typical to have waiting period
  - 2 - 5 years to become eligible
- Better to manage expectations at beginning of employment



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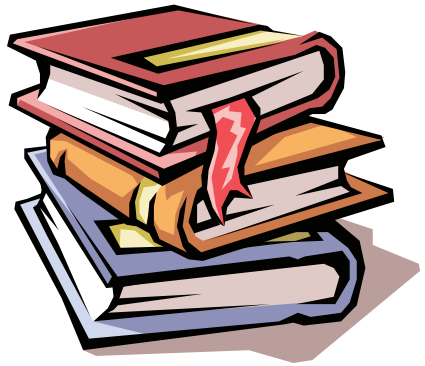
BUY-IN TO A MEDICAL PRACTICE

The Buy-In: Due Diligence

Documents, agreements and contracts relating to the Practice should be reviewed

- Certificate of Incorporation / Formation
- Bylaws
- Operating/Stockholder Agreement
- Organizational Minutes
- Tax Returns
- Payor Agreements
- Hospital Agreements



The Buy-In: Due Diligence

- Property leases and subleases
- Equipment leases
- Employment, consulting, management and other service agreements (owners and non-owners)
- Agreements with respect to shared facilities and functions
- Purchase and supply contracts
- Licenses

The Buy-In: Due Diligence

- Lines of credit
- Loan and credit agreements, mortgages, promissory notes, security agreements and other evidences of indebtedness
- Accounts payable
- Deferred Compensation Agreements
- Policies and procedures, including employment manuals and compliance plans
- Employee benefits agreements
- 401(k) plan and other pension plans
- Health, accident, life and disability insurance policies

The Buy-In:
Related Party Transactions

- Are there any arrangements between an owner and the Practice? Are they at fair market value?
  - Real estate (the medical office)
  - Equipment
  - Employment of relatives
  - Loans from / to related parties

Anatomy of a Purchase or Subscription Agreement

- Ownership Percentage Purchased
- How will the Practice be valued?
- Representations and Warranties

Ownership Agreements

1. Control and Management
   - Minority Protection Rights & Supermajority
2. Transferability of Ownership Interests
   - Triggering Events
   - Valuation
   - Tax Considerations
   - Funding Buy-outs

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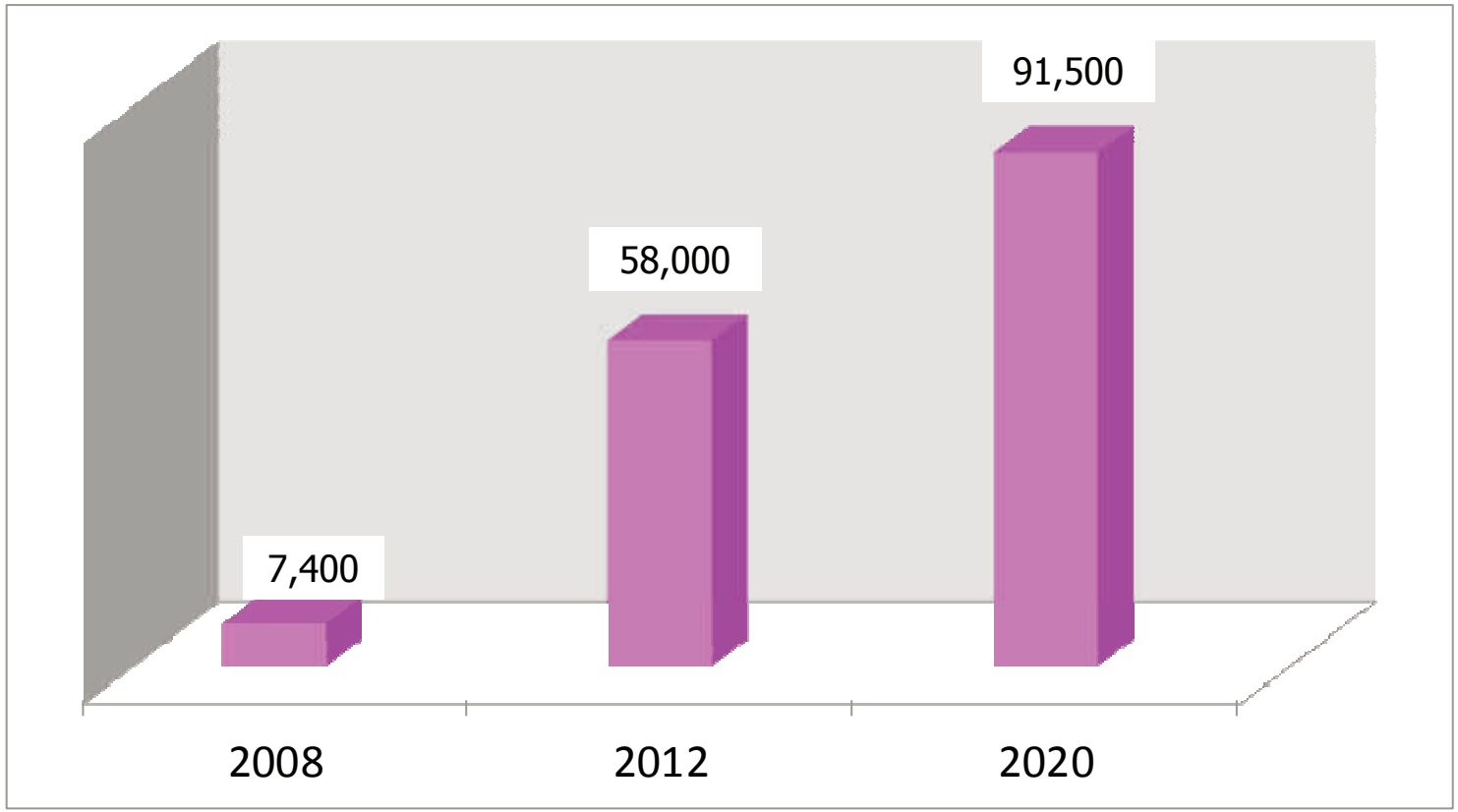
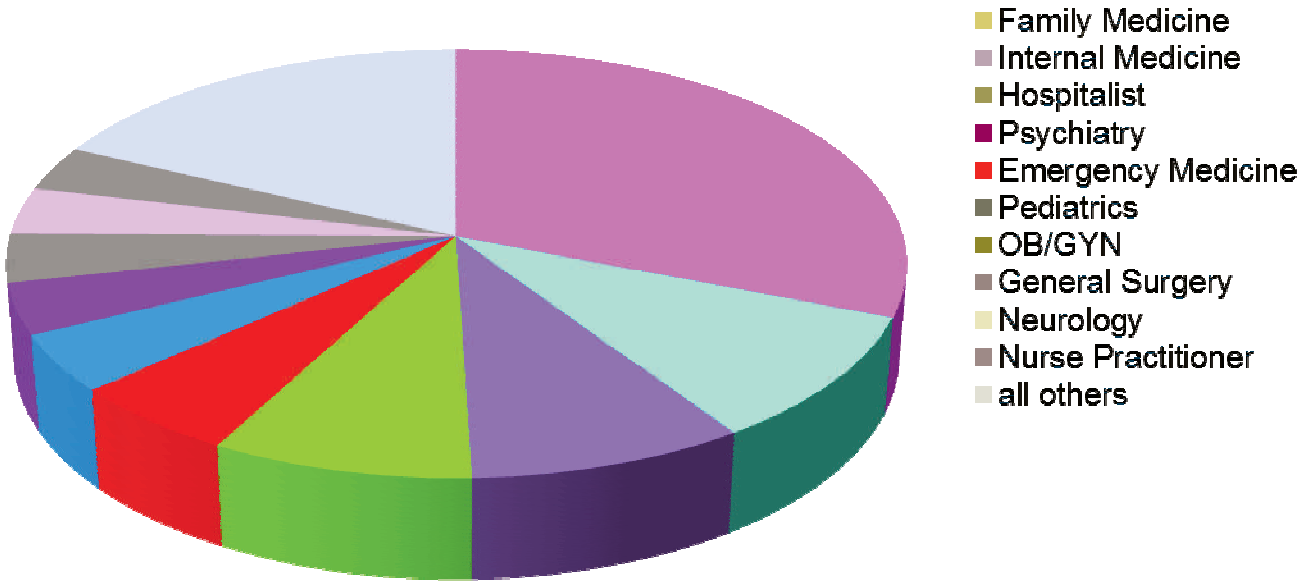
PHYSICIAN STATISTICS

Projected Physician Shortages



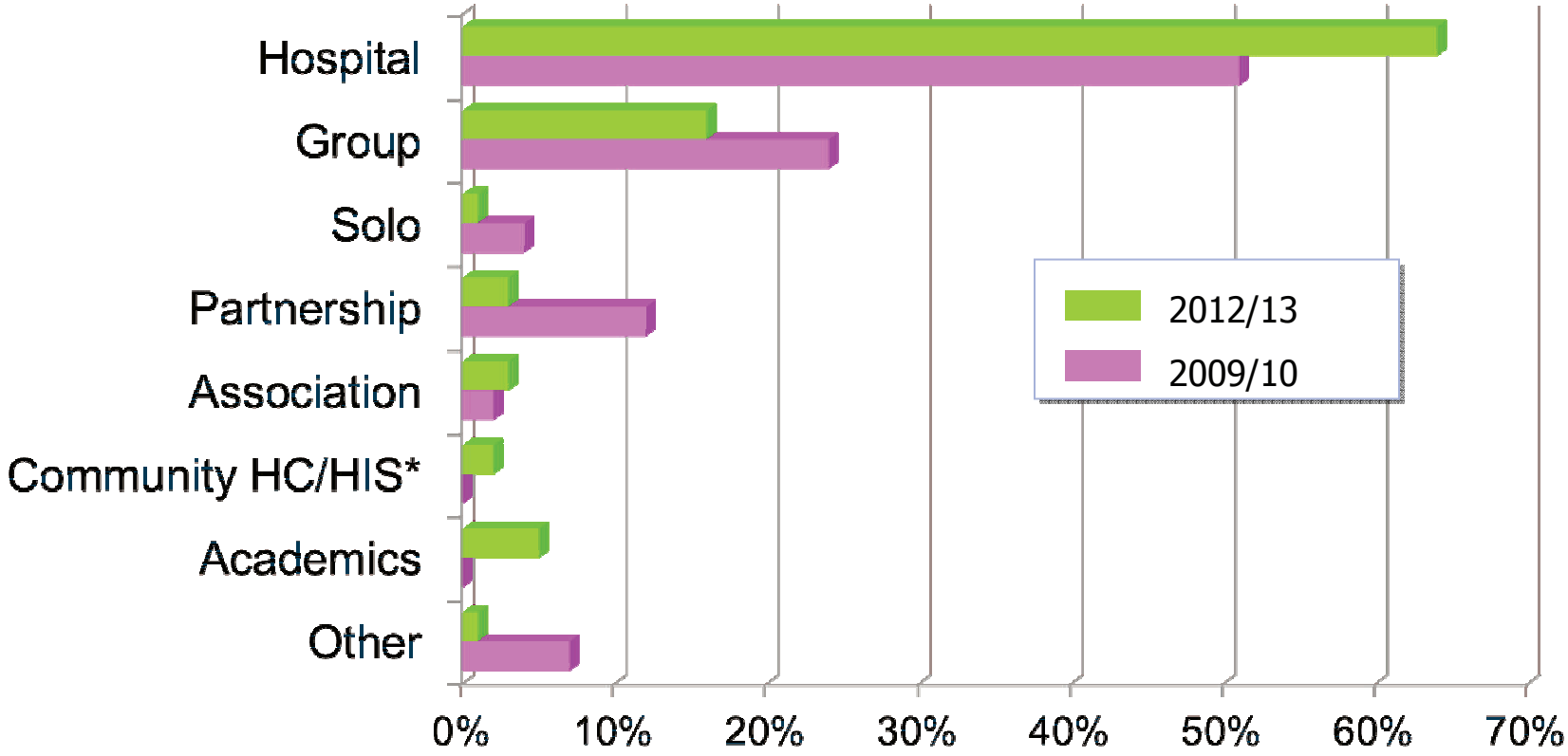
SOURCE: Merritt Hawkins 2013 Review of Physician and Advanced Practitioner Recruiting Incentives

Top 10 Most Requested Physician Searches by Medical Specialty – 2012/2013



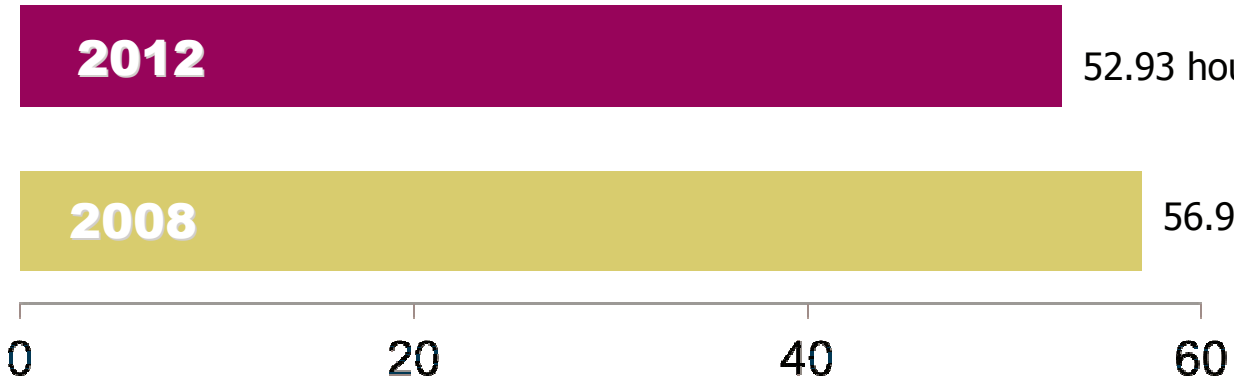
SOURCE: Merritt Hawkins 2013 Review of Physician and Advanced Practitioner Recruiting Incentives

Medical Settings of Physician Search Assignments – 2012/13 vs. 2009/10



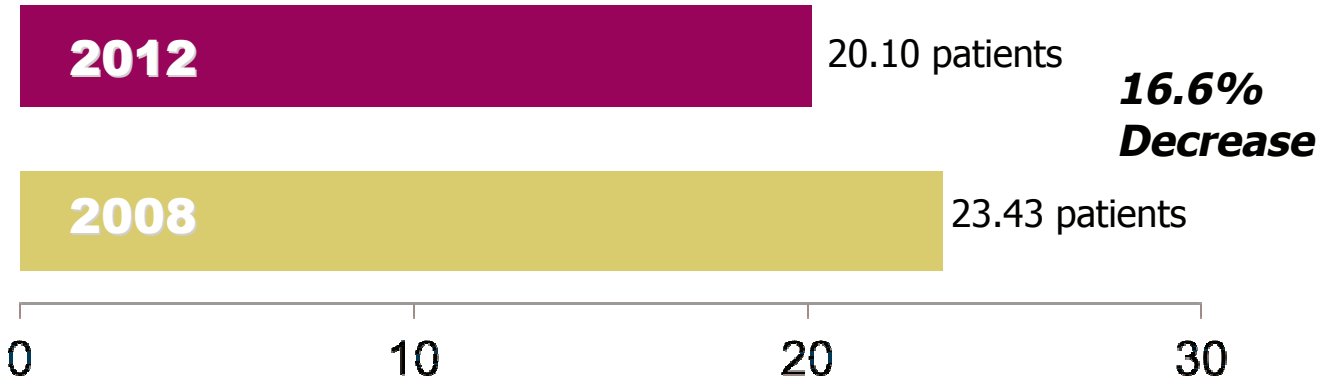
*This category included in "Other" in 2009/10.
SOURCE: Merritt Hawkins 2013 Review of Physician and Advanced Practitioner Recruiting Incentives

How Many Hours Do You Work Per Week?



SOURCE: A Survey of America's Physicians: Practice Patterns and Perspectives. The Physicians Foundation / Merritt Hawkins. September 2012.

How Many Patients Do You See Per Week?



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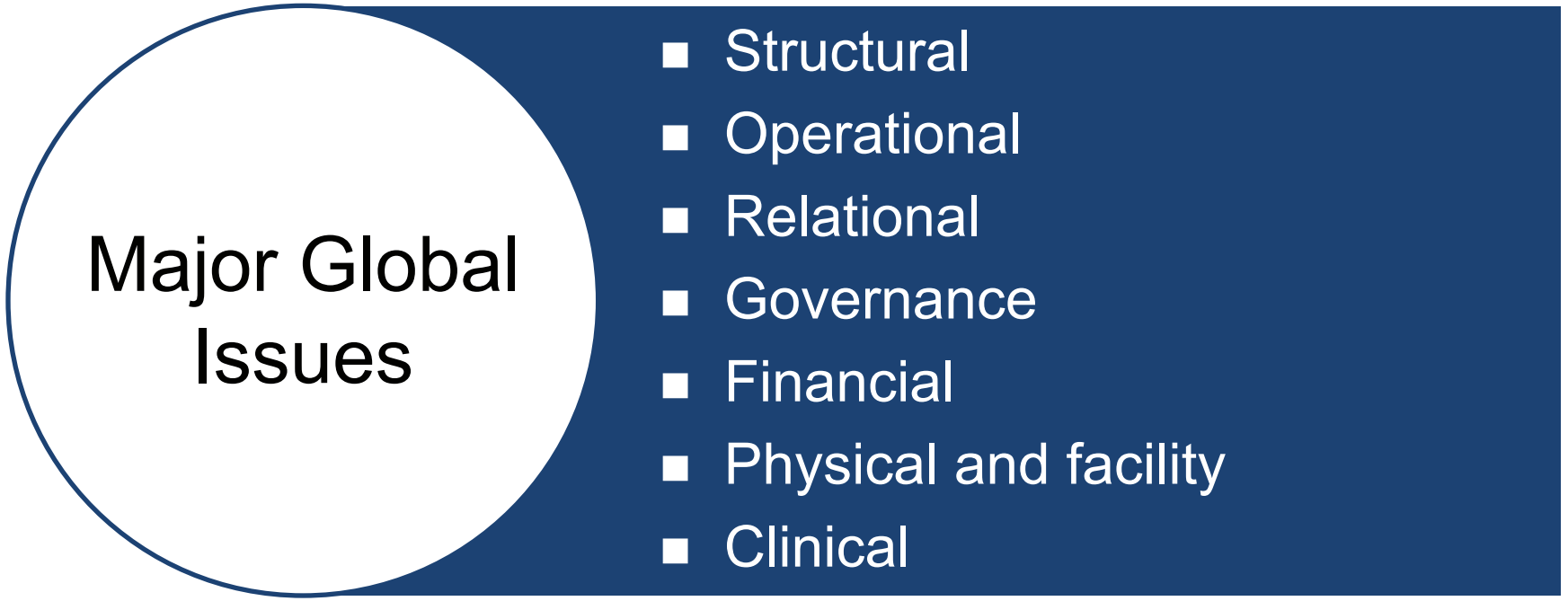
PHYSICIAN PRACTICE MERGERS

Physician Practice Mergers

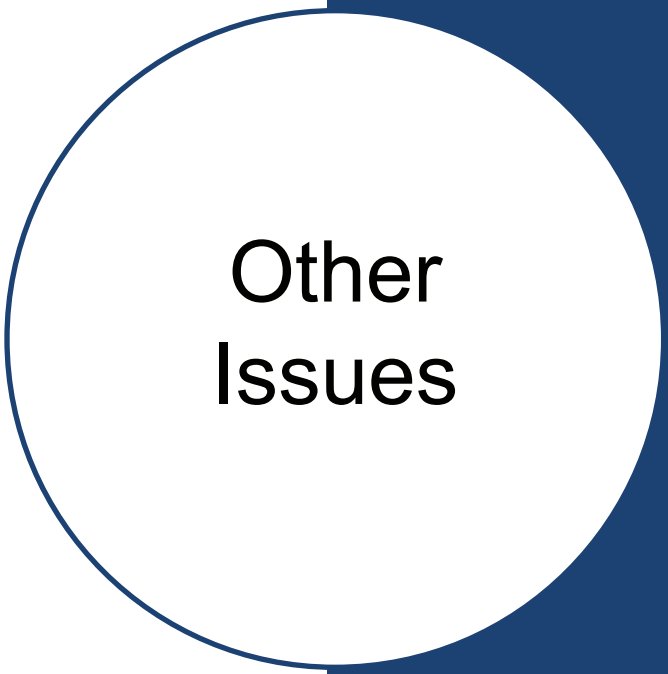
- Increased strength to negotiate with health systems
- Potential to create own ACO if group large enough or patient-centered medical home
- Large enough to contract with health systems and their CINs, quality collaboratives or ACOs
- Greater opportunity and leverage to negotiate co-management, service line oversight, pay-for-call, medical directorships, recruitment support, and management services organization arrangement with health systems

Issues to Address before Merging



SOURCE: The Healthcare Executive's Guide to Physician-Hospital Alignment, HealthLeaders Media, 2013

Issues to Address before Merging



- Facilities, real estate and locations
- Practice style and clinical protocols
- Physician recruitment/retention
- Practice income distribution plan
- Ancillary services
- Managed care reimbursement and contracting
- Costs and economies of scale
- Information technology
- Marketing and branding, including name designation
- Management and administrative leadership
- Staffing and overall personnel management
- Practice debt (both prior to and after merger)
- Clinical compatibility

SOURCE: The Healthcare Executive's Guide to Physician-Hospital Alignment, HealthLeaders Media, 2013

PHYSICIAN-HOSPITAL INTEGRATION MODELS

Physician-Hospital Alignment – Why Now?

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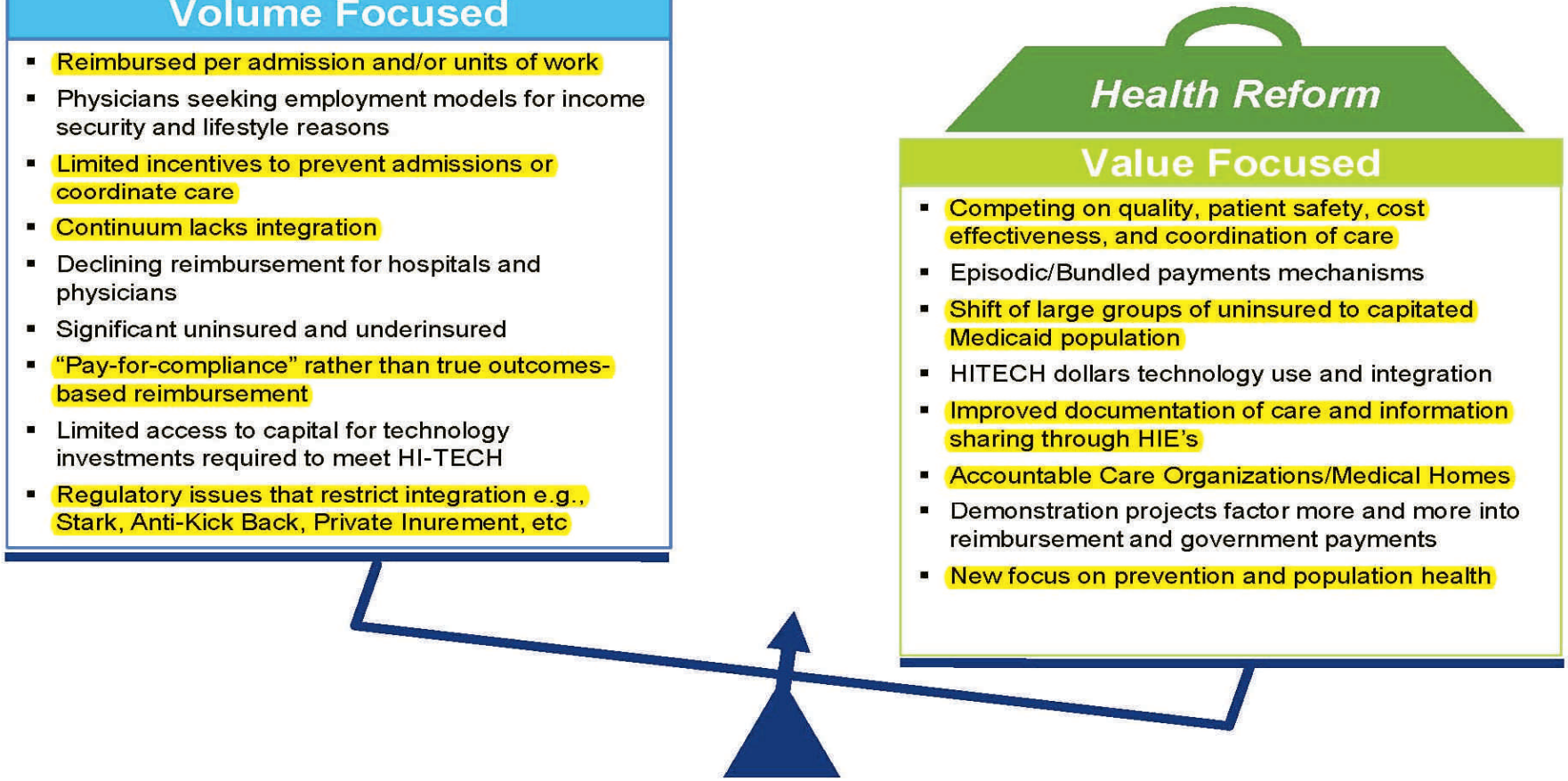
Health reform initiatives and incentives provide the tipping point to accelerate the existing momentum for health system/physician alignment

Volume Focused

- Reimbursed per admission and/or units of work
- Physicians seeking employment models for income security and lifestyle reasons
- Limited incentives to prevent admissions or coordinate care
- Continuum lacks integration
- Declining reimbursement for hospitals and physicians
- Significant uninsured and underinsured
- "Pay-for-compliance" rather than true outcomes-based reimbursement
- Limited access to capital for technology investments required to meet HI-TECH
- Regulatory issues that restrict integration e.g., Stark, Anti-Kick Back, Private Inurement, etc



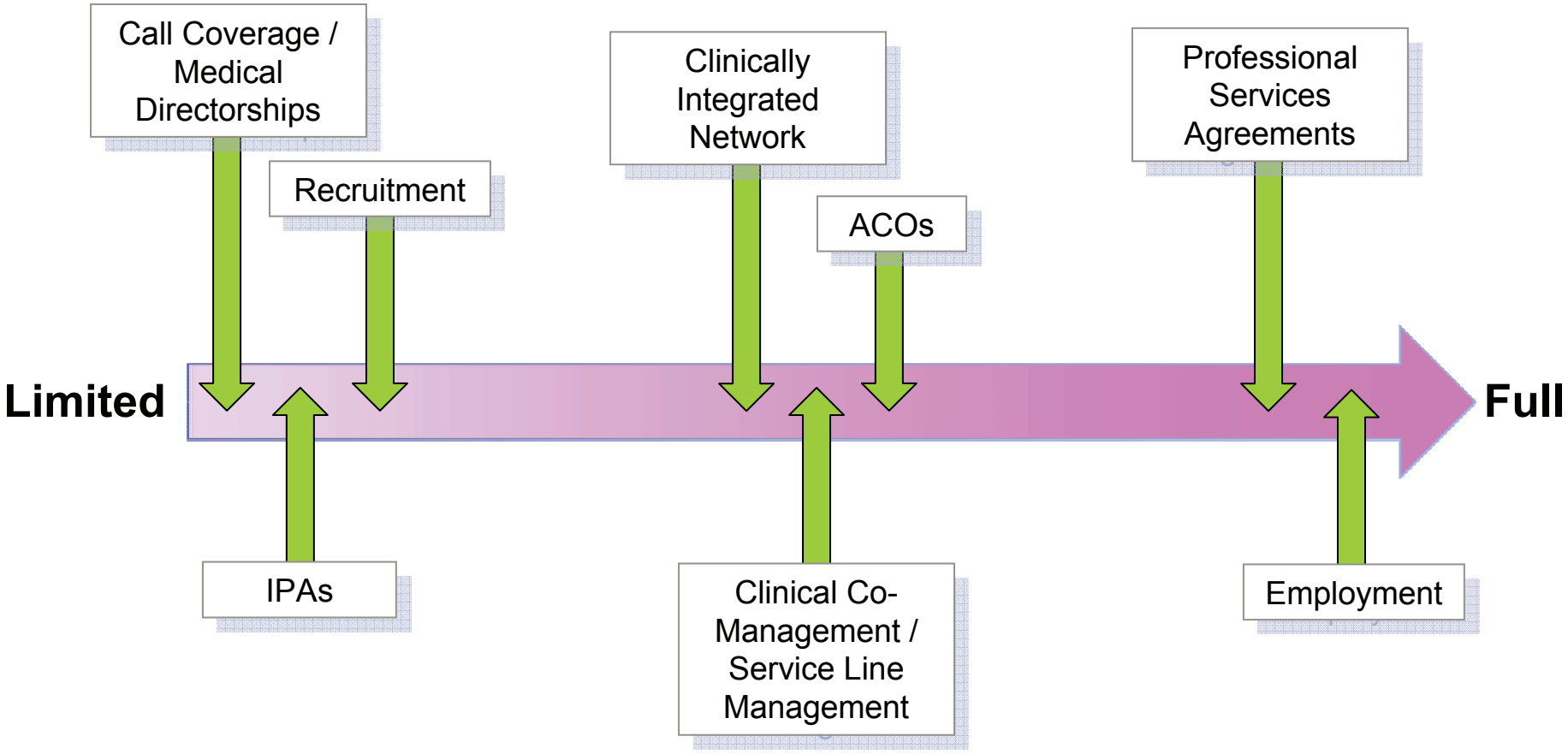
Value Focused

- Competing on quality, patient safety, cost effectiveness, and coordination of care
- Episodic/Bundled payments mechanisms
- Shift of large groups of uninsured to capitated Medicaid population
- HITECH dollars technology use and integration
- Improved documentation of care and information sharing through HIE's
- Accountable Care Organizations/Medical Homes
- Demonstration projects factor more and more into reimbursement and government payments
- New focus on prevention and population health

Then and Now

- Then
  - Volume and Procedurally-Based System
  - Specialists in Charge
- Now:
  - Quality and Preventive-Based
  - Primary Care in Charge

The Integration Continuum



Pros and Cons of Alignment

- Pros
  - Economics (Changes in Reimbursement)
  - Operations
  - Data Sharing
  - Revenue Sharing
- Cons
  - Culture
  - Trust
  - Autonomy and Control
  - Slow Moving
  - Unwind Difficult

Benefits of Alignment

- Transparency of Data/Integrated IT Systems
  - Access to lab tests, imaging studies and orders for patient made by another physician
  - Access to historical and concurrent data from other providers
  - Reduce risk of prescription drug interactions, duplicative testing, and overlapping care

Limited Integration

- Call Coverage
- Medical Directorships
- Other Hospital Based Agreements

Clinical Integration/CINs

What is it?

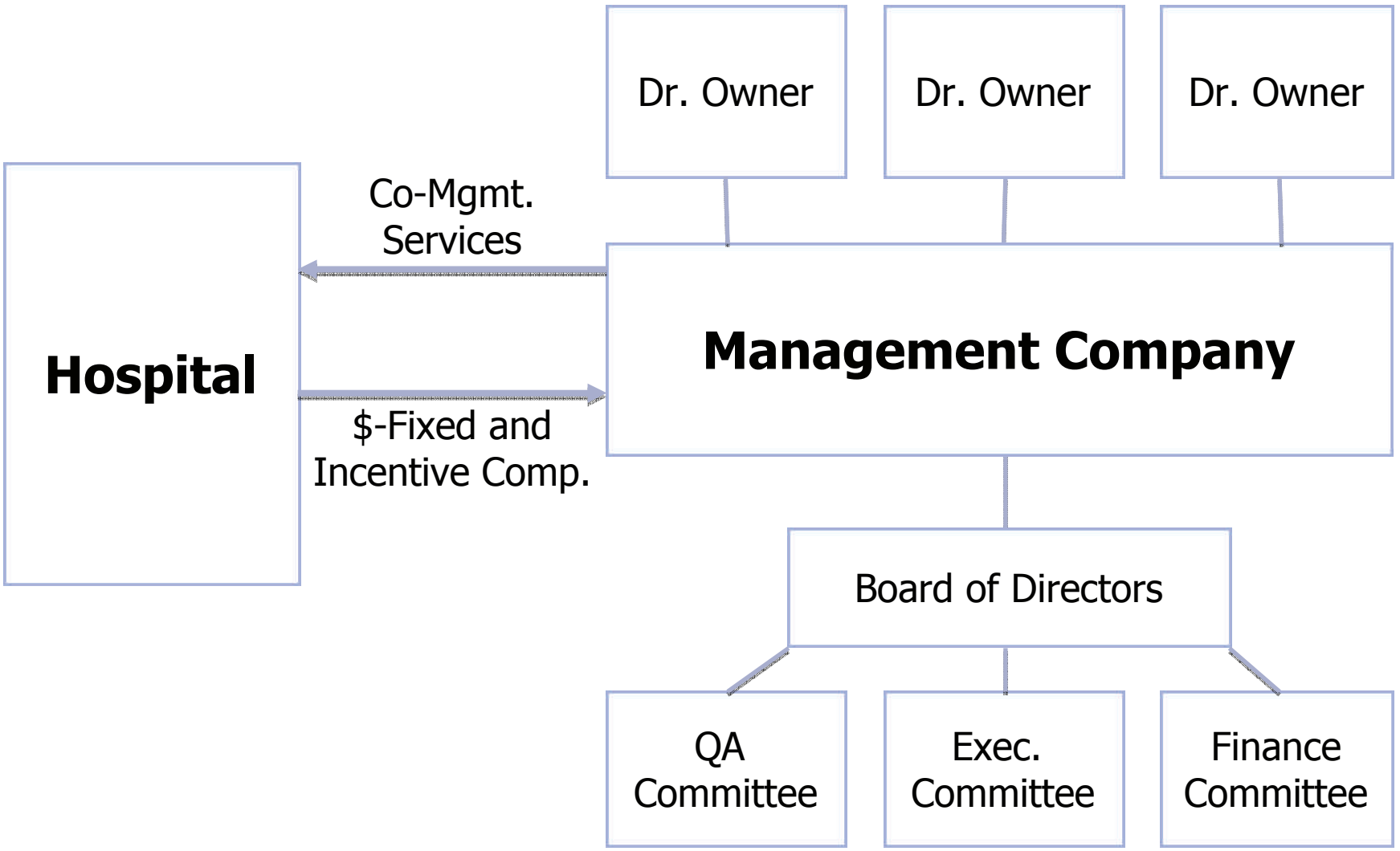
- Much like ACOs, but not Medicare specific
- Clinical integration is an effort among physicians (often with a hospital partner) to develop active and ongoing clinical initiatives that control costs and improve quality
- Two primary purposes of clinical integration are measurably to improve care while reducing costs
- Old PHOs may serve as good foundation for newer clinically integrated PHOs (PHO on steroids)

Co-Management Arrangements

What Are They?

- Contracts between hospitals and physicians, or physician-owned entity, or hospital-physician-owned entity to engage physicians as business partners in overseeing and managing a service line or a department.
- Two types:
  1. Clinical Co-Management of Hospital Service Line or hospital department; or
  2. Other Management Services Agreements ("MSAs")

Common Structure for Co-Management Arrangements



Co-Management Arrangements

Structure of Management Company

- Hospital may be an owner
- Delegate governance to management board or executive committee with both hospital and physician representatives
- Board forms committees, such as quality assurance and finance committees
- Customary form of entity is LLC
- Start-up capital (legal, consulting fees) paid by physicians unless management company is also owned by hospital

Co-Management Arrangements

- Duties of manager (Co-management agreements vary):
  - Operational and financial oversight
  - Consulting and making recommendations as to space, personnel and equipment
  - Adopting uniform clinical standards
  - Participating in committees
  - Hiring and firing
  - On-site management
  - UM and Quality Reviews
  - Compliance

Co-Management Arrangements

Compensation

- Hospital usually pays fixed compensation monthly to management co., typically to pay company's operational expenses (*e.g.,* staff salaries and benefits) and pays physicians for administrative duties on an hourly basis for committee and medical director time
- Hospital usually pays incentive or bonus compensation quarterly or annually based on pre-established amount conditioned upon meeting certain quality and efficiency goals

Co-Management Arrangements

Compensation

- Physicians compensated for management of a hospital's service line or department (such as cardiology, oncology, orthopedics, outpatient surgery)
- Management company is a separate entity (LLC is most common) formed and owned by physicians, or the entity may be owned jointly by the hospital and physicians
- Fixed monthly payment and incentive payments for meeting quality and efficiency goals

Co-Management Arrangements

Compensation

- Quality measures include:
  - Operational process improvements
    - Baseline levels determined by using facility's historical data or comparable regional or national data
    - Should include incentives for efficiency that do not result in reductions in care, such as start times, wait times
  - Reductions in infections or complication rates
  - Satisfaction levels such as patient and staff satisfaction surveys

Co-Management Arrangements

Compensation

- Need to have qualified, independent healthcare valuation firm establish metrics, ranking, weighting, and compensation amounts

Co-Management Arrangements

Legal Restrictions

- Under AKS, equity returns to owners must be proportionate to ownership and incentives should not be structured in a way that rewards physicians for increased volume

- Under CMP, cannot make payments for reducing or limiting medically necessary services to Medicare beneficiaries or for reducing lengths of stay

Accountable Care Organizations

What Are They?

A group of healthcare providers who are jointly responsible for quality and cost for a patient population

Who May Participate?

- Hospital that employs ACO professionals
- Physicians/practitioners/ACO professionals in a group practice
- Network of individual practices of ACO professionals
- Joint ventures or partnerships among hospitals and ACO professionals
- FQHCs, RHCs, Critical Access Hospitals (CAH)

Accountable Care Organizations

Overview

- Providers continue to submit individual claims and are paid separately
- If targets are met, ACO receives back-end percentage of the shared savings that are shared across providers
- Division of savings between ACO and Medicare is unspecified
- ACOs responsible for determining how savings are to be split among participants

Primary Focus of CMS ACOs

- Reduce or Eliminate Hospital Stays
- Reduce Readmissions
- Reduce Emergency Room Visits
- Better Manage Chronic Care

Accountable Care Organizations

It's all about "Quality"

- Quality is measured and assessed by:
  - Clinical process and outcomes
  - Patient and caregiver perspectives on care
  - Utilization and costs (such as rates of ambulatory-sensitive admissions and readmissions)

Accountable Care Organizations

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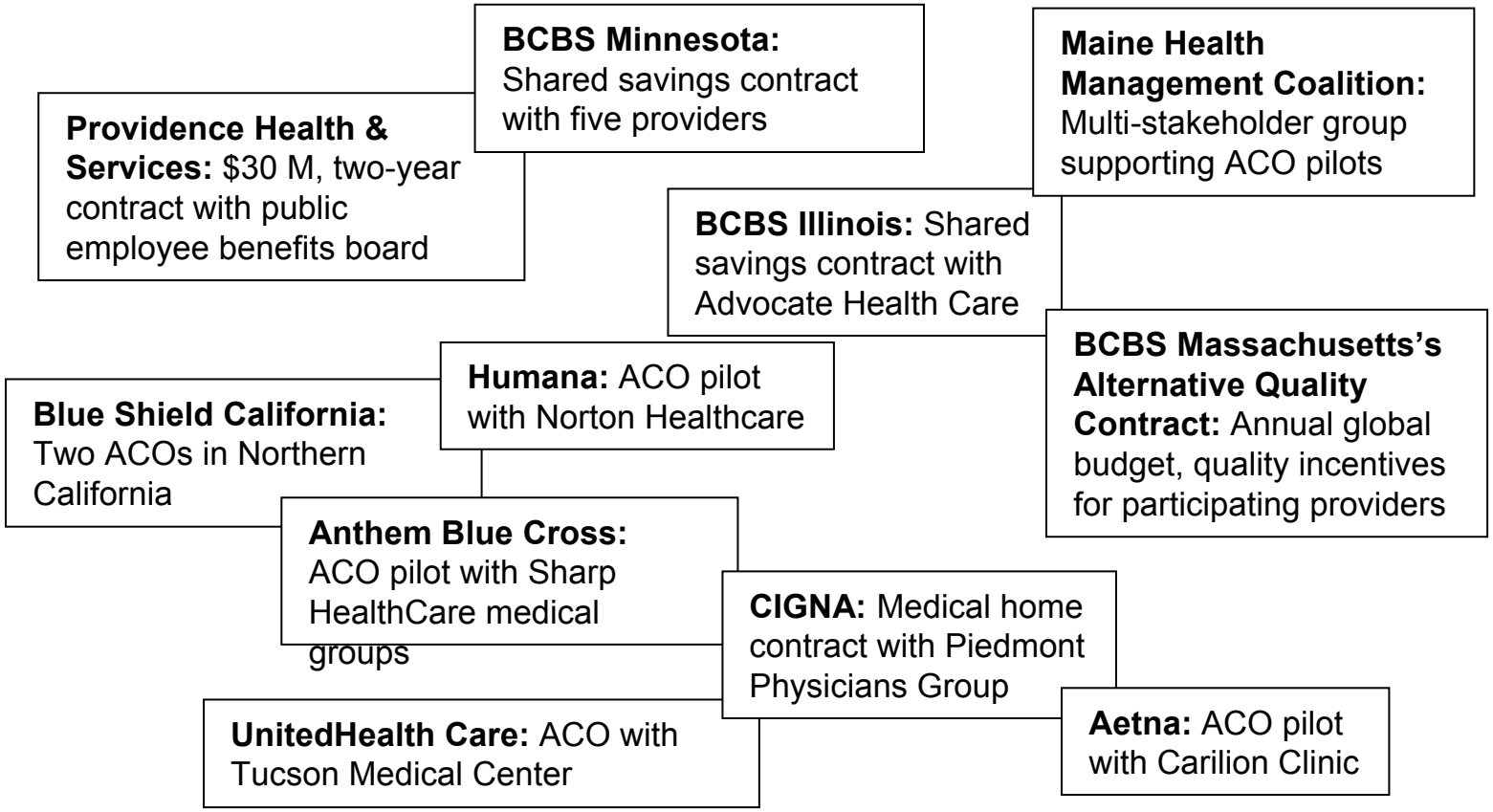
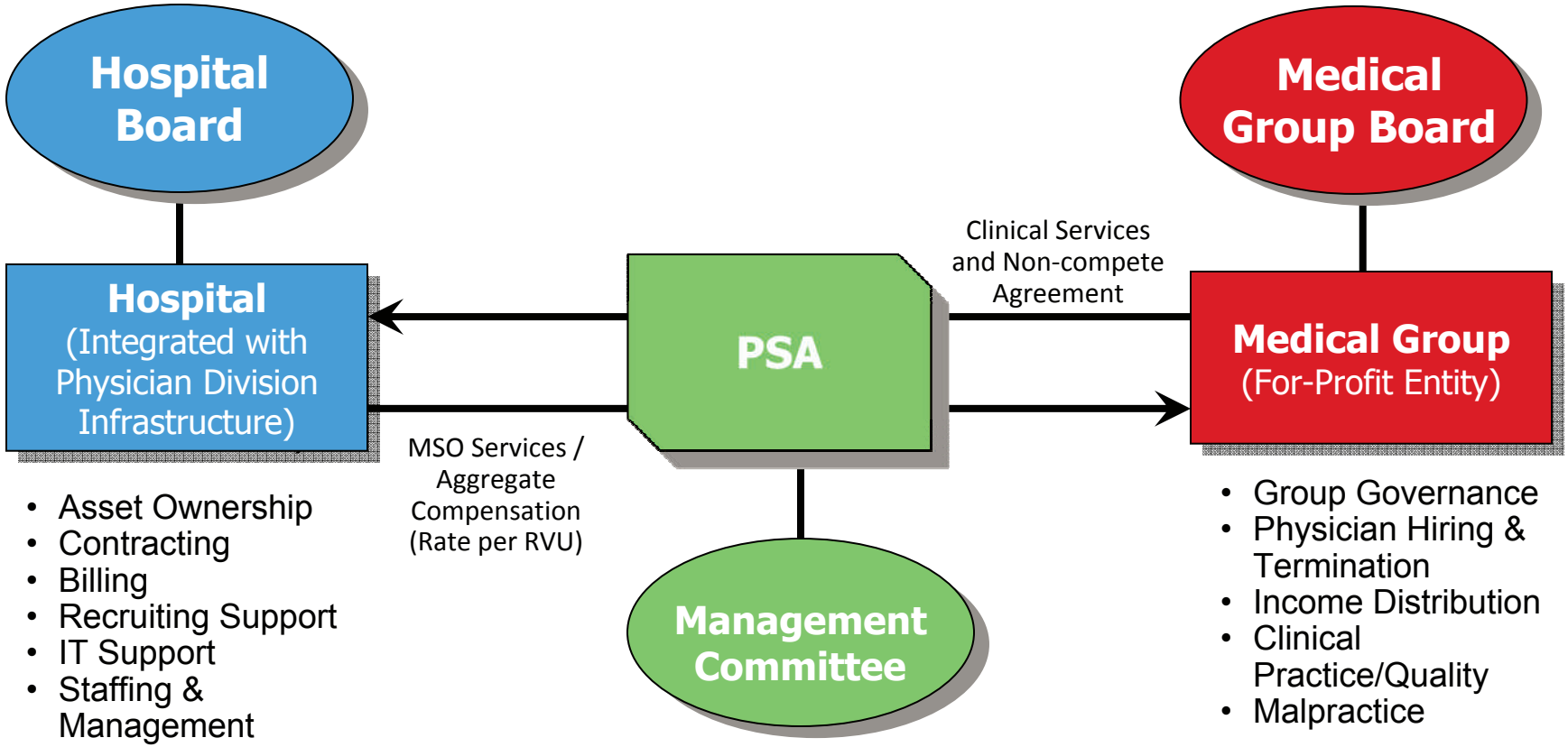
Not Just for Medicare –
Private Market ACOs are Developing Nationwide



Professional Services Agreements

- Types of PSAs:
  - Generic term usually used to refer to arrangements where physicians provide services to a hospital and get paid for those services
  - More integrated PSAs include leased employee arrangements and “synthetic employment” arrangements

Common PSA Structure



- Approves Strategy/Finances
- Oversees Operations/Business Planning
- Establishes Compensation Principles
- Achieves Value-Exchange Objectives
- Is Typically Split 50/50 Between Hospital and Medical Group

Professional Services Agreements

"Synthetic Employment" Arrangements

- Physicians may retain their own practice and be compensated by a hospital on a productivity (or wRVU) basis for clinical services
- wRVU rate paid to physicians typically includes cash compensation, retained practice expenses (*e.g.,* med mal insurance), taxes and benefits; however certain payments may be fixed rather than part of wRVU rate (*e.g.,* med mal insurance, hospital's portion of Medicare and social security taxes)

Professional Services Agreements

"Synthetic Employment" Arrangements

- May include leased employee component
- Hospital becomes billing provider in accordance with Medicare reassignment rules
- Hospital may contract with the practice for administrative services such as non-physician staff, equipment and space leases, and other non-clinical administrative duties

Professional Services Agreements

Legal Issues

- Must meet Stark and AKS fair market value requirements for personal services arrangements. May be able to fall under Stark personal services, fair market value, or indirect compensation exceptions

- Many times, a PSA cannot meet an AKS safe harbor if compensation is not a fixed amount. For example, wRVU compensation is not deemed to be "set in advance."

- If hospital bills, Medicare reassignment rules require joint and several liability for Medicare overpayments and physician assignment form

Professional Services Agreements

- Ensure that the contract addresses:
  - Addition of new physicians, advanced practice nurses, or physician assistants
  - Exclusivity
  - Staffing issues
  - Unwinding/termination
  - Non-compete and other restrictive covenants
  - Consider including compensation incentives such as payment for quality and cost savings to influence desired physician behavior

Employment / Sale of Practice

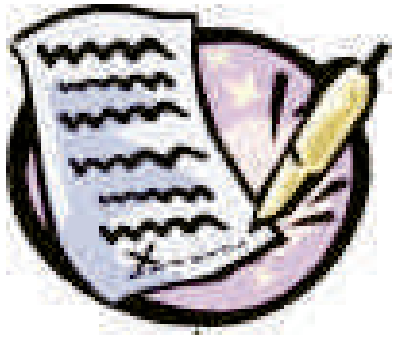
- Conduct due diligence of own medical practice to confirm that purchase price is adequate
- Liabilities post closing
- Understand decision-making hierarchy
- Assess current agreements

Employment / Sale of Practice

- Review and assess goals and objectives of physicians and the hospital
- Assess financial impact, especially ancillary revenue
- No safe harbor for the acquisition by a hospital
- Total arrangement (acquisition costs plus subsequent compensation) may be subject to scrutiny to determine whether there are “disguised” payments for referrals
- Problem areas: payments reflecting goodwill, covenant not to compete; patient lists; patient records; other “intangibles”

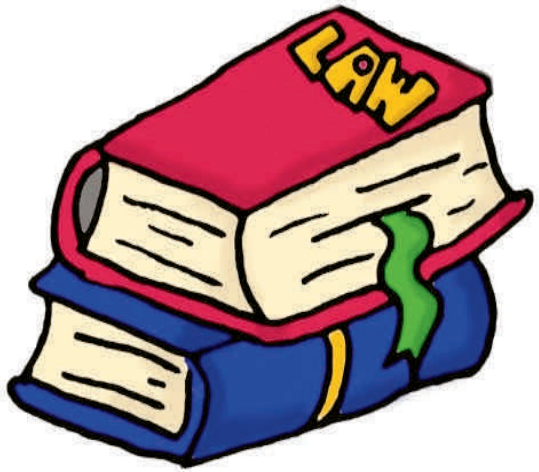
Employment/Sale of Practice Agreements

- Purchase Agreement for Practice
  - Generally Asset Purchase
  - Equipment
    - Diagnostic Imaging
    - Lab
- Employment Agreement for Physicians
  - Compensation
  - Non-Compete



Primary Laws that Affect Integrated Models

- Federal Anti-Kickback Statute
- Stark Law
- Tax-Exemption Laws
- State AKS laws
- State “Mini-Stark” laws
- State fee-splitting
- State corporate practice of medicine
- Medicare reassignment rules
- Medicare Anti-Markup Rules
- IRS requirements for bond-financed hospital facilities



Top 10 Sources of Conflicts between Physician and Practice

1. Compensation – expense allocation
2. Departing physician – income continuation payment – A/R collection efforts by Practice
3. Departing physician – tail coverage/other benefit payout

Top 10 Sources of Conflicts between Physician and Practice

4. Departing physician – non-compete
5. Departing physician – medical records / patient list
6. Departing physician owner – buy-out calculation (my accountant vs. Practice accountant)

Top 10 Sources of Conflicts between Physician and Practice

7. On-call responsibilities
8. Productivity – bonus calculations
9. Outside income / activities
10. Support staff – personality conflicts

Choices for Physicians

Questions?

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