



2009 CANCER CENTER BUSINESS SUMMIT



**Coping with New Economic Realities:
Positioning for Future Success**

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Negotiating the Deal Breakers



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It All Tends to Reduce Down to Two Basic Issues “Control”





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It All Tends to Reduce
Down to Two Basic Issues

“Money”





Regulatory Constraints

Many of our business constructs are dictated by healthcare regulation

- *Anti-kickback Statute*
- *Stark Law*
- *Provider-based requirements*
- *Corporate practice of medicine*
- *Certificate of Need (CON)*
- *Dealt with in “Legal Landmines” breakout*



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Prelude to the Discussion About Control & Money

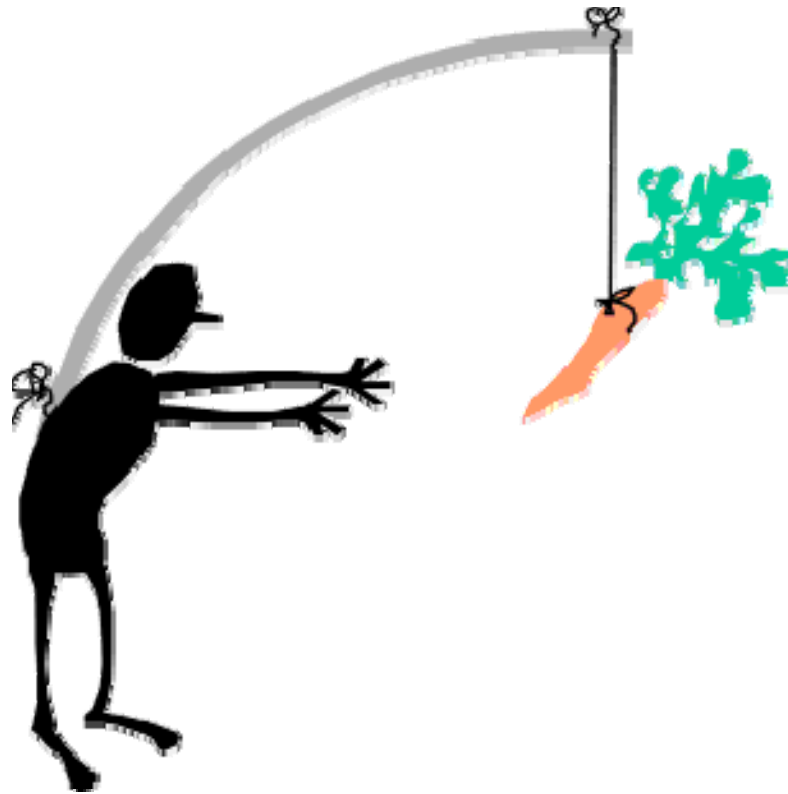
“Trust”





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Prelude to the Discussion About Control & Money “Motivation”





About Trust

History of “Bad Blood”

(usually over control or money)

Cultural Differences

*(physician autonomy/independence
v. hospital “bureaucracy”)*



About Motivation

What is motivating the players
to come together?

What does each want out of
the “marriage?”



About Control

- Governance & decision making
- Deadlock/dispute resolution
- Exclusivity & restrictive covenants
- Termination & buy out issues
- Durability



Governance & Decision Making

- For integrated JV, Governing Body often includes equal number of representatives of each party, with unanimity/supermajority requirements and deadlock-breaking procedure
- For contractual arrangement, a Steering or Advisory Committee advises the parties but each party retains authority over its own operations, subject to the contract
- Many deals have both



Governance & Decision Making

- Certain decisions may require supermajority or unanimous consent
 - Capital call or additional capital contribution
 - Major space or equipment leases/acquisitions
 - Debt in excess of specified amount
 - Opening or closing a service location or service line
 - Hiring or firing key personnel
 - Addition or expulsion of member
 - Approval of budget or marketing plan
 - Execution of agreement with a member
 - Sale of major assets



Deadlock Resolution

- Definition of deadlock
 - E.g., failure to make a key decision at three consecutive board meetings
- Process for resolving deadlocks—same as disputes
 - Executives “Meet and Confer”
 - Mediation
 - Binding arbitration
 - Consider American Health Lawyers Association Alternative Dispute Resolution Program
 - Venture continues during arbitration
- Alternative: deadlock triggers buy-out or term rights



Exclusivity & Restrictive Covenants

- Agreement not to provide competing services, either independently or in collaboration with any other party, within a specified area
- Geographic Scope
 - Right of first refusal outside core service area
- Duration
 - During the term of the venture
 - For a specified period (e.g., 2 years) after termination or departure of a party
- May have “carve outs,” e.g.,
 - Hospital can provide oncology-related specialty or surgical services (e.g., urology or endocrinology)
 - Physicians can provide hospital consultation services



Term and Termination Issues

- Length of the term
 - Short term (even with renewal provisions), or longer term with termination w/out cause provisions, make it easy to get out but do not promote durability/longevity
- Involuntary termination for breach, irresolvable change of law, etc.
- Disincentives to premature termination
 - Early termination fee
 - Application of covenant not to compete/restrictive covenants to party causing early termination
 - Buy out at discounted price
- Predetermined unwind v. negotiated divorce



Buy Out Provisions

- Buy-out rights triggered by certain events
 - Breach, deadlock, attempted sale to third party, other
 - Price may be discounted in the event of certain adverse trigger events, such as breach or early termination by the selling party
- Valuation formula/mechanism
 - Value of capital account
 - Periodically agreed upon value
 - Multiple of book value
 - Multiple of earnings
 - Appraisal
- Put and call rights
- “Texas shoot out”



Durability: Holding the Deal Together Over Time

- Limiting termination rights
- Early termination fees
- Vesting of buy-out rights over time
- Build in reopeners/reappraisal rights



About Money

1. Capitalization
2. Valuation
3. Share of profits
4. Physician compensation



Money Issue 1: Capitalization

- How much capital is needed?
- For what purposes (hard assets, working capital)?
- Who pays for legal/consulting fees?
- Equity and/or debt
- Recourse v. non-recourse (debt guarantees)
- Capital calls



Money Issue 2: Valuation

- No exchange that could be construed as “buying of patient referrals”
- No purchase of “goodwill” or earnings multiples
- Purchase of tangible assets at appraised value
- Purchase of intangibles on a very limited basis (for example: work-force in place, employee leasing margin rate, intellectual property)
- For more on valuation: breakout session (*The Fair Market Value Conundrum*)



Money Issue 3: Share of Profits

- According to capital contributions
- Uncompensated services (“sweat equity”)
- Retained earnings
- Who gets to provide (and profit from) technical component, ancillary and support services?
 - Imaging, RT, lab, chemo/infusion, pharmacy
 - social/psychiatric support, genetic counseling, hospice/home health, etc.
 - Future services



Money Issue 4: Physician Compensation

- Fair market value (FMV) standard per performance and comp surveys
- Source of comp: professional service (working as a physician)
- Source of comp: as business entrepreneur (taking risk as an investor/owner)
- For more on physician comp: breakout session (*Incentivizing Multi-D Care*)



Case Study in Physician Comp

- Comp for working as a physician
- Base, productivity, practice enhancement
- Comp for taking risk as an investor/owner
- Capital contribution
- “Sweat equity” contribution
- A compelling model: PC plus LLC



Conclusion

Audience questions & answers

Thank you

- Ron Barkley
- Bill Jordan
- Mike Scarano