

Effectively Using a Healthcare Attorney Is Critical to Your Practice's Legal Health

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ttorney jokes are legendary among physicians. However, in today's healthcare climate physicians can benefit by having a collaborative relationship with a trusted legal partner—one who understands the business and regulations of medicine as well as the law.

Key words: Healthcare attorney; legal; lawyer; agreement; contract; employment.

START WITH A SPECIALIST

“Health law is everything law with medical components thrown in,” explains Michael Guanzon, Partner with Clement & Wheatley, Danville, Virginia. “Using a general practice attorney to advise on health law issues is like wearing Spandex. One size fits all, but that doesn't mean you should wear it in public.”

To deliver solid legal advice, an attorney must understand the industry. A myriad of regulations impact a physician's ability to conduct business transactions that, in other industries, are perfectly permissible. Seemingly benign and customary transactions in other industries such as real estate leases and financial planning can trigger any number of healthcare regulatory statutes if physicians are involved. And of course, if done inappropriately between a physician and potential referral sources, could even land a physician in jail.

“That's why you can't just use the guy who prepares your will to advise your practice.”

According to Dorothy Voss Ward, Partner with Kamensky Rubinstein Hochman and Delott, Lincolnwood, Illinois, understanding healthcare regulations, and the conflicts among them, is what the specialty of healthcare law is all about. “That's why you can't just use the guy who prepares your will to advise your practice. A general

practitioner won't understand the ramifications of a contract if he or she doesn't understand the regulations.”

For example, real estate agents often give a discount for commercial rent in exchange for other flows of business. But if a hospital or medical group or its subsidiary does this, it's major trouble under Stark. And “*I didn't mean to*” won't cut it with the Feds.

“Physicians will overhear things at a party or in the hospital locker room about how to funnel money to their children,” Guanzon explains. “They don't understand that putting their 12-year-old son's name as owner of an x-ray machine, then having him lease it back to the practice, is not only a bad idea, but likely a fraudulent one, too.”

Or let's say you and your medical partner want to buy a building. “I had two doctor clients who did this using a banker and a real estate lawyer, prior to calling me,” says Guanzon. “They advised my clients to hold the property as joint tenants with right of survivorship. But what they didn't know was that joint tenancy does not afford them any asset protection from judgment creditors. If one of them is sued by a patient, he could take the other one down with the ship.”

A FRED-AND-GINGER STYLE COLLABORATION

Your relationship with a healthcare attorney should be like that of a good dance partner; collaboration and communication are key.

“A good physician client picks up the phone and involves us practically on a daily basis,” according to Andrés Gallegos, Partner with Robbins, Salomon, and Patt, Ltd.,

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Chicago, Illinois, “If you view counsel only as a necessary evil, you will be reactionary and get less out of the relationship.”

Patricia Hofstra, Partner with Duane Morris LLP, Chicago, cites an orthopedist client that called as soon as the hospital approached the physician about a joint venture and possible employment. “Because I was involved early, I could meet with the shareholders and find out what was important to them, discuss valuation, noncompetes, and implications of employment.”

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“Health lawyers typically will take the time to understand a specialty practice’s needs,” Guanzon says. “He or she will ask, ‘What is the income distribution model? What is the managed care climate in the market, and how does that affect referral patterns? How are you handling succession planning—if one physician dies, is there a mandatory buyout?’”

According to Hofstra, an ideal attorney understands your operations today, as well as how you would like to operate in the future. “If I understand what you want to achieve, and where you want to take your business, I can give better legal advice,” she says.

AVOID COMMON MISTAKES

Attorneys agree on a series of common pitfalls that physicians make with their attorneys. Here’s how to avoid them.

Engage Your Attorney Early in the Game.

Calling the attorney in late is far too common, and it often costs you *more* because your lawyer must unravel the mess.

“Early intervention is important so I can help my clients achieve their goals with a solid foundation, and I don’t have to back track and undo what has been done already,” says Hofstra. “One of our clients who has a 100% Medicaid practice was audited and never called us. He went to the meetings with Medicaid auditors and officials by himself—with no legal representation, believing that he had nothing to hide.” Needless to say, he didn’t fare so well, and now has Hofstra’s firm at his side.

Both Voss Ward and Guanzon have clients who signed and executed their hospital employment contract—then called them to read it. Big mistake. According to Guanzon, too many physicians look at the salary in detail, and just glance at everything else. They see “\$300K per year for three years” and stop reading. What many don’t realize is that because they are so highly

compensated, the hospital will expect them to do a lot of administrative work, and will include repayment and noncompetition provisions that may not be well defined in the contract. Further, most physicians don’t think they have bargaining power with the hospital, when in fact they might. You might be that fifth emergency department doctor the hospital needs, but it will take a health-care lawyer to help you analyze that.

Says Gallegos, “We have a client who didn’t consult with us when they decided to develop an electronic medical record [EMR] in collaboration with a pharmaceutical company. Thirteen months into the project, the pharmaceutical company wanted to walk away from the project so the physicians called us to find out what their options were.” Unfortunately, the practice had nothing in writing about the cost-sharing arrangement, the intended deliverable, or what data or software the practice was entitled to. Everything was based on loose email threads. Not only does the practice have an incomplete EMR program, it now has to rush to meet the 2011 EMR requirement.

But when you call proactively, the results are much better. One of Hofstra’s clients was identified for a ZPIC Audit. Because Hofstra was alerted early, “we were able to perform miracles.”

Disclose Everything.

According to Voss Ward, “many physicians omit critical facts.”

“A good client gives me every piece of information,” says Guanzon. “It’s like when you are examining a patient. You want the patient to give you all the details so *you* can determine what is important or not. A bad client gives you only what he or she *thinks* you need to see, or fails to tell you something really important. They figure they are being billed by the hour.” But physicians increase their risk, and often pay more on the back end if they don’t disclose everything up front.

Adds Guanzon, “sometimes a physician will hear something in the hospital locker room or read something in a magazine, then call me and ask a question—but they don’t share the article or the conversation.” When you call your attorney because you “just want to know if he or she agrees with this,” you have just filtered a legal question, and that can limit your attorney’s ability to help you or to provide you with other options.

Don’t Be John Wayne.

“We deal with a lot of physicians who think they won’t get caught so they don’t pay attention to the regulation details, thinking they can fly under the radar,” says Hofstra.

Case in point, shares Voss Ward: the Illinois Attorney General spent the last three years bringing a lawsuit against free-standing imaging centers that offered physicians block leases or per-click leases that allowed them to

pay a flat fee to the imaging center, then bill the insurance company for the technical component of the MRI and make a profit. More than a dozen imaging centers settled for over a million dollars. “Yesterday, a client called and asked me to review a contract that contains things that the Attorney General is focused on. I said, ‘You can’t sign this—haven’t you seen what the Attorney General is doing?’ and he said, ‘Why not—other doctors I know are doing it, why can’t I?’”

Attorneys know that it’s frustrating for physicians to deal with volumes of regulations. But regardless of how you feel about the legal system, it’s critical to comply because the consequence could be civil litigation, criminal litigation, or loss of licensure. “One of the physicians I work with had written a few prescriptions for nurses at the hospital,” Hofstra says. “Ultimately he almost lost his license because they weren’t his patients, and he had no medical record of the prescriptions.”

Take these risks at your own peril. “We have had to terminate clients because we know they are violating the law, and they won’t do anything about it,” says Voss Ward.

Pay Attention to Your Coding and Documentation.

Hire someone qualified to do your billing, and send him or her to ongoing training. Ideally, says Voss Ward, this should be a certified coder who has experience in your specialty. Keep the coder’s skills sharp by sending him or her to at least once a year to coding courses taught by qualified expert coders. And establish billing systems that follow accepted practices and comply with federal regulations. “We have a client who had no billing system. For 20 years, the client faxed a remote staff person a description of what the client did, and somehow she billed from that,” says Voss Ward. The client is now being investigated for overbilling.

Avoid DIY Personnel Law.

It’s tempting to think you can handle your staffing issues internally—whether they be poorly performing staff or disruptive physicians. But it’s critical to consult with your lawyer for all issues related to disciplinary action and termination. Personnel is not the area to save a buck on legal fees.

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“Many physicians make mistakes in this area,” says Guanzon. “Instead of adhering to the policies they’ve set, some of them react on instinct, and then they get sued for wrongful discharge.”

An example is a neurosurgery group with a near-retirement employee who had a history of performance

Eleven Things that Should Involve a Healthcare Attorney

Physicians have a unique set of legal and regulatory circumstances. Physicians should engage a healthcare attorney who understands the complexities of both. Make sure you involve your attorney with all of the following:

1. Practice-related real estate transactions of any kind
2. All transactions that involve family members
3. Compliance plan development and review
4. Audit notifications of any kind—Medicare, Medicaid, commercial insurance, managed care plan
5. All contracts—partnership, managed care, and vendor and other business agreements
6. Business arrangements such as medical directorships or collaborations with entities such as hospitals or pharmaceutical companies
7. Any type of electronic medical record usage agreement with hospitals
8. Hospital employment contracts and transactions
9. Employee disciplinary action and termination, and all personnel policies—for employed physicians and staff
10. Estate, tax, and financial planning
11. Partnership agreements and transactions, including call coverage, succession planning, exit strategies, and early retirement

issues and was frequently unpleasant with patients. The new practice administrator diligently documented the employee’s performance issues to the point where the practice could let her go. The Administrator conferred with the practice’s attorney to make sure everything was done correctly. Unfortunately, the guilt-ridden senior partner took it upon himself to write the ex-staffer a glowing letter of recommendation—without telling his colleagues or the attorney. The employee, using his letter, promptly sued for age discrimination and won.

And personnel issues don’t stop with staff. Failing to confer with Hofstra, a group of anesthesiologists drove their drug-addicted partner to rehab, after he had been caught on a surveillance tape diverting drugs intended for patients, then waited it out as he got straight. But problems arose when the partners decided they wanted to terminate him. “He claimed that he could not be terminated under the Americans with Disabilities Act, because he was being treated for substance abuse and was no longer an active substance abuser.”

So when another anesthesiology client called Hofstra prospectively because one of its employed anesthesiologists was actively abusing drugs, she was able to

advise them regarding the risks and benefits of their options. The partners wanted to be nice, but needed to fully understand the implications of terminating him immediately based on his drug diversion or continuing to employ him as he attempted rehabilitation.

Personnel issues like these are sticky, but your healthcare attorney will advise you to think beyond your personal relationship to what is in the best interest of the group.

Negotiate Rates.

“We want to bring value on a daily basis and understand that you have financial constraints,” says Gallegos. “The attorneys who want to be your long-term business partner will negotiate something reasonable so you feel comfortable picking up the phone regularly.”

PRESCRIPTION FOR PREVENTIVE LEGAL CARE

Given the current healthcare climate, here are the actions that healthcare attorneys recommend you take now.

1. Conduct a baseline audit of your medical records.

“With the government looking like it’s trying to finance healthcare reform through recoupment, practices should immediately contact a lawyer who can connect them with someone to do a baseline audit and compliance plan. This is the most important thing you can do right now,” says Voss Ward. Why? Physicians are up against Qui Tam suits by former employees and audits by Medicare, Medicaid, and commercial insurance companies. Proactively obtaining a baseline audit shows favorably when an agency auditor comes knocking.

2. Get the compliance plan reviewed.

“Too many practices use a very complicated plan from their society, or one that they found online, and can never comply with it,” Hofstra says. What you need, say the experts, is a basic realistic plan, simple enough to be followed by everyone, and tailored to your group. “It’s worse to have policies in your compliance plan that you don’t follow, or won’t follow, than having no policy at all,” according to Hofstra.

3. Ask your attorney to review the hospital’s EMR offer.

There are many potential Stark implications with these arrangements. Get a healthcare attorney involved

in the process of negotiating and/or contracting for this information technology service.

4. Arrange for a Stark compliance assessment.

“Compliance with Stark, the Anti-kickback statute, and other applicable federal and state laws and regulations is vital, and all transactions and relationships must comply strictly with letter of the law,” reminds Gallegos, who adds that “you don’t want to run afoul of Stark, especially if you have a high volume of Medicare and/or Medicaid patients.”

5. Put your policies in writing.

“Many of them are in your head, but you need to put them on paper,” says Hofstra. If a managed care plan or federal agency audits you—or there is a complaint filed by a patient—the auditors will ask to see them. Like the compliance plan, they don’t have to be elaborate, they just need to address your specific circumstances, and you have to follow them. Says Hofstra, “I have a solo practitioner client who was audited in a routine public aide review. He had no policies for anything, and he used unorthodox shorthand in his medical records. The auditors didn’t understand it and didn’t think he was providing the standard of care, so they shut off his payments.”

6. Get a “legal audit.”

This is an unbiased “second opinion”—from an attorney other than your own. Says Hofstra, “the audit should include a review of your contracts, employment agreements, compliance plan, and policies. You want an objective evaluation of things such as how you bill patients, document patient encounters, accept new patients, handle drug reps, make referrals to other doctors, discharge patients, and deal with no-shows.”

7. Arrange for a managed care contract audit.

According to Hofstra, most practices have signed contracts without realizing what they are getting into. “They don’t look at ‘most favored nation’ or ‘all products’ clauses, or they don’t see the clause about ‘we can change your fee schedule anytime.’ A healthcare attorney can clarify the terminology and help you avoid silent PPOs and other managed care reimbursement dangers.”

Says Guanzon, “your lawyer is there assist you. Even if the advice is not what you want to hear, it will be superior to the advice of the guy you scrubbed in with this morning.” ■