Structuring Physician Separation Agreements: Hospital and Group Practice Perspectives

Drafting Key Provisions to Address Patient Record Ownership, HIPAA, Restrictive Covenants, Compensation and More

WEDNESDAY, DECEMBER 10, 2014

1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

Matthew M. Brohm, Attorney, Arnall Golden Gregory, Atlanta

Caroline J. Patterson, Esq., Wade Goldstein Landau & Abruzzo, Berwyn, Pa.

Andrew B. Roth, Partner, Fulbright & Jaworski LLP, New York

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Tips for Optimal Quality

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial 1-866-819-0113 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
Continuing Education Credits

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

• In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
• Click the word balloon button to send
Structuring Physician Separation Agreements
Andrew B. Roth
Health Care Transactional
Norton Rose Fulbright LLP
December 10, 2014
Outline

• Upfront Considerations
  – Hospitals
  – Group Practices

• Legal Issues
  – Payment and/or buyout
  – Deferred compensation
  – HIPAA issues
  – Patient notifications
  – Restrictive covenants
  – Non-disclosure of confidential information
  – Management and/or administrative provisions
Upfront Considerations

• Memorializing the relationship between a physician and hospital or group practice.

• Types of agreements include:
  – Employment agreement.
  – Shareholder agreement.
  – Partnership agreement.

• In what capacity is the physician joining the hospital or group practice?
  – Hospital
    – Administrative, teaching, clinical, etc.
  – Group Practice
    – Employee, partner, shareholder, etc.
Upfront Considerations, cont’d

• Why should hospitals and group practices use separation agreements?

• Two Approaches:
  – Separate Separation Agreement (the "prenup").
  – Incorporating separation provisions into agreement.

• Negotiation of key terms:
  – Grounds for and effective date of termination.
  – Rights and obligations following termination.
    – Release of claims.
    – Money and insurance issues.
    – Confidentiality issues.
  – Patient notifications (negotiated in advance or upon termination?).
  – Restrictive covenants (enforceability).
Speaker Biography

Andrew B. Roth

- Partner in the Health Care Transactional practice.
- Represents a wide array of clients in the health industry, both on the provider side (including multihospital systems and individual hospitals of all sizes, nursing homes, and physician groups), and on the payor side (including managed care companies, HMOs, and prepaid health service plans).
- Conducts a national practice relating to accreditation by the Accreditation Council for Graduate Medical Education (ACGME), which accredits graduate medical education programs in academic medical centers and teaching hospitals, and by the Liaison Committee on Medical Education (LCME), which accredits medical schools. Regularly counsels institutions and teaching programs on compliance with ACGME requirements, and medical schools on compliance with LCME standards.
- Active in health industry mergers and acquisitions, and the establishment of joint ventures and other collaborative affiliations.
- Counsels clients in connection with corporate compliance and corporate governance, fraud and abuse, hospital-medical staff matters, HIPAA, and Medicare/Medicaid matters.
Disclaimer

Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP, Norton Rose Fulbright South Africa (incorporated as Deneys Reitz Inc) and Fulbright & Jaworski LLP, each of which is a separate legal entity, are members (‘the Norton Rose Fulbright members’) of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the Norton Rose Fulbright members but does not itself provide legal services to clients.

References to ‘Norton Rose Fulbright’, ‘the law firm’, and ‘legal practice’ are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together ‘Norton Rose Fulbright entity/entities’). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a ‘partner’) accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.
Structuring Physician Separation Agreements

Caroline J. Patterson, Esq.
December 10, 2014
Ms. Patterson concentrates her practice in the areas of corporate, business, employment, and health care law. She currently specializes in representing small to mid-sized companies, medical practices and physicians. Ms. Patterson regularly handles matters involving sales and acquisitions of medical practices and businesses, private equity investments, corporate governance compliance and contract negotiation.
Legal Issues To Be Addressed in Physician Separation Agreements

1. Payments and/or Buyout
2. Deferred Compensation
3. HIPAA Issues
4. Patient Notification
5. Restrictive Covenants
6. Non-Disclosure/Confidential Information
7. Management and/or Administrative Provisions
Payments and Buyouts

- Review Agreements
  - Shareholder/Buy-Sell
  - Ancillary Businesses
- Equity Repurchase
- Valuation Methods
- Payment Schedule
- Releases
- Post-Termination Liabilities

- Review Agreements
  - Employment
  - Practice Policy Manual
- Trailing payments
- Malpractice Insurance
- Notice Period
- Right to Offset
- Releases

Physician Shareholders

Physician Employees
Deferred Compensation

- Does the Employment Agreement provide for Deferred Compensation?
- What are the payment terms?
- Are there any applicable limitations?
  - Percentage of Gross Income
  - Failure to give adequate notice
  - Part-time/Sick Time
  - “Bad Boy/Girl” Clauses
- Is it negotiable upon separation?
HIPAA

Return of PHI
Data Use Agreements
Patient Notification

- Patient Records Belong to the Practice
- State Law Requirements
- Non-Solicitation Issues
- Letters to Patients
  - Retiring or relocating physician
  - Goodwill of the practice
  - Patients with scheduled appointments
Structuring Physician Separation Agreements: Hospital and Group Practice Perspectives

Matthew M. Brohm, Esq.
December 10, 2014
Introduction

Matthew M. Brohm
Arnall Golden Gregory LLP
Attorney, Atlanta Office
Email: matt.brohm@agg.com
Phone: 404.873.8740

Matt Brohm is an attorney in the Healthcare and Corporate practices of Arnall Golden Gregory LLP and is based in the firm’s Atlanta office.

Mr. Brohm concentrates his practice on advising all types of health care providers on a wide-range of health care issues, including federal and state fraud and abuse laws, physician self-referral laws, Medicare and Medicaid reimbursement, HIPAA privacy and security, tax exemption matters, licensure and accreditation standards, formation of joint ventures, corporate governance issues, and state certificate of need laws. He has substantive experience in corporate healthcare transactions, including mergers, acquisitions, affiliations, joint ventures, and complex hospital/physician integration models.

Mr. Brohm also regularly prepares and reviews a wide variety of hospital and physician contracts, including employment contracts, shareholders’ agreements, professional services agreements, recruitment agreements, management contracts, and equipment purchase and lease agreements.
Agenda

- Restrictive Covenants
  - Non-compete
  - Non-solicitation
  - Non-disparagement
- Non-disclosure of Confidential Information
- Management and/or Administrative Positions
Restrictive Covenants

- **What are restrictive covenants?**
  - A restrictive covenant is typically a clause in a contract which prohibits an employee (or, an independent contractor) from competing with his/her ex-employer for a certain period of time after the employee has left the business, or prevents the ex-employee from soliciting or dealing with customers of the business by using knowledge of these customers gained during his/her prior employment.

- **Examples:**
  - Non-compete
  - Non-solicit
    - Employees
    - Patients
    - Customers/Referral Sources
  - Non-disparagement
Restrictive Covenants

- Are they legal?
  - Dictated by state law
    - Laws can vary dramatically from state to state
      - Some states enforce restrictive covenants
      - Others essentially do not enforce them at all
  - Public policy concerns
  - Generally disfavored as a “restraint of trade”
What is a covenant not to compete?
- Agreement between employer and employee (and sometimes independent contractors) that the employee will not compete with any employer for a period of time throughout a specific geographic area

Components of restriction:
- Temporal
- Geographic
- Scope/type of practice

“Reasonableness” test
Restrictive Covenants – Non-Compete

- First, the employer must show that it has a *protectable business interest* that would justify the restrictive covenant, beyond a mere desire to avoid competition.
- Second, the restriction at issue must be reasonably limited to the specific time period and geographic area necessary to protect the employee’s *legitimate interest*.
- What is a *legitimate business interest*?
  - Courts generally recognize 3 “protectable interests” that an employer may demonstrate to justify enforcement:
    - Confidential Information (including trade secrets)
    - Investment in specialized training provided to employee
    - Customer or client relationships
Restrictive Covenants – Non-Compete

- Even where a protectable interest exists, courts will often decide to not enforce a restriction if it covers a territory that is broader than necessary to protect that interest.
- Courts will often consider the size of the employer’s market and the size of the area services by the employee.
- “Reasonableness” is typically determined on a case-by-case basis; and therefore there can be substantial variation even within one state as to what restrictions are considered reasonable.
Restrictive Covenants – Non-Compete

- Other relevant factors include the number of customers (or patients) existing within a specific region, the presence of other competitors within that region, and the scope of the employer’s efforts to market itself within a specific region.
- Non-compete restrictions must typically expire within a reasonable period of time to be enforced.
- Courts will also compare the scope of prohibited activities with the services actually provided by the former employee during the employment relationship.
Restrictive Covenants – Non-Compete

- Judicial Review
  - Reformation (reform to make reasonable)
    - E.g., DC, FL, OH, NJ, NY, (now GA)
  - Blue Pencil (strike from existing K)
    - E.g., AZ, CO, CT, DC, ID, IN, MD, LA—if K permits, NC, SC, WI
  - Red Pencil (“All or Nothing”)
    - NE, VA, (formerly GA)

- Courts give more latitude to non-competes entered into in M&A contexts than in employment contexts
  - The “consideration” which is given is greater
  - Freedom of contract among people of equal bargaining power
  - Importance of ensuring the buyer gets certainty and something of value
Restrictive Covenants – Non-Compete

- Physician Perspective
  - Extremely important provision
  - Temporal: evergreen vs. date-certain
  - Limit geographic restriction
  - Limit type of Practice
  - Carve-outs
  - Allow to go into private practice or hospital (as applicable)
  - \textit{Sometimes physicians actually want a non-compete!}
Restrictive Covenants – Non-Compete

- Hospital and Group Practice Perspectives
  - “Standard” contract language
  - Expand temporal restriction
  - Expand geographic restriction
    - Reach competitors
  - Type of Practice
  - Liquidated Damages
    - Buy-out
    - Injunctive relief AND damages
  - Attorneys’ fees
Restrictive Covenants – Non-Solicitation

- What are non-solicitation provisions?
  - Similar to a non-compete, a non-solicitation agreement is a form of a restrictive covenant
  - Also, similar to non-compete agreements, non-solicit agreements are viewed as “restraints of trade.” For this reason, they need to be carefully drafted to be enforceable
  - A non-solicitation clause restricts individuals and organizations from soliciting (a) employees, (b) customers or (c) business opportunities from another company or organization for a period of time
  - The enforceability of these clauses varies from state to state

- Types of non-solicitation provisions:
  - Employees
  - Patients
  - Customers/Referral Sources
Restrictive Covenants – Non-Solicitation

- Employee Non-Solicits (non-raid)
  - Physician Perspective:
    - Limit duration
    - What is solicitation?
    - Limit to employee’s that MD had contact with
    - Allow general advertisements
    - Exception for general solicitation or employees laid-off by employer
  - Hospital and Group Practice Perspective
    - Maximum extent permitted under state law
    - Maximum coverage of employees
    - Maximum duration
Restrictive Covenants – Non-Solicitation

- Patient Non-Solicits
  - Physician Perspective:
    - Carve out established patient base prior to employment
    - Allow general advertisements
    - Require hospital to notify patients of departure
  - Hospital and Group Practice Perspective:
    - Maximum coverage
Restrictive Covenants – Non-Solicitation

- Customer/Referral Source Non-Solicits (if MD serving in an administrative capacity)
  - Physician Perspective:
    - Limit to clients serviced by employee
  - Hospital and Group Practice Perspective:
    - Apply to all customers
Restrictive Covenants – Non-Disparagement

- A provision in a contract requiring one or more parties to the agreement not to make negative statements about the other(s).
- A non-disparagement clause is often included in a settlement agreement that resolves a dispute.
Nondisclosure of Confidential Information

- Confidentiality and Non-Disclosure Provisions
  - Agreement between parties to keep specified information confidential for a set period of time
  - Protects sensitive information
  - Defines what is considered confidential
  - Limits the use of confidential information
  - Forms a record in case of a later dispute
An confidentiality provision should contain the following terms:

- Definition of Confidential Information
- Identification of the Confidential Information
- Exceptions
- Requirements for safeguarding Confidential Information
- Permitted access/distribution
- Permitted uses
- Duration of the obligations
- Unilateral vs. bilateral
- Terms addressing breach of the obligations
- Damages
- Equitable relief: injunction
Nondisclosure of Confidential Information

- **Physician Perspective:**
  - Limit restricted period
  - Include carve outs
    - Already in possession of recipient
    - Becomes publicly available (other than through any breach by the recipient of the CA)
    - Independently developed by recipient
    - Exception when required by law or court order
  - Post-termination access to medical records

- **Hospital and Group Practice Perspective:**
  - Protection of intellectual property
  - Maximize restricted period in accordance with state law
  - Maximum protection for trade secrets
  - Protection of proprietary business techniques (e.g., billing or payment methods)
Management and/or Administrative Positions

- Management Roles/Administrative Positions
  - Medical Directors
  - Chief Medical Officer
  - Etc.

- Generally same issues; however, slightly different
  - No patients
  - Not practicing medicine
Structuring Physician Separation Agreements: Hospital and Group Practice Perspectives
This presentation is intended to provide general information on various regulatory and legal issues. It is NOT intended to serve as legal advice or counsel on any particular situation or circumstance.