

Key Considerations When Merging or Acquiring A Medical Practice – Part Two

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In part one of our discussion of the legal issues involving buying a new medical practice or merging your practice, we discussed many of the practice issues such as cultural compatibility issues, how to determine if the merger is working, and why one medical practice decides to acquire another medical practice or merge with an existing medical practice.

In this article, we discuss some of the many legal and healthcare compliance issues such as Stark Law, the Anti-Kickback Statute (AKS), and HIPAA. We also discuss the corporate practice of medicine, due diligence, healthcare compliance issues such as the need to keep patients informed, and the agreement of sale or merger agreement. In subsequent articles, we'll discuss the different ways to place a financial value on a medical practice, the use of an MSO to manage the new medical practice, Stark Law exceptions and AKS safe harbors, and other specific legal issues.

When Using a Management Services Organizations (MSO) Is the Right Choice for Your Medical Practice

Managed Services Organizations help physicians focus on practicing medicine by freeing doctors from many administrative tasks. Failure to consult with an MSO healthcare lawyer can cause civil and [...]

Legal compliance issues when merging or acquiring a medical practice

The Corporate Practice of Medicine

California law requires that medical practices must be owned by a medical corporation. As we've discussed earlier in our article on buying and selling a medical practice:

The Moscone-Knox Professional Corporation Act regulates “*who can invest in and own the professional medical corporation and the limits that apply to non-medical practitioners.*” The bottom line is that the clinical/medical operation of the business must be separate from the administrative side of the business. The medical side generally must be owned by physicians while the administrative side can be owned by the doctors and by “*investors, managed service organizations, and other non-professional managers.*”

California medical corporations must also comply with

- “*The Medical Practice Act, Business and Professions Code section 2052, which provides that the unauthorized practice of medicine is illegal.*”
- “*The California Business and Professions Code section 2400 which prohibits corporations and “other artificial entities: from*

having “professional rights, privileges, or powers.”

- Other laws including federal and state privacy laws
- The state and medical regulations for each type of medical practice

Other states have their own specific medical practice requirements.

Stark and AKS

When one medical practice buys out or merges with another, these anti-referral laws need to be reviewed to ensure compliance with how the bills are submitted and paid, whether the fee arrangements violate any of the terms of these laws, whether the manner of payment of the physicians violates these laws, whether the purchase or leasing of the office space or equipment violates any of these laws, and other possible Stark or AKS violations.

Our skilled healthcare lawyers will also review whether any exceptions or safe harbors may apply and how to implement those exceptions or safe harbors. Experienced healthcare lawyers also review how a managed service organization (MSO) can be used to address any possible Stark or AKS violations. We'll explain what payment arrangements may be permissible and what documentation and evidence is necessary to confirm those arrangements are legal.

Healthcare M&A: Do's and Don'ts of Buying or Selling a Medical Practice

Buying and selling a medical practice is much different than selling a commercial business. Due diligence must address special healthcare legal compliance issues, licensing requirements, patient [...]

Financing

Buyers and sellers may have different thoughts and due diligence requirements with regard to financing. If a buyer is willing to pay a lump sum at the time of settlement, that removes the financing issues. Since many medical practices have substantial value, a buyer may ask the seller to be allowed to pay the sales price in installments. The seller may also extend credit – by allowing the buyer to pay in installments based on the funds received from patients and insurance companies during the length of the new medical business operation. A seller may require a security interest in the new medical practice in return for accepting a payout. A buyer may not want to pay a lump sum in order to have time to complete any necessary conditions such as repairs or obtaining consent from patients. There are many different possibilities that we'll review with you.

Due Diligence

In part one we discussed the need to conduct due diligence reviews about the legal, financial, and operational aspects of the medical practice you're buying or merging with. Due diligence includes reviewing any existing or likely new legal, financial, or regulatory claims or complaints such as legal actions, judgments, or security interests.

Other due diligence issues include:

- Any current MSO agreements
- Any corporate practice of medicine issues
- All open contracts with vendors, suppliers, third parties and administrators
- Any open litigation
- Any open rental or lease agreements
- All open contracts with contractors and employees
- Any other open contracts of any nature

Our skilled lawyers will review whether these contracts can be assigned to the new practice and all related legal issues.

The Agreement of Sale/Merger Agreement

Perhaps the most critical part of the purchase, sale, or merger of a medical practice is the agreement of the sale or the merger agreement. The agreement of sale/merger establishes the price of the sale, the legal and business structures of the medical practice, the terms and conditions of the sale, the remedies of each practice for any breaches, the handling of the legal compliance issues, the handling of the medical compliance issues, the rights of each medical practice and the physicians in each practice, and many other legal, medical, financial, and practical issues.

In our prior discussion of the sale of business, we reviewed the following issues – most or all of which apply to merging medical practices (though many additional terms will likely need to be addressed).

- Identifying what items are being sold and what is not being sold.
- The *“professional and personal obligations of each party to the sale”*
- *“The terms of the sale. This includes the consideration and purchase price. It includes the time for the buyer to obtain financing or the terms of any payments if the seller is giving the buyer time to pay for the medical practice. The agreement of sale should make clear what happens if the buyer can’t get the necessary financing or defaults on any payments.”*
- The remedies on default including the right to demand arbitration
- Identifying any representations of either medical practice
- The licenses, credentials, education, and qualifications of each physician
- That there *“are no current complaints pending or disciplinary action with the state and local medical boards”*
- The terms of the integration topics we reviewed in our general article on this topic – integration planning, stakeholder communication, cultural compatibility, integration planning, human resources integration, and performance management.

The healthcare M&A lawyers should also review the following topics with their clients:

- **Drug Enforcement Agency (DEA) requirements.** *“Normally, the DEA will not allow controlled substances to be sold with the practice. The seller should understand its duties regarding drugs in its possession when the practice is sold. The buyer normally needs to make new arrangements regarding the acquisition of new controlled medications.”*
- **Insurance issues.** The agreement of insurance should determine which insurance coverage applies, from which medical practice, for medical malpractice claims, general liability claims, workers’ compensation claims, and other claims that may be filed after the date of sale. New insurance policies may be required.
- **Liabilities and warranties.** The buyers in acquisition and sales and both buyers in mergers will normally want representations as to any liabilities and warranties as to their status.
- **Non-compete clauses.** Physicians who buy new practices generally do not want the selling physicians to compete with them. Non-compete clauses should be in writing and definite as to their terms. California specifically forbids non-compete clauses. The legality of these clauses in other states will vary.

Additional legal compliance issues

Experienced healthcare lawyers also help medical practices that are obtaining, selling, or merging medical practices with:

- Determining the value of a medical practice. We will discuss this issue in a separate article.
- Any open contracts
- Employee and staff retention and relations

- Patient list and patient rights requirements
- Many other legal issues

With proper planning and analysis,

“Sellers can get the right price for their practice, satisfy their legal requirements to their patients, and feel confident that the sale won’t have any after-shocks. Buyers, with the use of skilled lawyers, will be able to focus on their new medical practice while understanding their medical and legal obligations.”

Healthcare compliance issues involved with the purchase, sale, and merger of medical practices

Medical practices that buy other practices or merge with other practices need to work with lawyers who understand the healthcare compliance issues for medical practices. Some of these issues our healthcare lawyers will review include:

- **Healthcare compliance laws.** In addition to Stark Law and the AKS, medical practices need to understand all other federal and state laws that regulate medical care and their specific types of practice. One important law that needs to be reviewed is the Health Insurance Portability and Accountability Act (HIPAA) which requires that medical practitioners comply with privacy and security requirements for electronic health records. There are also state privacy laws that must be reviewed. Additional healthcare compliance issues include how to bill public healthcare programs and private insurers, the False Claims Act, FTC compliance issues, FDA compliance issues, and many other compliance requirements.
- **Patient notification.** Patients have the right to know about any sales or mergers that involve their doctors. Patients should be informed of their HIPAA rights. Our lawyers will review the need to obtain authorizations from the patients to transfer medical records from one medical practice to another. Patients should also be informed about the new medical practice so the patients can decide whether they want to be treated by the new medical practice or be treated by a different medical practice. We’ll help draft these medical letters so the practices don’t put undue pressure on a patient.
- **Medical records.** The agreement of sale should make clear who owns the medical records after the sale and the requirements for keeping those records.
- **Billing and coding.** The medical practices need to review their billing codes and how bills are submitted so that the codes comply with the False Claims Act or any state false claims acts.
- **Insurance carriers and medical programs.** The Agreement of Sale should *“also review which insurance carriers and medical programs the medical practice works with, how quickly and how much of the bills those insurance carriers and programs pay and any issues that have been raised in the past or currently regarding payment.”* The insurance carriers, Medicare, Medicaid, and other payors should be notified about the new medical practice arrangement so the payors know who can submit bills and to whom payments should be made.
- **License requirements.** The medical licenses and qualifications of each doctor should be analyzed.
- **Financial records and tax records.** Due diligence requires reviewing these records for at least the prior three years. There should also be a review of *“any withholding taxes that may be due, unpaid vacation pay, the status of any worker’s compensation and unemployment compensation accounts, business and medical insurance, and many other financial issues.”*

The medical practices should also review their relationships with their nurses, technicians, and other medical and non-medical staff so these personnel understand their roles in the new practice and so that the practices can keep the staff the practices need on their payroll. Contractors and vendors should also be informed about the new medical practice.

When leaving a medical practice, can you take patient records?

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Experienced legal counsel helps medical practices review the federal and state laws that regulate the practice of medicine along with the various requirements to keep patients informed. When a doctor or medical practice is considering buying or merging with another practice, our skilled healthcare lawyers will review your goals, the legal and healthcare compliance requirements, and the rights and remedies of the medical practices after the sale or merger is completed. We'll help negotiate the proper legal documents and with the preparation of compliance plans.

Medical practices that wish to buy, sell, or merge their medical practice should contact Cohen Healthcare Law Group to discuss their legal and healthcare compliance requirements. Our experienced healthcare attorneys advise physicians and medical practices about healthcare compliance laws and regulations.

Schedule a Legal Strategy Session Today

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.