



# DUE DILIGENCE *for* **INDEPENDENT** PRACTICE:

## *An Introductory Overview*

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**T**O SAY “THE BUCK STOPS HERE” is satisfying and empowering to some people. That is why they choose to make a career as an independent practitioner. To be independent means “not influenced or controlled by others in matters of opinion or conduct; not affiliated with a larger, controlling unit; not requiring or relying on something else.”<sup>1</sup> It is difficult to conceive of any medical practice setting today where a physician can achieve that level of independence. But control is a relative thing. Another important component of the definition of *independent* is “thinking or acting for oneself.”<sup>1</sup> Even if the choices available to you are controlled by others, independence means that, at day’s end, you make the final choice.



This element of choice could be the determining factor that causes a resident to choose independence over hospital employment or causes a currently employed physician to terminate that arrangement and begin—or return to—independent practice. If you are one of those people who choose independence over hospital employment, or think you might be, it's important that you understand what you're getting into by doing your own due diligence and planning.

With that in mind, this article offers an overview of a new series that *MDAdvisor* will publish in the upcoming issues providing detailed information on what a physician should consider when making the move to independent practice.

## EXITING

One of the first necessities when choosing an independent practice is whether or not there are ties that bind you. Whether leaving an employment or ownership arrangement, before taking any steps out the door to your new practice, two preliminary questions are in order: *Do the agreements you signed as part of your current position limit how and where you can practice and the collaborations you can continue or establish?* Many physicians have signed an employment agreement or a shareholder/operating agreement that restricts the physician's ability to compete with the physician's prior practice. The restriction often includes a geographic radius and time period, post termination, within which the physician cannot compete, alone or with others. Or a physician may have agreed to a period of non-solicitation of patients and/or employees of the prior employer and non-interference in contractual arrangements of the prior employer. Depending on how a restriction is drafted, you may be able to employ a prior employee or contract with someone who did business

with the employer, but only if you did not solicit the engagement or induce the third party to do business with you. The agreement may also require the physician to relinquish medical staff privileges at the employer's affiliated hospital or to sell the physician's shares in a surgical center or other ambulatory care facility affiliated with the former practice. These restrictions must be narrowly drawn to withstand legal challenge. *Are there penalties for an early departure from the practice or financial obligations you committed to that must be satisfied?* Financial penalties and obligations are usually an issue only if you are an owner in your current arrangement or signed on to a recruitment agreement. If you are leaving an ownership position, it is important to address and negotiate a resolution to any financial contractual liabilities, such as personal guarantees securing the former practice's debt or leases.

## BUYING IN OR PURCHASING

Maybe you are not ready to have your own practice but see a good opportunity in joining an existing small- to medium-sized practice with the prospect of future ownership. If you are starting out in independent practice as an employee, your written employment agreement should clearly address compensation, benefits, schedule and work location(s), including inpatient settings and the path to ownership. If the compensation formula and/or the ownership path is unclear or complicated, ask that an example of each be included as an exhibit to your agreement. Ask about the existing owner's plans for retirement/succession. And, again, be mindful of what post-termination restrictions the agreements contain.

If you are considering purchasing an existing practice outright, conduct due diligence on that practice, e.g., financials, patient/payor mix and billing compliance. Analyze the practice's revenue sources and referral patterns. Practice and billing rules are constantly changing. The billing and employment practices of a seasoned, successful physician may put you at risk if his or her billing and regulatory compliance is subpar. Choosing an asset purchase will provide some protection from successor liability. However, if the practice revenue you anticipate is based on faulty operations that must be corrected, revenue could decrease significantly. Don't assume you can fly under the radar, even if the seller has done that. It takes only one patient complaint to bring you to the attention of a regulator.

## PLANNING

No physician should open a practice in the absence of a viable business plan. The broad issues are how to provide services of a quality and price that attract and maintain a patient base and how much revenue you must bring in to be successful, while also including time for yourself and your interests. Ask these important questions:



*What is the competition where you want to locate your practice?* Consider existing competitors as well as local health systems' plans for new facilities and clinics in your geographic area.

*Can you provide the services you want at the location you have identified?* This requires investigating whether a medical practice falls within an acceptable use under local zoning laws. If locating in a multi-unit building, confirm that no exclusions granted by the landlord to another tenant would preclude a service you intend to provide.

Keep in mind that your business plan should also include an exit strategy—a plan for how and when you would like to leave private practice, as well as a contingency plan for an involuntary disruption or end to your practice.

Developing your business plan will reveal the need to establish relationships with trusted and experienced advisors in such areas as tax planning, asset protection, pension and benefits, practice management and healthcare law. Consult a multi-line insurance agent for coverage of property and casualty, workers' compensation, employment practices, data breach, health, life, disability and medical malpractice. Because most practices will be audited by a payor or government agency, and few come out of an audit without some deficiencies identified, you should obtain a policy covering such liabilities as billing, HIPAA and Stark violations.

One advantage of conferring with consultants experienced and current in the business of healthcare is their understanding of nuances in the law that will allow you to accomplish your objectives, which, after all, include not just independent practice but financial independence. Ask your colleagues for recommendations and ask candidates how they envision your practice and financial opportunities. Educate yourself and remember that not every consultant is bound by an ethical obligation to serve your best interests.

## COMPLYING

Regulations are the bane of every physician's existence, no matter the practice setting. The draconian regulatory burden of both state and federal laws applicable to the provision of medical services, and the billing and reimbursement for the same,<sup>2</sup> make hospital acquisition or other employment settings highly desirable to many physicians, purportedly freeing up the physician to spend more time with patients and off-loading the compliance burden to personnel whose job it is to know the regulations, implement them and monitor compliance. But whether in an employment setting or in your own private practice, regulatory compliance is non-delegable by the physician.<sup>3</sup> In an independent practice, you can limit the time you have to spend to stay on top of the rules by hiring competent staff or consultants to assist with that task and have in place an effective compliance program.

## SETTING UP

One of the first business and compliance decisions you must make is which form of legal entity to use in establishing your practice entity. In New Jersey, as in many states, a private medical practice cannot be established as a general business corporation or other entity that allows ownership by nonlicensed persons.<sup>4</sup> This prohibition on the corporate practice of medicine requires that (with very limited exceptions) you form your practice entity as a professional services corporation or limited liability company limited to ownership by licensed healthcare professionals. Even partnering with other healthcare professionals is problematic if it gives limited license practitioners control over the practice of the plenary-licensed physician.<sup>5</sup>

The corporate practice prohibition also prohibits you from entering into arrangements—such as a management services agreement or a joint venture—with a non-licensed entity where the arrangement cedes too much control over your practice to that entity. This is not to say that you cannot have other entities with non-licensed partners, even in a company in the business of healthcare. In fact, that may be part of your exit strategy from private practice. If you have an idea to pursue—whether business or clinical—there is nothing wrong with having a parallel track for such a business. If you have the energy and funds to fuel that passion, then begin early on to consider entrepreneurial opportunities. But don't make an investment or sign an agreement without obtaining advice about the regulatory implications. Being an actively practicing physician while participating in outside healthcare ventures can be a tricky proposition.

## CONTRACTING

You will be reviewing and signing multiple agreements, including property and equipment leases. Legal review of these agreements is highly recommended, considering the cost and length of the obligations. Such agreements require detailed provisions not found in typical lease agreements, and regulatory issues arise whenever a lease is between referring entities or involves a shared office arrangement. Other contracts will be with third-party vendors providing services you can't provide in house. Most arrangements with a third party that involve protected health information require a HIPAA Business Associate agreement that goes beyond the boilerplate<sup>6</sup> to include protective provisions for the physician practice.

Be especially careful when entering into an agreement for the purpose of securing or providing a billable service or product. Billing a federal healthcare program requires compliance with self-referral<sup>7</sup> and anti-kickback laws.<sup>8</sup> Even services billed to private payors or to patients as out-of-pocket costs can trigger state compliance requirements. In New Jersey, many more services are subject to self-referral restrictions than are governed by federal law,<sup>9</sup> and compliance with federal law is



not automatically deemed compliance with state law or vice versa. Hence, it is smart to obtain advice from an experienced healthcare lawyer before bringing in a new ancillary service or cementing a new collaboration, rather than be told later that the venture must be unwound and, worse, reported to regulators along with attendant repayment obligations.

## HIRING

Your personnel are your greatest asset, starting with your practice manager. A practice manager for a small practice may handle everything from human resources to billing, payor negotiations, patient complaints, vendor relations and regulatory compliance. Indeed, the competence and diligence of your manager sets the course for your practice. Personnel can also be your greatest liability. Even as a small practice, you will need policies that address, among other considerations, wages and hours, OSHA, nondiscrimination and screening for exclusions and other sanctions. Your employees also play a major role in your practice's compliance with HIPAA's privacy, security and data breach requirements.

## BILLING/REIMBURSEMENT

Billing correctly and getting the reimbursement you are due is the lifeblood of your practice. Your initial decision is whether to perform billing internally or outsource to a billing company. Vet your biller thoroughly. For example, billing companies in New Jersey must be appropriately credentialed with the state. Many companies or billers will tout their years of experience, but if those years were spent billing incorrectly, such billing methods will jeopardize your practice. A good billing company will provide more than billing and collection services, such as staying on top of payor credentialing and billing requirements and providing valuable advice when you are considering adding or dropping a service.

It is impossible to escape the overwhelming control that third-party payors will have on your practice. Before you decide to open your practice or ambulatory facility, determine whether you should be in or out of a payor's network. If you think you must be in-network, seek a written commitment from key payors, well in advance, that you will be accepted into their network and confirm the anticipated fee schedule.

Getting direct payment from patients is more important—and difficult—than in years past. Seek advice regarding: out-of-network requirements, co-pays, waiving fees for financial hardship, professional courtesy, assignment of benefits and secondary payor requirements. To avoid at least some hassles with reimbursement, consider direct primary care<sup>10</sup> or a concierge practice.

## AFFILIATING

Clearly, independent practice does not mean that you don't rely on others. This is especially true in understanding and meeting new billing requirements that seem to move forward and backwards at once.<sup>11</sup> Investigate participation in an Independent Practice Association or Accountable Care Organization, which could bring you better rates from payors. Medical and specialty societies and networks that exist solely to ease the financial, contracting and compliance burdens of independent practitioners should be fully exploited.<sup>12</sup>

## COLLABORATING

You may also find that collaborating with other physician specialists and non-physician practitioners allows you to provide multispecialty services and reap the accompanying revenue.<sup>13</sup> The two extremes of collaboration are the safest. One is simply to develop good, collegial relationships with other practitioners you respect clinically and to whom you can confidently refer patients but not share in the billing for or revenue from the



referred services. The other end of the collaboration spectrum is to employ other practitioners as bona fide employees, which brings you within straightforward exceptions to self-referral and billing rules that allow you to receive revenue from those services. Arrangements that fall somewhere between those two extremes require attention to billing, self-referral and fee-splitting rules. In addition, every category of professional healthcare licensee in New Jersey is governed by its own set of rules.<sup>14</sup> Billed services provided in an arrangement that violates any of these rules could be deemed “noncompensable” by payors, resulting in denied claims and demand for repayments.<sup>15</sup>

## **MARKETING/ADVERTISING**

A patient base that is social media savvy and new online platforms for patients to find and evaluate physicians require a sophisticated marketing plan for the independent practitioner. Websites are still important but are being overtaken by mobile applications for advertising your services. Both “cutting edge” and traditional marketing methods are subject to professional board advertising rules as well as rules governing nondiscrimination and consumer fraud. If you don’t know the difference between a HIPAA Notice of Privacy Policies and a website privacy policy, then consult with someone who does.

## **Marketing Strategy Process**





## USING TECHNOLOGY

A physician may have left a paper chart practice in order to be part of a health system or large practice that was an early adopter of an EMR and other technology only to become exasperated with roadblocks that prevented full and efficient implementation of the technology or that impaired patient care. Even if you are comfortable with technology, don't assume you know what will work best for your practice. EMR and IT agreements require review by experienced health law counsel, particularly regarding HIPAA security requirements and updates for government incentive payment programs. Take the time to investigate and invest in the best and most secure technology you can afford, but be sure it is workable for you and your staff in providing patient care and billing for services.

**Adding a cost-beneficial ancillary service such as imaging or other diagnostic testing could be the key to financial health for your practice, while bringing value to your patients.**

## INNOVATING


To supplement your conventional practice of medicine, it may be necessary to think outside the box, especially because the box keeps shrinking. Telemedicine may allow you to use fewer resources to treat patients on a platform they find convenient and economical. Legislation was finally enacted this year in New Jersey, providing more certainty about the legality of practicing through telemedicine,<sup>16</sup> but there is no uniform national telemedicine law. Legal analysis is needed when practicing "across borders" and in contracting with a telemedicine company. Home care service is another avenue to consider.

As with any new service or platform, you must assess the cost, the reimbursement and the potential liability. Providing medical services away from the bricks and mortar of the practice brings unique issues under billing, HIPAA and employer liability.

Adding a cost-beneficial ancillary service such as imaging or other diagnostic testing could be the key to financial health for your practice, while bringing value to your patients. Recognize, however, that ancillary services often are governed by complex billing rules and implicate self-referral prohibitions, with variations between state and federal law. What makes good business and/or clinical sense may be legally prohibited in healthcare.

Offering "add-on" services to make your practice more accessible for patients is another area for innovation. For example, transportation services for patients can be provided within a safe harbor under the federal Anti-Kickback Statute.

## GOING FORWARD

This introductory overview, intended to be informative, is also sobering. Still, independent practice, whether as an owner or an employee in a physician-owned entity, is the reality for the majority of physicians<sup>17</sup>, and it may be for you, too. Each of the topics addressed in this article will be expanded upon in detail in upcoming issues of this magazine. Stay tuned. 

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1. Independent. (2017). *Merriam-Webster*. [www.merriam-webster.com/dictionary/independent](http://www.merriam-webster.com/dictionary/independent).
2. Medical Group Management Association. (2017, August). *MGMA regulatory burden survey*. [www.mgma.com/government-affairs/advocacy/mgma-2017-regulatory-relief-survey](http://www.mgma.com/government-affairs/advocacy/mgma-2017-regulatory-relief-survey).
3. U.S. Department of Health and Human Services, Office of Inspector General. (n.d.). *A roadmap for new physicians: Avoiding Medicare and Medicaid fraud and abuse*. [https://oig.hhs.gov/compliance/physician-education/roadmap\\_web\\_version.pdf](https://oig.hhs.gov/compliance/physician-education/roadmap_web_version.pdf).
4. *N.J.A.C. 13:35 – 6.16 (f)(2)*.
5. *Allstate Ins. Co. v. Northfield Med. Ctr., P.C.*, 228 N.J. 596, 601–03 (2017).
6. *See*, 45 C.F.R. § 164.504 (e).
7. *See*, 42 U.S.C. § 1395nn.
8. *See*, 42 U.S.C. § 1320a7b (b).
9. *See*, *N.J.A.C. 13:35-6.17*; 42 C.F.R. §411.351.
10. American Academy of Family Physicians. (2017). An alternative to fee-for-service. *Direct Primary Care*. [www.aafp.org/practice-management/payment/dpc.html](http://www.aafp.org/practice-management/payment/dpc.html).
11. *See, e.g.*, Center for Medicare & Medicaid Services. (2017, August 15). *CMS proposes changes to the Comprehensive Care for Joint Replacement Model, cancellation of the mandatory Episode Payment Models and Cardiac Rehabilitation Incentive payment model* [press release]. [www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2017-Press-releases-items/2017-08-15.html?DLPage=3&DLEntries=10&DLSort=0&DLSortDir=descending](http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2017-Press-releases-items/2017-08-15.html?DLPage=3&DLEntries=10&DLSort=0&DLSortDir=descending).
12. *See, e.g.*, The Physicians Advocacy Institute, available at [www.physiciansadvocacyinstitute.org](http://www.physiciansadvocacyinstitute.org).
13. The Physicians Foundation. (2016). 2016 Survey of America's Physicians: Practice Patterns & Perspectives. [www.physiciansfoundation.org/healthcare-research/physician-survey](http://www.physiciansfoundation.org/healthcare-research/physician-survey).
14. *See, e.g.*, *N.J.A.C. 13:35, Subchapter 2B, Limited Licenses: Physician Assistants*.
15. *Allstate Insurance Co. v. Orthopedic Evaluations, Inc.*, 300 N.J. Super. 510 (App. Div. 1997).
16. P.L. 2017, c.117.
17. Kane, C. (2017). Updated data on physician practice arrangements: physician ownership drops below 50 percent. *AMA Policy Research Perspectives*. [www.ama-assn.org/sites/default/files/media-browser/public/health-policy/PRP-2016-physician-benchmark-survey.pdf](http://www.ama-assn.org/sites/default/files/media-browser/public/health-policy/PRP-2016-physician-benchmark-survey.pdf).