Ethical Considerations For New and Emerging Affiliation Structures

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Introduction

When participating in the forming of new and emerging affiliation structures required for transforming the delivery of health care, attorneys need to pay attention to a number of ethical considerations. The primary three ethical considerations are: (1) conflicts of interest; (2) information sharing; and (3) lobbying rules. Each of these considerations present their own unique challenges.

Conflicts of Interest

Transforming health care requires providers to collaborate through the creation of official and unofficial partnerships among separate provider entities. The Delivery System Reform Incentive Payment Program (DSRIP), for example, brought many diverse providers together to form Performing Provider Systems (PPS) requiring the establishment of new companies with multiple provider owners. Similarly, to create greater access for consumers and to facilitate better transition of care across the healthcare spectrum, providers are joining forces through joint ventures. New models of care can also be seen through collaborations between payers and providers. These new affiliations raise ethical concerns for attorneys. Anytime a new affiliation structure is being created, there are multiple stakeholders, many of whom have differing interests. For convenience, efficiency, or cost-saving reasons, these stakeholders will frequently seek to jointly retain the same counsel or rely on one partner's in-house counsel. Occasionally,

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the attorney may be asked to be on the board of the new entity. While this may make sense for practical reasons, it is a minefield from an attorney ethics standpoint.

New York's Rules of Professional Conduct provide that "a lawyer shall not represent a client if a reasonable lawyer would conclude that either . . . (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." N.Y. R.P.C. 1.7(a).

Applying this Rule, it would appear that an attorney involved in an affiliation transaction would not be able to represent multiple stakeholders if there was any risk that the stakeholders had, or will have, differing interests. The Rules define "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest." N.Y. R.P.C. 1.0(f).

Also, conflicts may not just arise with regard to the representing of multiple stakeholders. As a 2001 formal opinion of the Association of the Bar of the City of New York makes clear, differing interests may exist between a corporate entity and an affiliate that is partly, but not wholly, owned by the corporate entity. Formal Opinion 2001-02, Comm. on Prof'l and Judicial Ethics, The Ass'n of the Bar of the City of New York.[3]

It is important to realize that these are not just theoretical rule violations. New York courts have found attorneys who represented both sides of a transaction, but failed to make the required disclosures and obtain joint informed consent to have committed professional

[3]Available http://www.nycbar.org/ethics/ethics-opinions-local/2001-opinions/1039-formal-opinion-2001-2.

misconduct. *See Matter of Rogoff,* 2006 N.Y. Slip. Op. 4719, 31 A.D. 3d 111 (4th Dep't 2006); *Matter of Fendick*, 2006 NY Slip. Op. 3410, 31 A.D. 3d 17 (4th Dep't 2006).

There are exceptions to the conflicts-of-interest provisions. Under the Rules of Professional Conduct, a lawyer "may represent multiple parties to a single transaction when the interests of the parties are generally aligned or not directly adverse, provided: (1) the lawyer reasonably believes that he/she will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4). each affected client gives informed written consent." N.Y. R.P.C. 1.7(b).

Even if the representation of multiple stakeholders is permitted under the Rule 1.7(b) exception, there are other factors to consider when determining whether common representation is appropriate. One particularly important factor is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation occurs between the clients, the privilege will not protect any such communications. All clients should be informed of this possibility. Comment [30] to N.Y. R.P.C. 1.7.

Additionally, new affiliation arrangements involve a change in control of one or more entities' management. It is important to remember that, when there is a change of control, the lawyer's duties transfer to the new management. The corporate attorney may also be disqualified

from representing the corporation in actions related to the prior management if the former manager had a "reasonable belief" that he or she had an attorney-client relationship with the corporate attorney. *See Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987); *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 137–38, 674 N.E.2d 663, 671 (1996).

Finally, an attorney who takes a position on the board of a new entity may have a conflict of interest if the new entity expects the attorney to both serve as a director and as counsel. Accordingly, an attorney involved in the creation of the new entity should clarify that service as on the board will be a business role and not as counsel for the entity.

Information Sharing

In addition to conflict-of-interest issues, attorneys representing parties in forming new affiliation arrangements must be alert to the ethical considerations associated with the sharing of data and other confidential information.

In forming a new affiliation arrangement, there will inevitably be the sharing of information. Much of this information will be confidential, proprietary, or competitively sensitive. This information will be shared for a number of reasonable, even necessary purposes, such as due diligence, the establishment of a population health management relationship, and clinical integration.

Before this information is shared, the entity seeking to share the information must take care to ensure that its disclosure of this information to a third party does not run afoul of federal, state, or local law, such as the Health Insurance Portability and Accountability Act (HIPAA).

The entity seeking to share the information also must ensure that disclosure of the information does not run afoul of contractual confidentiality provisions or trade secret protections. If it does, then consent to disclosure must be obtained in accordance with the provisions of the applicable contract. Also, if there are trade secrets or other proprietary information involved, the information should only be shared under the protection of a non-disclosure information.

Any non-disclosure agreement should precisely define what is and is not covered by the terms of the agreement. (Publicly available information, example, should be excluded from coverage.) The agreement should also clearly explain who at the receiving party can access the information and any safeguards that the recipient must take to protect the information. Finally, the agreement must explain what happens to the information if the deal falls through, or the information is not needed any more.

In addition to making sure that shared information is kept confidential and complies with all laws concerning the disclosure of such information, attorneys involved in the forming of affiliation arrangements that involve the sharing of information also must consider whether or not the sharing of information, or other related conduct, during the negotiation and formation of the affiliation arrangement will run afoul of the antitrust laws.

Specifically, if a potential affiliation is subject to the Hart-Scott-Rodino Act pre-merger notification requirements, then the parties could subject themselves to stiff fines and penalties imposed by the federal government if they are found to be “gun jumping.”

Gun jumping occurs in the antitrust context when parties to a transaction fail to remain independent actors before the transaction's closing. This can occur either by premature control, where there is a premature consolidation of the parties' businesses, or by the exchange of information between competitors. Gun jumping risks are greatest during the due diligence process as well as during pre-closing integration planning.

Generally, there is a tension between impermissible gun jumping and the legitimate need for the parties to a potential transaction or affiliation to obtain key information needed for the transaction decision making process, and then to get out in front of the integration process. One of key questions that the federal antitrust enforcement agencies will consider is whether or not the parties' conduct has to the effect of transferring beneficial ownership before expiration or termination of the pre-merger notification waiting period. The significant indicia of beneficial ownership that the agencies consider are such things as whether or not access to confidential information and control over key decision making has been transferred, whether there is an ability to reverse any key decisions if the transaction does not close, whether key decisions were unilateral as opposed to jointly made between the parties.

Boiling all this down to a practical level, there are certain activities that the enforcement agencies consider to raise a strong indicia of gun jumping, and should therefore be avoided until after the pre-merger notification waiting period ends. Such conduct includes agreements between the parties to exist certain lines of business before completion of the transaction or affiliation, agreements between the parties to delay negotiations with managed care companies pending completion of the transaction or affiliation, requiring that each party obtain the other party's pre-clearance or approval for routine business decisions, relocating staff to the other party's

premises, attending the other party's internal meetings, and discussion of post-transaction conduct in relationship to marketing and competitive planning.

Pure information sharing before the transaction is completed can also raise antitrust concerns. While parties are permitted to exchange information as part of a reasonable due diligence process, there is a concern that, to the extent this involves the exchange of competitively sensitive information between actual or potential competitors may lead to improper collusion in areas not covered by the transaction.

The antitrust enforcement agencies have traditionally considered the exchange of the following types of information to present low antitrust risk: historical financial and accounting information, including balance sheets; departmental or functional budgets; business descriptions; and publicly available information.

The antitrust enforcement agencies have traditionally considered the exchange of the following types of information to present a moderate antitrust risk: current strategic, marketing, or business plans or planning documents; future strategic initiatives and expansion plans; prospective financial information, including budgets and projections; and general predictions of market trends.

The antitrust enforcement agencies have traditionally considered the exchange of the following types of information to present a significant antitrust risk: customer (or payer) specific confidential information, including details of current conducts; current or prospective pricing on a product or payer basis; and detailed cost information.

One United States Court of Appeal has dealt with a case involving allegations of improper pre-transaction information sharing in the health care context. The case is *Omnicare v. UnitedHealth Group*, 629 F.3d 697 (7th Cir. 2011). In that case, an institutional pharmacy brought an antitrust action against two merging managed care companies alleging a conspiracy between the managed care companies to coordinate their negotiating strategies with the pharmacy before the merger was completed to depress the pharmacy's reimbursement rate.

Affirming the District Court's grant of summary judgment dismissing claims against the managed care companies, the Seventh Circuit found that the information exchanged between the parties presented a low risk of pre-merger collusion. It noted that the information exchanges were restricted to aggregated pricing data, estimates, and high-level review, and that price information was shared only among a limited number of executives who were less likely to be involved in negotiations with the pharmacy. It also noted that this disclosed information was "necessary to due diligence and was performed in a reasonably sensitive manner." Finally, a major factor in the Court's decision was that the information exchange process was monitored by outside antitrust counsel.

Finally, there are some best practices that parties negotiating affiliation arrangements can follow to avoid running afoul of antitrust issues surrounding information sharing. These include:

- Consulting at the start of the process with antitrust counsel able to manage risks when sharing information needed for due diligence and integration purposes.

- Adopting a careful information sharing plan and process, with appropriate documentation.
- Limiting the sharing of information beyond strictly what is needed for negotiation and post-merger integration.
- Always remember that detailed, current competitive information presents the highest risk.
- Creating a limited due diligence team with personnel who are not responsible for pricing and marketing decisions.
- When dealing with extremely sensitive information, consider aggregating the data or using third-party vendors to review and summarize the information.

Lobbying Rules

Finally, attorneys involved in negotiating and forming new affiliation arrangements also must consider the ethical and legal considerations surrounding lobbying. This is because the forming of new affiliation arrangements in this ever-changing health care environment almost always involves the need for multiple layers of government approval from various agencies. And, because there are many obsolete, or nearly obsolete, health care laws and regulations that can pose obstacles when forming new affiliation arrangements, often lobbying is needed to deal with these laws and regulations.

In New York, lobbying is controlled by two main statutory provisions. The first, set forth in the Legislative Law, creates an entire registration process for lobbyists. The intent of this process is to provide the public and government officials with knowledge regarding the source and amount of pressure on government officials.

Under these provisions, any time a lobbyist is hired to advocate on behalf of a client before state government entities or entities, a statement of registration must be filed with the Joint Commission on Public Ethics (JCOPE). This statement must identify the name and contact information of the lobbyist, the name and contact information of the client, copy of the written agreement or authorization to lobby signed by both the client and the lobbyist, detailed information regarding the specific topics on which the lobbyist is being retained to lobby, the name of the persons, agencies, or entities that are the intended targets of the lobbying, and any reportable business relationships that the lobbyist may have with the governmental officials who

are the targets of the lobbying efforts. These statements must be filed biennially. When the lobbying relationship ends, both the lobbyist and the client must give notice to JCOPE.

The second relevant provision is section 73 of the Public Officers Law. This goes beyond pure lobbyist and controls what former state officials can do after they lease state employment. Specifically, section 73(8)(a)(i) provides that no "person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency."

Likewise, section 73(8)(a)(ii) provides that no "person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or director on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration."

Section 73(8)(a)(iii) provides that no "person who has served as a member of the legislature shall within a period of two years after the termination of such service receive compensation for any services on behalf of any person, firm, corporation or association to promote or oppose, directly or indirectly, the passage of bills or resolutions by either house of the

legislature. No legislative employee shall within a period of two years after the termination of such service receive compensation for any services on behalf of any person, firm, corporation or association to appear, practice or directly communicate before either house of the legislature to promote or oppose the passage of bills or resolutions by either house of the legislature."

Finally, section 73(8)(a)(iv) provides that no "person who has served as an officer or employee in the executive chamber of the governor shall within a period of two years after termination of such service appear or practice before any state agency."