

MERGERS & ACQUISITIONS TOOLKIT  
PART 1

**Health Law Specific Representations & Warranties**

1. Licenses

All material governmental licenses, certificates, approvals, authorizations, registrations, consents, orders, certificates, decrees, franchises and permits applicable to the Business (collectively, the “Licenses”) of the Seller are listed on Schedule of the Disclosure Schedules under the heading “Licenses”. The Licenses are all of the licenses necessary for the Seller’s ownership and operation of the Purchased Assets and the Business. All such Licenses are valid, binding and in full force and effect, and Seller is not in material default under any such License. Seller has taken all necessary action to maintain each License, except where the failure to so act shall not have an adverse effect on Seller or the Business in any material respect. No loss of any License is threatened or pending (other than by reason of the transfer of the Assets or in the case of non-assignable Licenses expiration upon the end of any term). Seller has previously made available for inspection by Buyer a true and correct copy of each License.

2. Accreditation.

Seller is accredited by the Joint Commission (“The Joint Commission”). Except as set forth on Schedule of the Disclosure Schedules under the heading “Accreditation”, Seller has not received any written notices of deficiency from The Joint Commission with respect to any of Seller’s current accreditation period that are outstanding on the Execution Date and require any action or response by Seller, and pertaining to such deficiencies that have not been corrected or otherwise remedied. Seller has made available to Buyer a true and complete copy of Seller’s most recent Joint Commission accreditation survey report and deficiency list, if any; the most recent state licensing report and list of deficiencies, if any; the most recent fire marshal’s survey and deficiency list, if any, and the corresponding plans of correction or other responses, each as set forth on Schedule of the Disclosure Schedules under the heading “Accreditation”.

3. Compliance Generally.

To Seller’s Knowledge, Seller has complied, and is now complying, with all legal requirements applicable to the conduct of Seller’s Business or the ownership and use of the Purchased Assets, including without limitation (A) any federal or state fraud and abuse Laws, including the Stark Law (42 U.S.C. §1395nn), the civil False Claims Act (31 U.S.C. §3729 et seq.), Sections 1320a-7a and 1320a-7b of Title 42 of the United States Code, (B) Medicare (Title XVIII of the Social Security Act), (C) Medicaid (Title XIX of the Social Security Act), (D) any prompt pay Laws, (E) any quality, safety or accreditation standards, (F) any applicable licensure Laws or regulations, or (G) any other applicable health care Law. To Seller’s Knowledge, Seller is not in violation of or in default with respect to any Governmental Order which would have a material adverse effect on the financial condition, business operations or ownership and use of the property and assets of the Seller or otherwise, and no claim relating to the matters set forth in this Section is pending or, to the Seller’s Knowledge, threatened against the Seller.

#### 4. Fraud and Abuse Compliance Specifically

To Seller's Knowledge, the Business has been conducted and operated in material compliance with, and Seller's contracts and financial arrangements with physicians and other referral sources (including ownership interests and compensation relationships between the Business and physicians as defined in 42 U.S.C. § 1395nn and regulations adopted pursuant thereto) are in material compliance with: (i) the federal statutes regarding kickbacks and health professional self-referrals in connection with federal and state health care programs, 42 U.S.C. § 1320a-7b, 42 U.S.C. § 1395nn and 42 U.S.C. § 1396b, and the regulations promulgated pursuant to such statutes; (ii) 42 U.S.C. § 1320a-7a(b) regarding payments to induce reduction or limitation of services; and (iii) any state and local statutes and regulations regarding kickbacks and health professional self-referrals.

#### 5. Medicare and Medicaid

##### a. *Short Form*

Seller is qualified for participation in and is a participant in good standing in Medicare and Medicaid. The operations of Seller are and to Seller's Knowledge, have at all times been in substantial compliance with the conditions, requirements and standards of participation in, and the rules and regulations of Medicare and Medicaid and other third party reimbursement programs in which Seller participates or has participated. All billings of Seller with respect to Medicare and Medicaid have been and are in compliance in all respects with applicable Law, and, Seller has not billed or received payment or reimbursement in excess of amounts allowed by Law (other than refunds, claims, deficiencies, offsets or adjustments allowed by Law). There are no material disputes, audits, known investigations, inquiries or claims pending or, to Seller's Knowledge, threatened, nor any material settlements involving Seller or any of its employees and Medicare, Medicaid or other third party reimbursement programs that would impair the ability of Seller to perform its obligations under this Agreement, prevent it from consummating the Contemplated Transactions or create any Liability for Buyer. None of Seller's employees, or to Seller's Knowledge, vendors or employees of vendors, have been excluded from Medicare or Medicaid. All material liabilities and contractual adjustments of the Business under any third party payor or reimbursement programs have been properly reflected and adequately reserved for in the Financial Statements.

##### b. *Long Form*

(a) Seller and all Employed Physicians are duly certified to participate in, and have provider agreements for participation in, the Medicare and Medicaid programs. Seller is in material compliance with all of the material terms, conditions and provisions of such contracts, as well as state and federal laws related thereto. Copies of any notices of termination of Seller's participation in the Medicare or Medicaid program, and Seller's Statement of Deficiencies and Plan of Correction, if any, for the past three (3) years, have previously been provided or made available to Buyer.

(b) Seller has not claimed or received reimbursements from the Medicare program, the Medicaid program (including any advances or pre-payments from the New York Medicaid program), or any other governmental health benefit program in connection with the operation of the Business materially in excess of the amounts permitted by law, except as and to the extent that liability for such overpayment has already been satisfied in full.

(c) Seller has not claimed or received reimbursements from any private insurer, health maintenance organization, employer, or other payor in connection with the operation of the Business materially in excess of the amounts permitted by the applicable benefit plan or any applicable contract of Seller with any such payor, except as to the extent that liability for such overpayment has already been satisfied in full.

(d) No notice of overpayment, false claims, civil money penalties, or any offsets or recoupments against future reimbursement has been received by Seller in connection with the operation of the Business nor, to the Seller's Knowledge, is there any basis therefor. To Seller's Knowledge, there are no pending appeals, adjustments, challenges, audits, litigation, notices of intent to reopen or open cost reports in connection with the operation of the Business with respect to the Medicare, Medicaid, or other federal or state governmental health care programs. Seller has not received notice of any pending, threatened or possible decertification or other loss of participation in Medicare, Medicaid or any other governmental health program. Other than regularly scheduled reviews or surveys, no validation review, complaint review, peer review or program integrity review related to the Business has been conducted, scheduled, demanded or requested by any entity, commission, board or agency in connection with Medicare, Medicaid or other governmental health benefit program, and to Seller's Knowledge, no such reviews are threatened against or affecting Seller.

## 6. HIPAA

### a. *Short Form*

Seller is in compliance with all applicable federal and state laws relating to patient or individual healthcare information, including the Administrative Simplification requirements of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, as amended, and any rules or regulations promulgated thereunder.

### b. *Long Form*

(a) Seller has adopted, maintains and operates pursuant to a written privacy policy (the "Privacy Policy") regarding, among other things, the collection and use of information from its patients, customers and visitors to the websites of Seller ("Patient Information"). The Privacy Policy and Seller's actions thereunder are in compliance in all material respects with all applicable Laws and industry standards and practice, including all applicable HIPAA requirements and other Information Privacy and Security Laws. The Privacy Policy (a copy of which has been delivered to Buyer prior to the Execution Date) applies to all patients, and no other privacy policies regarding the collection and use of Patient Information have been adopted or used by Seller have been provided to patients by or on behalf of Seller. In addition to the Privacy Policy, Seller has adopted reasonable internal written policies and procedures that comply with applicable Information Privacy and Security Laws with respect to privacy, data protection, security, processing, collection, disclosure and use of Personal Information. Seller is in compliance in all material respects with the Privacy Policy and such internal policies, and does

not use Patient Information in an unlawful manner or in a manner that violates the privacy rights of its patients, including its patients' rights under HIPAA or other Information Privacy and Security Laws.

(b) Seller's receipt, collection, monitoring, maintenance, creation, transmission, use, analysis, disclosure, storage, disposal and security of Patient Information has complied, and complies, with (i) any Contracts to which Seller is party, (ii) applicable Information Privacy and Security Laws, and (iii) all consents and authorizations that apply to Seller's receipt, access, use and disclosure of Patient Information. Seller has all necessary authority, consents and authorizations to receive, access, use and disclose the Patient Information in Seller's possession or under its control in connection with the operation of Seller.

(c) Seller has, in all material respects, protected the confidentiality, integrity and security of its Patient Information and IT Assets against any unauthorized control, use, access, interruption, modification or corruption in conformance with Information Privacy and Security Laws.

(d) There has been no data security breach or unauthorized access, control, use, modification or destruction of any IT Asset, or unauthorized access, use, acquisition or disclosure of any Patient Information owned, used, stored, received, or controlled by or on behalf of Seller, including any unauthorized access, use or disclosure of Patient Information that would constitute a breach for which notification to individuals and/or Governmental Authorities is required under any applicable Information Privacy and Security Laws or Contracts to which Seller is a party.

(e) Seller is not subject to any Orders, nor are any Orders pending or, to Seller's Knowledge, threatened against Seller or its "workforce" (as defined under HIPAA) regarding or relating to Seller's processing of Patient Information.

(f) The (A) collection, storage, processing, transfer, sharing and destruction of Patient Information in connection with the transactions contemplated by this Agreement and (B) execution, delivery and performance of this Agreement and the other agreements and instruments contemplated hereby and the consummation of the transactions contemplated hereby and thereby complies with Seller's applicable privacy notices and policies and with all applicable Information Privacy and Data Security Laws. Seller has the right to assign to Buyer, and Buyer shall have the right to possess and use following the Closing, all Patient Information as used or held for use by Seller in the Business prior to the Closing.

(g) Seller has performed a security risk assessment no less frequently than annually that meets (i) the standards set forth at 45 C.F.R. § 164.308(a)(1)(ii)(A), including an assessment as described at 45 C.F.R. § 164.306(d)(3), taking into account factors set forth in 45 C.F.R. § 164.306(a)-(c); (ii) any requirements to perform security assessments under any Information Privacy and Security Law; and (iii) any obligations to perform security assessments set forth in any Contracts to which Seller or a Subsidiary is party (collectively, the "Security Risk Assessment"). Seller has addressed all threats and deficiencies identified in every Security Risk Assessment.

7. Related Party Transactions.

Except as set forth on Schedule \_\_\_\_, no employee, officer, director, shareholder or Affiliate of Seller, no individual, related by blood, marriage or adoption to any such individual, and no entity in which any such Person or individual owns any beneficial interest is a party to any oral or written agreement, contract, commitment or transaction with Seller, or has any interest in any property, tangible or intangible, used by Seller. The agreements, contracts, commitments or transactions set forth on Schedule \_\_ of the Disclosure Schedules under the heading "Related Party Transactions" were negotiated at arms-length by the applicable Seller or the applicable Hospital, as the case may be, with the other party thereto.

8. Convictions; Exclusions.

Neither Seller nor any director, officer, shareholder or employee thereof have been debarred, suspended or otherwise excluded from participating in in any state or federally funded health care program. None of the Seller's officers, directors, shareholders, agents or managing employees (as that term is defined in 42 U.S.C. § 1320a-5(b)), has been (a) excluded from participating in the Medicare program or any other applicable Government Reimbursement Program (b) subject to sanction pursuant to 42 U.S.C. § 1320a-7a or 1320a-8, (c) convicted of, a criminal offense under the Anti-Kickback Statute (42 U.S.C. § 1320a-7b) or (d) charged with, or to Seller's Knowledge, investigated, for any violation of Laws related to fraud, theft, embezzlement, breach of fiduciary responsibility, financial misconduct, obstruction of any investigation, or controlled substances.

9. Licensed Employees.

a. *Short Form*

Each employee of Seller that is required to be licensed in connection with their employment holds a valid and unrestricted license to practice his or her profession in New York.

b. *Long Form*

Each physician owner or physician employee of Seller is duly authorized to practice medicine in the State of New York, is qualified for participation in and is a participant in good standing in Medicare and Medicaid; and is not currently and has never been the subject of any investigation, settlement, consent or adjudication regarding any professional malpractice or professional misconduct in the State of New York or any other state in which such physician is or has been authorized to practice medicine. Schedule \_\_ of the Disclosure Schedules lists any Contractual Obligation to which (x) a physician, or (y) any entity in which or with respect to which a physician holds directly or indirectly an investment interest, is a counterparty with Seller whether or not such Contractual Obligation relates to medical services. No Physician holds any direct or indirect ownership or investment interest in any entity that is a party to any real property lease.

10. Audits; Settlements.

Schedule of the Disclosure Schedules sets forth a summary description of any audits of Seller performed within the last twelve (12) months by any Governmental Authority or other contract auditor on behalf of a Governmental Authority, an identification of any settlement agreements and, to Seller's Knowledge, any unresolved matters raised in writing with Seller by any such Governmental Authority or other contract auditor on behalf of a Governmental Authority.

11. Contracts. Consider including the following in the list of assumed contracts or material contracts, as applicable:

- (a) all leases relating to the Leased Real Property or other leases or licenses involving any properties or assets (whether real, personal or mixed, tangible or intangible);
- (b) all contracts and agreements with third party payors, health maintenance organizations, managed care plans or other similar entities;
- (c) all provider or similar agreements with Medicare, Medicaid or any other federal or state healthcare program;
- (d) all contracts and agreements providing for the transfer of patients to or from the Seller's facilities;
- (e) all contracts and agreements providing for the affiliation of Seller with any educational or similar institution;
- (f) all contracts and agreements with physicians or other Persons referring patients to the Business;
- (g) all contracts and agreements relating to the Seller's or any Employed Physician's participation in any network of healthcare providers;
- (h) all contracts and agreements that limit or restrict Seller or any officers or key employees of Seller from engaging in any business in any jurisdiction;
- (k) all joint venture or partnership contracts and all other contracts providing for the sharing of any profits;
- (l) all contracts for the provision of goods or services by or to Seller involving future payments, performance of services or goods;
- (m) all settlement agreements;
- (n) all contracts and agreements with an Affiliate, or with any entity in which an employee, officer, shareholder, or director of Seller holds an interest, including any agreement whereby such Seller has advanced or loaned any amount to any such person;
- (o) all contracts and agreements relating to confidentiality, non-competition or non-solicitation (in cases where such Seller is subject to such obligations);
- (p) all contracts and agreements with any insurance company, prepaid health plan, health maintenance organization, preferred provider organization, independent practice association, accountable care organization, or private or public healthcare program; and
- (q) all contracts and agreements with any person to provide services to patients.

## **Health Law Specific Covenants**

### 1. Access to Medical Records.

To the extent permitted by law, Seller shall be entitled, after the Closing, upon reasonable advance notice and during regular business hours, to have access to and make copies of the patient records, including the medical records and medical charts of any patient served by Seller prior to the Closing. In addition, Seller shall be entitled to remove any such record or chart, but only for purposes of pending litigation involving a patient to whom such record or chart refers, as certified in writing prior to removal by the Chief Executive Officer or Chief Financial Officer of Seller or its parent or counsel retained by Seller in connection with such litigation. Any record or chart so removed shall be promptly returned to Buyer following its use by Seller.

### 2. License Applications.

Seller shall cooperate with the reasonable requests of Buyer in connection with its application to obtain all Licenses that are required for Buyer to acquire the Purchased Assets and to operate the Business. In connection with each such application on the part of Buyer, Seller will furnish promptly with such information and data in Seller's possession as may reasonably be requested by Buyer which is necessary and shall otherwise assist Buyer as reasonably requested.

### 3. Tail Insurance

On or prior to the Closing Date, Seller will purchase and obtain, on Seller's behalf and, with regard to professional liability insurance, on behalf of each Physician, and as applicable, any other professional employee of Seller, an unlimited extended claims reporting provision for all primary and excess insurance policies in force as of the Closing Date that cover Seller, a Physician or, as applicable, any other professional employee of Seller, and which are written on a claims made insuring agreement.

### 4. Covenant Not to Compete

Seller hereby covenants and agrees with Buyer that, during the Non-Compete Period (as such term is defined below) and within the Non-Compete Area (as such term is defined below), it shall not directly or indirectly, (a) acquire, lease, manage, consult for, finance, invest in, own any part of or exercise management control over any facility or business that provides services that are the same or reasonably similar to the services provided by Buyer (a "Competing Business"); (b) solicit for employment or employ any person who is employed by Buyer as of the Closing Date (other than general media advertisements of employment opportunities), or (c) disrupt or attempt to disrupt any past, present or reasonably foreseeable future relationship, contractual or otherwise between the Buyer, on the one hand, and any physician employed by Buyer, or any physician, physician group, or other healthcare provider with whom Buyer contracts with or make statements to the same that disparage Buyer or its operations in any way. The "Non-Compete Period" shall commence on the Closing Date and terminate on the second anniversary of the Closing Date. The "Non-Compete Area" shall mean the area within a ten (10) mile radius of Buyer's principal place of business. Ownership of less than ten percent (10%) of the stock of a publicly held company shall not be deemed a breach of this covenant.

## 5. Offers of Employment - Physicians

(a) Attached hereto as Schedule \_\_\_\_\_ is a list of each physician who is employed or was formerly employed by Seller or one of its Affiliates and who perform services at or in the vicinity of Buyer's office location(s) (each, a "Seller Physician"). The parties acknowledge that Buyer and its Affiliates have engaged in discussions with some or all of the Seller Physicians regarding employment opportunities at Buyer and its Affiliates prior to the date hereof, and Seller consents to the aforesaid discussions. Following Closing, the parties agree that Buyer and its Affiliates may continue to discuss employment opportunities with the Seller Physicians and that Buyer and its Affiliates may offer to employ some or all of such Seller Physicians.

(b) In the event that Buyer or one of its Affiliates makes an offer of employment to a Seller Physician and the Seller Physician accepts an offer of employment by Buyer or one of its Affiliates (such physician being referred to herein as a "Buyer Hired Physician"): (i) the Buyer Hired Physician and Buyer or its Affiliate will enter into a new employment agreement governing the terms and conditions of the Buyer Hired Physician's employment; (ii) the Buyer Hired Physician's employment agreement with Seller or Seller's Affiliate will be terminated by mutual agreement of the Buyer Hired Physician and Seller or its Affiliate as of a mutually agreed upon date, without enforcement of any notice period otherwise required to be satisfied to terminate such agreement and without penalty to the Buyer Hired Physician; (iii) Seller or its Affiliate will waive the enforcement of any restrictive covenant that by its terms would otherwise survive termination of the employment agreement between the Buyer Hired Physician and Seller or its Affiliate, so that the covenant would not be violated or be implicated as a result of the Buyer Hired Physician's employment by and service to Buyer or Buyer's Affiliate; (iv) Seller or its Affiliate will forgive any unamortized portion of any signing bonus or similar payment advances ("Unearned Advance") received by the Buyer Hired Physician under the Buyer Hired Physician's prior employment agreement with Seller or its Affiliate. Buyer will reimburse Seller or its Affiliate for any Unearned Advance that was paid to such Buyer Hired Physician and was forgiven by Seller or its Affiliate in accordance with this Section \_\_\_\_\_.

## 6. Transition IT Services.

In order to facilitate the orderly transfer and continuation of the operations of the Seller for a transitional period after the Closing Date and in connection with the transactions contemplated hereby, Buyer wishes to obtain, and Seller has agreed to cause \_\_\_\_\_, to provide, certain transition IT and other services as to be set forth in a Transition Services Agreement to be in form and substance satisfactory to, and approved in writing by, Seller and Buyer.



MERGERS & ACQUISITIONS TOOLKIT  
PART 2

**NY Rules of Professional Conduct**

1. Rule 1.7

(a) Except as provided in paragraph (b), 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer 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 consent, confirmed in writing.

2. Rule 1.13

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the

scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

#### Comments

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean,

however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation's informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

### 3. Rule 4.1(a) Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### 4. Rule 4.2 Communicating With Represented Parties

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

5. Rule 4.4(b) Respect of Rights of Third Persons

A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

See also, Rule 1.6 (duty to preserve confidentiality of information) and Rule 1.1 (duty of competent representation)

## **Antitrust Considerations for Information Exchanges**

1. Not Permitted
  - a. Current or future reimbursement rates
  - b. Current or future discounting, financing or other pricing policies, plans or formulas
  - c. Current or future profit margins or targets on specific projects or services
  - d. Detailed cost information
  - e. Provider compensation rates, benefits and terms and conditions of employment
  - f. Marketing studies or policies
  - g. Strategic or development plans (ex: plans for new services or locations)
  - h. Other potential mergers, acquisitions, or joint ventures.
  - i. Patient lists
  - j. Proprietary technologies of a confidential nature
  - k. Competitively sensitive information that could be used to competitive advantage by one or both of the parties.
2. Permitted
  - a. 1996 Statements of Antitrust Enforcement Policy in Health Care set forth a safe harbor for the exchange of price and cost information between healthcare providers if:
    - i. The survey is conducted by a third party.
    - ii. The data is at least three months old.
    - iii. The data is aggregated.
    - iv. There are at least five participants and no single participant's data represents more than 25% of a given statistic.
  - b. Publicly available information (more likely in the case of hospitals, which have public reporting requirements)
  - c. Less antitrust risk if the information is:
    - i. averages, ranges or aggregated data
    - ii. historical data
3. Lessons Learned from Recent FTC litigation
  - a. The FTC will challenge mergers of varying sizes and dollar values in the health care industry.
  - b. The FTC will continue to attempt to narrowly define the product market and/or the geographic market.
  - c. The relevant geographic market is defined by the needs of health plans. The FTC will use testimony from health plans that are opposed to a merger on the basis that it would create market power that the health plan is unable to defend by substituting other hospitals and/or physicians in the area.

- d. Internal communications can and will be used against the parties, including references to clout, market power, bargaining strength, and/or better reimbursement rates.
- e. The “efficiencies” defense requires convincing proof of significant and merger-specific efficiencies arising as a result of the merger. In other words, the parties must be able to prove that such inefficiencies can only be obtained through acquisition, and not any other business relationship. The court expressed great skepticism of this defense.

## New York Not-For-Profit Corporation Law

1. NPCL Section 102(a)(22): “Relative” of an individual means (i) his or her spouse or domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law ; (ii) his or her ancestors, brothers and sisters (whether whole or half-blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.
2. NPCL Section 102(a)(23): “Related party” means (i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any individual described in clause (i) of this subparagraph; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.
3. NPCL Section 102(a)(24): “Related party transaction” means any transaction, agreement or any other arrangement in which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant, except that a transaction shall not be a related party transaction if: (i) the transaction or the related party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.
4. NPCL Section 102 (a)(25): “Key person” means any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation’s capital expenditures or operating budget.
5. NPCL Section 715
  - (a) No corporation shall enter into any related party transaction unless the transaction is determined by the board, or an authorized committee thereof, to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key person who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

(b) With respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, the board of such corporation, or an authorized committee thereof, shall:

- (1) Prior to entering into the transaction, consider alternative transactions to the extent available;
- (2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and
- (3) Contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.

6. NPCL Section 715-A

(a) Except as provided in paragraph (d) of this section, the board shall adopt, and oversee the implementation of, and compliance with, a conflict of interest policy to ensure that its directors, officers and key persons act in the corporation's best interest and comply with applicable legal requirements, including but not limited to the requirements set forth in section seven hundred fifteen of this article.

(b) The conflict of interest policy shall include, at a minimum, the following provisions:

- (1) a definition of the circumstances that constitute a conflict of interest;
- (2) procedures for disclosing a conflict of interest or possible conflict of interest to the board or to a committee of the board, and procedures for the board or committee to determine whether a conflict exists;
- (3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict, provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto;
- (4) a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict;
- (5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and
- (6) procedures for disclosing, addressing, and documenting related party transactions in accordance with section seven hundred fifteen of this article.



(c) The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation or a designated compliance officer a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit such written statement. The secretary of the corporation or the designated compliance officer shall provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.