Hospitals have generally abandoned their losing strategy of acquiring physician practices. Many are now proposing that physicians join them in joint ventures to develop new imaging centers, surgery centers, and other facilities and services. Physicians should consider at the threshold of their discussions with their potential hospital partners the following issues:

**Stark Law** If the joint venture will provide a "designated health service" (DHS) as defined in the federal Stark Law to Medicare or Medicaid beneficiaries, the business plan is probably a non-starter, unless the joint venture will operate only in a "rural area." DHS includes MRI, CT scanning, and most other imaging services. A list of the other DHS items is set out in the Stark Law and explained in regulations. Don't give up hope on rural status too easily. "Rural" doesn't mean only cornfields, forests, or deserts. This is one area where the law provides a clear yes or no answer. If the hospital promoter says "we will be urban, but the joint venture will not offer any DHS," be careful. Many facilities or services which do not offer a DHS as their main activity provide one or more DHS as an ancillary service. Identify and analyze every service the joint venture will provide.

**Anti-Kickback Statute** The Anti-Kickback statute is very serious business. Certain inducements to refer Medicare, Medicaid or other federal program patients violate this federal criminal statute. The limited safe harbor regulations under it are narrowly drawn and are unlikely to provide absolute protection for many joint ventures. Careful planning can reduce risks significantly.

**Governance** Physicians contributing 50% of the capital should receive 50% participation in ultimate decision-making. Tax-exempt hospitals will assert (correctly) that the joint venture must operate in a manner consistent with their exempt purpose if they are to assure that their tax exemptions are preserved and their allocable share of joint venture income is not taxable to them. Physicians should give on this point, but they should work with the hospitals to define on the front end, as far as possible, what level of charity care will be provided.

**Dispute Resolution** With most significant decision making 50-50, an efficient, inexpensive dispute resolution procedure is a must. The joint venture agreement should provide for private mediation under the guidance
of a person experienced in health care joint ventures, with mandatory arbitration if mediation does not resolve the disputed issues.

Exit Strategy If the physicians are asked to make significant capital contributions, they should make sure the agreement gives them an opportunity to sell out their participation if things don't go well. Some hospitals will allow the physicians to have a put option with the hospital organization as the buyer at a fixed or formula price. It may be necessary also to have an auction option, with either party having the power to put the whole venture up for sale, usually with either party having the right to bid.

Non-Competes and Additional Activities Physicians should face head-on the question of whether the joint venture participants will be able to engage in any activities that compete with the joint venture. They should also consider whether other new activities the separate participants may want to undertake must first be brought to the joint venture for its decision whether to undertake them.

Chemistry Above all else, physicians should make sure the chemistry is right. One of the greatest assets of the joint venture will be the respect and trust the two members have for each other. Take the time to make sure the marriage is likely to succeed.

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