Hospital/Physician joint ventures come about for a variety of reasons. Sometimes the symbiotic relationship between hospitals and physicians will result in innovative and successful joint ventures, while other times hospitals and physicians enter into joint ventures because they don’t trust one another (i.e., “keep your friends close and your enemies even closer”). In recent times, however, hospitals and physicians have often gone their own way and end up competing for the same lines of business. There is no better evidence of this latter situation than the war over physician-owned ambulatory surgical centers (ASCs).

Physician-owned ASCs essentially have been fighting a “two-front war” against the hospital and insurance industries. The attack from the hospital industry has primarily focused on what the hospitals perceive as an un-level playing field, one where the physicians steer the “good paying” patients (i.e., private pay and well insured) to their own ASCs while leaving the hospital with the “bad paying” patients (i.e., Medicare, Medicaid, charity care and no-pay). This has obviously been a delicate issue for the hospitals, since waging war against the physicians who also fill your hospital beds can be counterproductive.

With regard to the insurance industry, it has been the typical battle insurers have waged everywhere – how to avoid reimbursing providers, especially those who are out-of-network. It was an insurer that brought suit against an ASC in Garcia v. Health Net of New Jersey, Inc. The insurer alleged, among other things, that physicians violated New Jersey’s Codey Law when they referred patients to an ASC in which they had an ownership interest. The insurers argued, therefore, that they should not have to reimburse the ASCs. Unfortunately for the physician industry, the courts agreed.
The Garcia decision created quite a dilemma. It was estimated at the time that there were about 200 physician-owned ASCs (unaffiliated with hospitals), with upwards of 750 physician investors and hundreds of health care workers employed by such facilities. Obvious chaos would ensue if all of these ASCs were forced to shut down at once. The legislature reacted by enacting the Codey Amendments, which effectively grandfathered existing physician-owned facilities. This averted the immediate crisis.

But the legislature also reacted to the hospitals’ complaint about the un-level playing field by creating additional requirements for new ASCs (which are technically licensed as Ambulatory Care Facilities). More specifically, the Codey Amendments provide that a new license for an ASC will not be issued unless one of several enumerated exceptions contained in the Cody Law applies. For physicians wanting to open a new ASC, that exception requires that the ASC be “owned jointly by a general hospital in this State and one or more parties...” Hence, the Codey Amendments created a “shot-gun wedding” of sorts; or put another way, a forced marriage for better or for worse.

But does it have to be “for worse”? Hospitals and physicians are, and should be, natural allies. Although there are some exceptions (usually depending on the physician specialty), hospitals and physicians generally need each other. Although more and more services will continue to migrate to the outpatient setting, there will always be a need for inpatient facilities for complicated surgeries requiring hospitalization and for management of serious injuries and diseases that cannot be managed in the out-patient setting. Hospitals and physicians should partner and plan to grow these lines of businesses (both inpatient and outpatient) together.

In entering into a hospital/physician joint venture, there are obvious legal hurdles that must be cleared, not the least of which is the proliferation of federal and state laws and regulations generally referred to as the fraud and abuse laws (the federal Stark Law and Anti-kickback Statute; as well as the State’s Codey Law) and IRS regulations that apply to hospital/physician joint ventures involving nonprofit hospitals (which represent the majority of hospitals in New Jersey). Properly structured, however, these ventures can avoid such hurdles. Moreover, the federal government has shown more tolerance recently for hospital/physician joint ventures that demonstrate innovative and unique benefits to the community served as opposed to being merely a guise for providers to generate more revenue at the expense of federal health care programs or other payers.

In pursuing hospital/physician joint ventures, it is clear that each party brings something to the table. Hospitals have access to capital that may not otherwise be available to physicians, especially in the current economic environment. Hospitals may also have resources available that, if pursued separately by physicians, could require substantial capital investment and lengthy start-up time (e.g., information technology systems, including electronic medical records). What should be of particular interest to physicians is the fact that many hospitals are currently experiencing underutilization of their physical plants. With so many services gravitating to freestanding facilities, hospitals have existing space (e.g., underutilized operating and procedure rooms) which could be ready for use with a properly structured hospital physician joint venture. Again, use of such space can result in significant savings with regard to start-up costs and cut down on the start-up time.

The physicians also bring important assets to the table as well; not the least of which is their expertise in providing the quality services that establish the reputation of the hospital. What physicians also bring to the table, and what they have proven over the last decade, is that they are pretty good at managing out-patient services. While physicians have moved easily into the freestanding out-patient setting, hospitals have often struggled working to make the transition from running large in-patient facilities to effectively managing freestanding out-patient services.

Perhaps one of the greatest reasons to pursue hospital/physician joint ventures today is the simple fact that the model for delivering health care is going to continue to change drastically in the coming years. Hospitals and physicians need to begin the discussions now on new delivery models for the communities they serve. Whether it is a forced marriage or a true romance, the first dance has to begin in order for hospitals and physicians to prosper together in the years to come.

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