The Future of Health Care

Three Legal Experts Offer Strategies for Private Practices

By Robert Janek

"THE ONLY CONSTANT is change." That was true in ancient Greece, where this quote reportedly originated in 480 B.C. And certainly, it is true today in modern America — especially in regard to the healthcare industry.

Just in the last decade, new and revised government regulations have changed the delivery, as well as the reimbursement, of healthcare service. While all providers have been affected, private practitioners seem to be impacted the most. What does the future hold for them?

Three local attorneys who specialize in healthcare law ponder this question. They are Joseph J. Feltes, Esq.; Daniel K. Glessner, Esq.; and Jason F. Haupt, Esq.

About Our Experts

Glessner is Partner of Brouse McDowell in Akron and Chair of its Health Care Group. He is certified by the Compliance Certification Board as a specialist in Healthcare Compliance and serves the needs of various hospitals, physician group practices, ancillary healthcare companies and other healthcare entities. Prior to joining Brouse McDowell in 2008, Glessner served as in-house counsel with Akron General Health System for 16 years and was an Adjunct Professor at The

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University of Akron School of Law. Glessner is included in *The Best Lawyers in America*, 19th Edition, 2012–2014.

Haupt is a Director of Krugliak, Wilkins, Griffiths & Dougherty Co., LPA. He also currently chairs the firm's Healthcare Section and the firm's Marketing Committee. His practice is focused in the areas of healthcare law, business/corporate law, mergers and acquisitions, business planning, and real estate law. He represents healthcare providers, health-related entities, physicians and physician groups and has been recognized as a "Rising Star" in Ohio's *Super Lawyers* (top lawyers under 40).

Feltes is Canton Office Partner in Charge of Buckingham, Doolittle & Burroughs. His areas of practice include Health & Medicine, Employment & Labor, and Litigation. He represents acute care and rehabilitation hospitals, physicians, nurses and other healthcare professionals, managed care plans, and other healthcare providers and suppliers. Feltes has been selected seven times for inclusion in Ohio's *Super Lawyers*, six times for *The Best Lawyers in America*. He also received Martindale-Hubbell's highest Peer Review Rating of AV Preeminent.

When all three attorneys peer into what Feltes describes as "that foggy crystal ball," they predict the future of health care will be challenging for physicians who want to remain in private practice. But they also predict that many can and will succeed. Here are their suggested strategies for success.

The Challenges

Recent laws have resulted in decreased revenues and increased costs for private practitioners. This combination, along with higher overhead expenses, threatens the financial stability of small group, and especially solo, practices.

"Even prior to the passage of the Affordable Care Act (ACA), sources of revenue for physicians were under attack by federal regulatory agencies, including, and in particular, diagnostic and other ancillary income sources viewed as being drivers of healthcare costs in this country," says Haupt. "The passage of the ACA and projected cuts in reimbursement pose even greater threats to the financial viability of private practices. This financial strain, and the fear associated therewith, has and will continue to drive physicians who want to maximize their income in the short-term . . . to choose hospital employment over private practice."

"For all of its flaws, Obamacare may be hastening change, but even in its absence, change would have been inevitable," adds Feltes. "Economic pressures, resulting from increased operating expenses, including the financial burden of implementing HITECH requirements associated with EHRs, coupled with declining reimbursement, have hit traditional solo and small private practices particularly hard, causing many physicians to sell their practices and accept employment from healthcare systems. Some prognosticators predict that, within just a few years, as many as 75 percent of physicians could be hospital employees."

"While many physicians have become, or are considering becoming, salaried hospital employees, other physicians are realizing that hospital employment may not make sense," says Glessner. "Some physician practices are not well suited to the hospital employment model. Other physicians are reluctant to give up the autonomy and flexibility that private practice often offers. In an ever-changing health care landscape, though, how do physicians hold on to the benefits of private practice while continuing to provide first-rate patient care and earn a living?"

All three attorneys agree that there is no easy answer to this question. In fact, they say, physicians who want to retain at least some of their autonomy may need to consider a number of strategies, including:

+ physician extenders
+ practice mergers and acquisitions
+ physician health organizations (PHOs)
+ professional service agreements (PSAs)
+ accountable care organizations (ACOs)
+ group purchasing organizations (GPOs)

There are other options, as well.

Basic Treatments

Feltes advises private practitioners to start with a "rudimentary approach" and re-evaluate both the revenue and expense side of their practice and formulate an economic "treatment plan" to give themselves the best prognosis for survival.

"To boost reimbursement (or, at least, retard erosion), independent physicians may want to consider contracting with PHOs that may offer a greater opportunity to receive better negotiated rates with payers that may include value-based payment models," he says. "Another option is to explore co-management and gain-sharing contracts with hospitals to manage service lines, provided these arrangements meet legal safe harbor requirements to avoid implicating the Stark and anti-kickback laws."

He points out that contracting with a GPO that uses market power to negotiate volume discounts from vendors can help minimize expenses and help bolster the practice's bottom line.

"Employing advanced practice practitioners, including certified nurse practitioners and physician assistants, may be a way to provide services more cost-effectively, as well," Feltes says. "Also, opportunity still exists for independent physician practices to become patient-centered medical homes and participate in co-management, gain-sharing, joint-venturing, group purchasing, and other contractual arrangements.

"Clearly, the shift from fee-for-service to bundled payment and shared

saving, encourages a team-based healthcare approach, as recently recommended by the AMA, which aims at improving quality and reducing costs through coordinated efforts among vertically integrated practitioners."

Contractual Agreements

Physician practices that enter into a PSA contractual agreement with a hospital are able to strengthen their ties with the hospital while keeping their private practice intact. According to Glessner, these options often provide opportunities to improve the delivery of patient care. They also provide a measure of stability and predictability to a physician's compensation while simultaneously allowing the physician to maintain some autonomy.

"Under a PSA, physicians lease a practice to a hospital and agree to provide services to the hospital's patients. The hospital is responsible for all billing and collections and assumes responsibility for the practice's overhead. The physicians are paid on a productivity compensation model, such as a wRVU-based methodology. In exchange, the physicians agree to exclusively provide services at the hospital (absent certain circumstances)," Glessner explains.

"A PSA is often accompanied by a co-management agreement under which the hospital hires the practice to manage and develop a clinical service line. A co-management agreement often encompasses the duties of a medical director agreement and adds certain administrative responsibilities."

Other options he offers for consideration are Medicare ACOs and/or private payor shared savings programs. These programs attempt to incentivize coordination of patient care among different providers by allowing participating providers to share in the cost-savings realized by the payor as a result of such coordination.

"Primary care and many specialist physicians play a vital role in these programs, and practices should seek out hospitals or large physician groups looking for physicians to participate," says Glessner. "The practice's share of the savings is often negotiable and the practice should carefully consider the terms of any offer to participate in such a program."

Recruitment, Mergers and Acquisitions

Growing a practice through recruitment and mergers/acquisitions of other medical practices seems to be a logical solution — not only to lessen the per-physician cost to practice medicine, but also to gain leverage in negotiating with insurers and suppliers.

"As many physicians know, growth is easier said than done," says Haupt. "First, depending on the size of the subject medical community, mergers/acquisitions can raise issues of anti-trust/competition. Therefore, the transaction must be structured properly and an analysis of the competitive effects of the transaction must be fully analyzed to ensure compliance.

"Second, there are reasons why there are different groups practicing the same specialty in the same community (autonomy, ego, disparity in work ethic, etc.). Dealing with differences is a delicate and difficult part of bringing groups together. Accordingly, buy-sell agreements, close corporation agreements, and other organizational documents governing the ownership and management of the practice are critical."

Finally, Haupt points out how increasingly difficult it is for a private practice to recruit physicians in light of the monies that hospitals can offer and the skepticism of new physicians about the long term viability of private practice. "To attract quality recruits, physicians need to pay a premium or offer benefits and ownership paths that are better than what was available when they were coming out of medical school."

While some private practitioners might be considering concierge medicine to increase their income, Haupt does not recommend it. He says, "With less than 1 percent of all physicians practicing concierge medicine, the test sample upon which others can structure their practice is very small, and the risk of failure is very high."

Time Is of the Essence

Glessner, Feltes and Haupt all agree that while there are many strategies to consider, private practitioners must hasten the speed in which they examine these options and determine a course of action.

"I agree with Joe (Feltes) regarding his reference to a 'foggy crystal ball.' Those of us who have been in the industry for years understand that the only constant regarding integration between physicians and hospitals is change," says Glessner.

"Like fee-for-service, traditional practice models are likely on the path to extinction. Clinging onto the *status quo* no longer is viable long-term strategy," says Feltes. "Neither is the paralyzing effect of hope or despair. Today, more than ever, physicians need to be open to change."

"The future of health care is here," says Haupt. "If the private practitioner is to survive — and succeed — the time to act is now."