Subject: August 2019 Issue of Wisdom. Applied. Newsletter

WEISS

ADVISORY E-ALERT

THE MARK F. WEISS LAW FIRM
A PROFESSIONAL CORPORATION

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Hospital Sues Medical Group. Medical Group Returns The Favor. Both Likely Lose.

This month's lead article is an expanded version of a blog post that generated a significant number of "offline" comments from clients and friends of the firm. Based on their interest, I've provided additional observations and actionable comments. - Mark

At first I couldn't believe my eyes.

It seemed like a plot from the old Divorce Court TV show. But no, it wasn't a battle of the spouses over the failure of a marriage, it was a battle of a hospital and a medical group over what appears to be the failure of an exclusive contract.

Far more than simply appealing to prurient interest, the breakup saga provides valuable lessons to hospital-based group leaders and to office-practice physicians alike.

The Marriage

Trinity Health, a not for profit, Catholic healthcare system, operates more than 90 hospitals across more than 20 states.

Anesthesia Associates of Ann Arbor, also known as "A4," is the largest anesthesia group in Michigan.

Trinity and A4 are parties to an exclusive anesthesia agreement that covers six of Trinity's Michigan facilities. That contract apparently has provisions barring Trinity from soliciting the employment of A4's anesthesiologists and CRNAs.

And, A4 apparently has covenants not to compete in its agreements with its anesthesiologists and CRNAs.

The Breakup

Earlier this year, A4 terminated its payer agreements with Blue Cross Blue Shield of Michigan and with Provider Health.

As a result, In July, Trinity sued A4 in federal court alleging that the terms of the exclusive anesthesia contract between them requires A4 to remain in network.

Additionally, Trinity's lawsuit seeks to enjoin A4 from enforcing covenants not to compete with its anesthesia providers, whom, it appears, Trinity began courting so that it could employ them.

The other aggrieved spouse, I mean, party, A4, then filed suit in state court against Trinity alleging that the hospital system ignored the non-competes in the agreements between A4 and its anesthesiologists and CRNAs as well as non-solicitation provisions in Trinity's agreement with A4.

Just as in divorce cases when spouses argue over child custody, this fight over who has "custody" of the anesthesiologists and CRNAs has an uncertain ending for the parties. (However, we can be sure that the divorce lawyers, I mean, trial lawyers, are going to come out okay.)

The Judgment

But no matter the ending, we can extract some valuable lessons from the overall dynamic for

1. Covenants not to compete, in jurisdictions in which they are enforceable, remain powerful tools. However, they have their limits. They work best within an overall system of protection which combine a web of supporting strategies. For example, systems in which covenants not to compete and fiduciary duties combine.

2. Non-solicitation provisions in agreements with hospitals also remain powerful tools. They, too, have their limits, not simply because non-solicitation and “no hire” are distinct concepts and the hospital might not be the party that’s soliciting. Just as with covenants not to compete, non-solicitation provisions work best within an overall system of protection.

3. No contractual provision is perfect and will always be enforced. This is especially the case with restrictive provisions such as covenants not to compete. And, as medical groups grow larger and control more market share, it may be more difficult for them to effectively enforce restrictive covenants. This is either bad news or great news depending on whether you’re doing the restricting or the soliciting. On the “restricting” side, serious thinking needs to be done on whether other approaches that don’t necessarily involve classic restrictions might accomplish the same or similar goal.

4. Lawsuits aimed at enforcing covenants not to compete are likely most effective when brought against the individuals who agreed to them, not a third party. That’s not to say that separate non-solicitation provisions don’t form the basis for other legal action.

5. In light of the Trinity/A4 dispute, consider the problems with an agreement to remain in network. In network with whom, any and all payers? What if the reimbursement from a particular payer is ridiculously low? What if the payer doesn’t timely pay? What if the payer refuses to contract with you? Managed care plan provisions should be designed from another angle. There are at least several others.

6. Unless considered during the exclusive contracting process, medical groups can become uncompensated recruitment agencies. There are strategies to prevent this.

7. Suing the hospital with which you hope to maintain a relationship will probably be as effective as filing a divorce action to save a marriage. Sure, it might be a wake-up call, but more likely it’s a permanent parting of the ways. The more valuable time for action is in the strategy and negotiation phases as well as in regular and purposeful ongoing communication to keep the love alive.

Wisdom. Applied. 129: Rainbows, Unicorns, and Fraudulent ASC Deals

ASCs can be great investments for physicians. Oh, as long as they are real.

But if all they are are rainbows, unicorns, and clear blue sky, then you’d better stay away.

All Things Personal

On the way home, I stopped at the market to buy some red leaf lettuce, radishes, and a bunch of broccoli

When I got to the front of the store, the few lines with checkers were jammed. But the six stations for "self checkout" were wide open.

If I had a few items with barcodes, I might've opted for self checkout, but there I was a bunch of vegetables. I imagined the hassle of finding them on a chart in order to put in the correct SKU code and then weigh them. So, instead, I stood in line and thought about this column.

Of course, self checkout is not for the customers' benefit – it's all about shifting labor costs from the market to the customers.

In an economic sense, it's like the story of the whitewashed fence in the novel *The Adventures of Tom Sawyer*, by Mark Twain. Tom, ordered by his Aunt Polly to whitewash the fence, convinces other kids to pay him in trinkets and treasures for the privilege of doing the whitewashing.

At the market, the customers pay for the "privilege" of skipping long lines (created by the

Ah, there's a negotiation lesson here.

If this were a negotiation, you'd never be wise to trade something of value such as a position, a demand for a certain provision, or a concession on price, in return for, well, nothing.

Remember that lesson the next time you think about going into the self checkout line.

No, I'm not telling you to skip self checkout when you're really in a rush and the line from check stand number 2 stretches from the front of the store to the dairy counter.

Instead, use it as a tool to remember not to give up a concession in a negotiation without obtaining something of value in return.

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- 4.5 Things Magic Mountain Taught Me About Your Business, Winter 2019, Sentinel.
- Why the Hospital's Idea of Physician Leader Means Follower, Winter 2019, Sentinel

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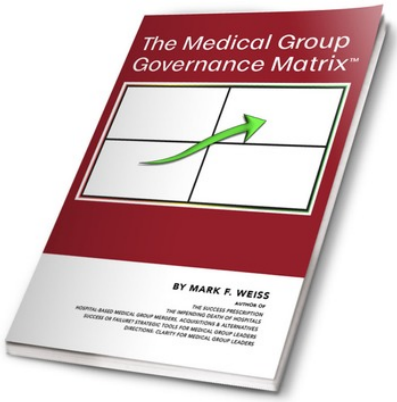
Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one is which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s

quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy here.

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2. Be a guest on "Wisdom. Applied. Podcast." Although most of my podcasts involve me addressing an important point for your success, I'm always looking for guests who'd like to be interviewed about their personal and professional achievements and the lessons learned. Email me if you're interested in participating.

3. Book me to speak to your group or organization. I've spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, drop us a line.

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