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# Mergers & Acquisitions Toolkit

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# Part 1

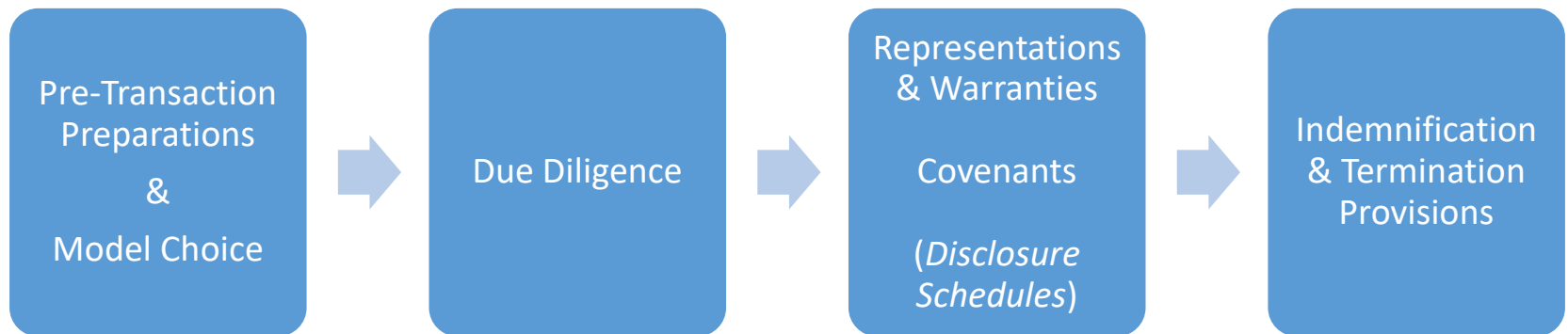
Issue Spotting

Application of Decision Tree



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# Deal Mechanics



# Pre-Transaction Preparations

- Goals
- Must-haves
- Cleanup
  - Governance
  - Ownership
  - Financials
  - Contracts
  - Compliance
- Deal Team
- Valuation (expectations, negotiation, substantiation)
- Evaluate transaction models



# Choosing Your Model



- **Who?** (professionals, professional entity, hospital, non-New York persons, non-medical professionals)
- **What:**
  - Significant operational issues?
  - Liability concerns (reimbursement, malpractice, employment)?
  - Tax implications and consequences (direct and indirect parties, income and sales tax)?
- **When?** What is the (real) timeline?
- **Why?** What are the purposes and goals of the parties?
- **How?**
  - Necessary transaction documents
  - Operation transition steps (contracts, employees, licenses, assets, liabilities)



# Types of Transaction Models

- Merger
- Asset Acquisition
- Stock Purchase
- Joint Venture
- Management Services Organization (MSO)
- Professional Services Agreement
- Affiliation Agreement



# Due Diligence

## Health Law Specifics

### General

- Licenses, certifications, and accreditations
- Reimbursement
- Payors
- Administrative proceedings or investigations (OIG, OMIG, OCR, DOJ, Attorney General)
- Insurance policies and claims history
- Malpractice and professional misconduct or discipline
- MCO, IPA, PHO, ACO or other similar agreements

### HIPAA

- Policies and procedures
- Breach notifications (large and small)
- IT infrastructure
- Business associate agreements



# Due Diligence Health Law Specifics

## **Fraud & Abuse**

- Leases (space & equipment)
- Personal services agreements
- Management agreements
- Physician employment agreements
- Unwritten financial relationships
- Referral arrangements
- Ownership interests (including related entities)
- Compliance Plan and committee minutes and reports
- Evaluate employees and contractors against Excluded Persons List
- Copies of FMV Valuations

## **Reimbursement**

- Over/under payments
- Audits and investigations
- Disclosures to payors
- Subpoenas
- Civil investigative demand
- Corporate integrity agreement
- Litigation





# Issue Spotting




- New professional entity required?
- CHOW?
- Operations transition – interim agreements?
- Contracts – assignment, change of control, early termination?
- Consents and notices – mission critical (payors, banks, leased medical equipment, critical administrative services)
- UCC searches – collateral
- Guarantees (corporate and personal)
- Accounts receivable
- Winding up existing business – leasebacks?
- Antitrust
- Corporate practice of medicine restrictions
- Executive Order #38 restrictions
- Different EMR?
- Funding the purchase (captive PCs)
- Physician malpractice and professional discipline



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# Issue Spotting

- Transactions with physicians and related persons (or their affiliates)
  - Stark – designated health services?
  - Anti-Kickback Statute – referral potential?
  - Problems with agreements for personal services (professional and management), employment agreements, and leases:
    - Unwritten
    - Term less than 1 year
    - Volume or value based compensation
    - Compensation under/over FMV
- 
- Provider compensation
  - Board certification for specialties
  - Fee-splitting prohibitions
  - Compensation (cash or in-kind) to referral sources
  - Existing non-compete provisions
  - Governance requirements (including post-closing planning)
  - Licenses, certifications, and permits (transferability, expiration)
  - Medical Records Custody Agreement



# Representations & Warranties

- Knowledge qualifiers
  - Whose knowledge? (confirm with those included)
  - Materiality threshold (actual or constructive)
  - Material Adverse Effect trigger
- Survivability
- Date of Representation (execution, closing, both, other?)
- Consequences (indemnification, termination)
- Disclosure Schedules



# Covenants

- Notice of Certain Events (incorporate compliance issues)
- Patient notification
- Non-compete
- Non-solicit
- Special deal points



# Indemnification & Termination

## Indemnification

- Who? How broad?
- Materiality threshold for breaches of reps and warranties?

## Termination

- Physician private practice reversion clause



# Option to Unwind



Specific right to unwind the sale and return to private practice should include:

- Right repurchase assets at FMV
- Restrictive Covenant carve-out right
- Right to re-employ former practice employees, includes a waiver of employee restrictive covenants and imposes non-solicitation covenant on acquiring entity.
- Right to re-assignment of space and equipment leases



# Part 2

Ethical Considerations

Antitrust

Exempt Organizations



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# Ethical Considerations

- Who is the Client?
- Conflicts of Interest
- Advocacy vs. Fairness Duty of Candor to Third Parties
- Communicating with Represented Parties
- Duty to Prevent Disclosure of Metadata





# Antitrust

- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011)
- Improving Health Care: A Dose of Competition (2004)
- Statements of Antitrust Enforcement Policy in Healthcare (1996)
- Antitrust Guidance for Human Resource Professionals (2016)
- Horizontal Merger Guidelines (2010)
- Antitrust Guidelines for Collaborations Among Competitors (2000)
- FTC v. St. Luke's Health System (2015)
- FTC v. Sanford Health (2017)



# Exempt Organizations

## **Internal Revenue Code**

- Private inurement
- Excess benefit transactions

## **NY Not-For-Profit Corporation Law**

- Conflicts of Interest
- Related Party Transactions



# Questions?



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