Learned Profession or Business?
Historically, medicine has been considered a learned profession where an ethical code of conduct takes precedence over economic considerations. While in theory this view remains intact, the reality of decreasing reimbursement rates and increasing operating costs is forcing physicians to realize that, like it or not, there is a business side of medicine. Medical training does little to prepare young doctors for the harsh reality that their ability to practice medicine may hinge upon their ability to successfully manage a business.

Setting Up a Practice
A successful business begins with a business plan — a detailed road map for taking the business from a dream to a successful reality.

Practice description. Describe the practice in terms of a mission statement, practice goals and objectives, practice philosophy, strengths and core competencies.

Choose and describe the legal form of ownership for the practice.

Services. Describe the services offered and the fees charged. If inpatient care is offered, identify which hospitals an application for privileges and credentialing should be submitted.

Marketing. Identify the source of patients, patient demographics, competitors, potential market share, and promotion strategy. If there is no market for the services offered, there is little chance for success.

Operational plan. Describe the daily operation of the practice, such as its location, equipment and personnel needs, as well as how accounts receivable and accounts payable will be handled. Suppliers of medical equipment and supplies need to be identified. Decide who will hire the needed personnel and who will train them.

Management and organization. Develop an organizational hierarchy to show who is responsible for what functions.

Identify professional and advisory support, including an attorney, an accountant, an insurance agent, a banker, consultants, mentors, and key advisers.

Expenses. Research business startup expenses to determine how much investment will be needed to initially finance the practice.

Personal financial statement. Develop a personal financial statement that may be used to help the bank determine if it will finance the practice.

Financial plan. Develop a financial plan to show a twelve-month profit and loss projection, a four-year profit projection, projected cash flow, opening day balance sheet, and a break even analysis (when expenses equal reimbursements).

The Internet offers sample business plan forms and advice on how to set up a medical practice.
Physicians setting up a practice should take advantage of these resources as a starting point to avoid making common mistakes.

**Legal Forms of Doing Business**

There are four basic forms of doing business:

- **Sole proprietorship,**
- **Partnership,**
- **Limited liability company;** and
- **Corporation.**

The choice of the legal form of doing business has significant legal and tax consequences. A brief description of each follows.

**Sole proprietorship.** A sole proprietorship has one owner who has total control of the business and receives 100% of the profit and loss. The personal assets of the owner are at risk for liabilities and debts of the business. Taxes are reported on the owner’s individual income tax return. This is the easiest form of business to set up because there are few administrative requirements. However, a physician does not want to set up his or her practice as a sole proprietorship because of the liability issues.

**Partnership.** A partnership is two or more people who are in business for a profit. The management of the business and the profits and loss are shared among the partners according to the terms of the partnership agreement, which may be formal or informal. General partners are liable for the debts and liabilities of the partnership, including tort damages incurred by other partners. A general partner’s personal assets are at risk. Each partner reports his or her share of the profit or loss on his or her individual income tax return. A general partnership has few administrative requirements, but a written partnership agreement is highly recommended.

Because of the liability issues, a general partnership is not recommended for a medical practice. Some states allow limited liability partnerships which may be desirable for a medical practice. Legal advice is recommended before choosing the form of doing business.

**Limited liability company.** A limited liability company can have the tax advantages of a partnership and the limited liability of a corporation, although the members may choose to be taxed as a corporation. Generally, members risk only their investment in the business, unless they are personally obligated or at fault. There are administrative requirements, such as filing Articles of Organization with the Secretary of State. Limited liability companies are a popular form of doing business for a medical practice.

**Corporation.** A corporation is the most complex form of doing business because the corporation is a legal entity separate from its owners, the shareholders. A corporation may be subject to double taxation, because corporate profit is taxed first on the corporation’s income tax return, and again on individual shareholders’ returns if dividends are paid. The officers, directors, and shareholders are not personally liable for the debts and liabilities of the corporation, except for personal negligence, personal guarantee of debt, or if the corporate form is found to be a sham. Professional corporations are the most common form of doing business for medical practices, although limited liability companies are gaining in popularity.

**Reimbursement**

To remain in business, the medical practice must take in more income than it spends. For many medical practices, the primary source of income will be reimbursement for the services provided. Those services may be reimbursed in several ways.

- **Self pay (which is often “no pay”),**
- **Private third party pay (HMO’s, private health insurance, employer provided health insurance, etc.),** or
- **Government third party pay (Medicare, Medicaid, TennCare, etc.)**

Medical fees used to be paid on a “fee for service model.” The provider was paid on a retrospective basis, in full, for all medically necessary services provided to the patient. This model was based upon the principles of physician fidelity and patient autonomy, and every insured patient was entitled to all medical care that could be beneficial, regardless of how much that care may cost.

With rising health care costs, the fee for service model has largely been replaced by the managed care model. The managed care
model attempts to control health care costs by limiting the services provided to a patient. The focus is on what is best, not for the individual patient, but for society by ensuring that health care remains affordable to the largest number of individuals.

Third party payors, both private and governmental, determine what medical services will be reimbursed under their guidelines. They have a system of review that takes one of three forms.

- Retrospective review (approves or disapproves services already rendered),
- Concurrent review (approves or disapproves services immediately before they are rendered), or
- Prospective review (approves or disapproves services that are to be rendered in the future).

The first type of review can result in services that are not reimbursed, and the latter two types of reviews may result in delayed treatment.

Services rendered are billed by using codes. If the wrong code is submitted, reimbursement will be denied until the appropriate code is submitted. A medical practice must have qualified staff who know how to appropriately submit bills to third party payors to avoid unnecessary delays in reimbursement.

Physician-Hospital Relationship

Before a physician may admit a patient to a hospital, the physician must be a member of the hospital medical staff with admitting privileges and credentialed to perform the needed medical services. Hospital committees, normally comprised of other physicians, will decide whether to grant clinical privileges to a physician, and what medical services that physician is qualified to perform. A committee of physicians also determines whether to continue granting a physician clinical privileges if questions arise about the physician’s competency.

Physicians who are in private practice and who are granted clinical privileges at a hospital are not usually considered an employee of the hospital. Instead, the physician is considered an “independent contractor.” Historically, courts would not hold a hospital liable for the medical malpractice of a nonemployee physician. Over the years, this rule has been eroded as plaintiffs have carved out new causes of action against hospitals, such as negligent retention of an incompetent physician on staff. The possibility of this type of lawsuit has put pressure on hospitals to ensure that the physicians who practice within its walls are competent.

Joining an Existing Practice

The economic realities of today’s medical practice make it difficult to set up a solo practice, and many physicians choose to join existing medical practices. Usually, this means signing a contract that will bind the medical practice and the signing physician in all future dealings concerning benefit packages, reimbursement, vacation, sick leave, coverage, responsibilities, ownership rights, capital investments, staff support, termination, and dissolution, to mention a few. Because the contract has been written by the medical practice’s lawyers, having the contract reviewed by a lawyer representing the signing physician is strongly recommended. Several contract clauses require close scrutiny.

Covenant not to compete. In the event that the physician either chooses to leave or is asked to leave the medical practice, a covenant not to compete restricts the departing physician’s right to practice medicine within a certain geographical area for a certain length of time after the physician’s employment is terminated.

Before January 1, 2008, covenants not to compete were not enforceable against physicians in Tennessee except in two circumstances. The Tennessee legislature recognized two situations in which the public interest weighed in favor of enforcing covenants not to compete against physicians: (1) when the employer is a hospital or an affiliate of a hospital, and (2) when the employer is a faculty practice plan associated with a medical school.

However, beginning January 1, 2008, a new law in Tennessee makes covenants not to compete enforceable against any health care provider who signs such an agreement if certain conditions are met: (1) the duration of the restriction is two years or less; and (2) the restriction meets geographic limitations (10 mile radius) or facility limitations (at all facilities
where the practice provided services while the physician was employed by the practice). The new law does not apply to physicians who specialize in emergency medicine.

The AMA strongly discourages covenants not to compete, and under Section 9.02 of the Code of Medical Ethics, it states: "Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services." Federal law also limits the use of covenants not to compete if a hospital is involved in the recruitment. Nevertheless, many states enforce reasonable covenants not to compete against physicians.

Non-solicitation covenant. Prohibits a departing physician from soliciting patients from the medical practice for a specified length of time after leaving the practice.

Non-disclosure covenant. Prohibits the departing physician from disclosing any confidential business information for the physician’s advantage, such as patient lists, price or fee structures, etc.

No-hire covenant. Prohibits the departing physician from trying to hire any employee of the medical practice for a specified length of time after leaving the practice.

Liquidated damages. This clause sets a predetermined amount to cover any breach of the contract. The sum stated must be a reasonable pre-estimate of the probable loss to the medical practice if a physician breaches the contract. To be enforceable, it must be in the nature of probable damages rather than a penalty. Termination clause. Under what conditions may a medical practice terminate a physician’s employment or ownership rights? For cause only, or for no cause? What happens if a physician chooses to leave the practice? What happens if a member of the practice dies? What happens to the departing physician’s deferred compensation, ownership interest, capital investments, etc.?

Regardless of how friendly or close the members of a medical practice are at the beginning of the relationship, no joint practice should be established without a comprehensive contract to set out the expectations, rights, and responsibilities of the parties from the start of the practice to its potential dissolution. For physicians who join an existing practice, the contract should be read carefully and fully understood. Legal counsel can help more easily before the contract is signed than afterwards.

Anti-Fraud Laws
Health care providers must be alert to several anti-fraud laws that can result in large fines and/or criminal penalties if violated.

Anti-Kickback statute. Prohibits health care providers from paying others for referring business to them.

Civil False Claims Act. Imposes fines for submitting false claims for reimbursement to the government.

Stark Laws. Prohibits health care providers from referring patients for ancillary medical services to entities in which the provider (or the provider’s immediate family) holds a financial interest.

These laws are far more complex than indicated, with exceptions, safe harbors, and pitfalls, the discussion of which is beyond the scope of this factsheet.

Conclusion
Many health care providers are poorly prepared for the business side of medicine, making legal, accounting, financial, and business advice critical to the success of the medical practice.

Helpful Web sites
For business plans and business advice in general:
http://www.score.org/index.html


Disclaimer: The information contained in this factsheet is educational in nature and provided as a public service. It is neither a comprehensive statement of the law nor intended as legal advice, and it should not be relied upon as such. The information is based upon federal and Tennessee law, and the law in other states may be different. Laws may change without notice, rendering the information contained in this factsheet inaccurate. If you have specific legal questions, please consult an attorney.

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