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### CASE AND COMMENTARY: PEER-REVIEWED ARTICLE

#### When and How Should Patients Be Informed About Clinicians' or Organizations' Sale of a Clinical Practice to a Private Equity Buyer?

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##### Abstract

Private equity (PE) firms' acquisition and management of health service delivery entities, such as specialty physicians' practices, have been associated with increased cost and diminished quality of care. This commentary on a case argues that clinician-sellers have obligations to disclose to their patients known and foreseeable changes—especially those affecting services' cost or quality or health outcomes—to which PE ownership could contribute.

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##### Case

SB arrives for a regularly scheduled appointment with Dr W, their primary care physician for the past 25 years. While in the waiting room, SB overhears office staff members talking about Dr W's practice being acquired by a private equity (PE) firm and what that might mean for their jobs.

When SB is taken to an examination room and Dr W enters, SB asks, "Dr W, are you planning to retire and sell your practice? If so, what does that mean for me?"

Dr W considers how to respond.

##### Commentary

In recent years, PE firms have made major investments in health care through the acquisition of hospitals and clinician practices. PE firms are private investment vehicles that can acquire assets of a hospital or practice and manage the business going forward. Whether the acquisition is of a hospital or clinician practice, the net result has been a shift in the health care landscape from independent practice toward direct physician employment. A 2022 report by the Physicians Advocacy Institute found that, at the end of 2021, 74% of physicians in the United States were employed by a hospital, health system, or other corporate entity.<sup>1</sup> In 2023, that number had risen to 78% of all physicians.<sup>2</sup>

One driver of physician employment that led to PE acquisitions was the adoption of managed care arrangements by state and federal health care programs. Payers established a range of managed Medicare and Medicaid products that led hospitals, beginning in the 1990s, to seek alignment with groups of practitioners using business models such as independent practice associations and physician hospital organizations.<sup>3</sup> As the Centers for Medicare and Medicaid Services introduced new programs to reduce costs and increase access after the passage of the Affordable Care Act in 2010,<sup>4</sup> hospitals found it necessary to establish their own employed or captive practice model in order to meet payer changes. For traditional independent practices, the costs of managing care under new payer models affected profitability and resulted in physicians taking early retirement or joining a health system. As fee-for-service programs diminished, access to funds and relief from high overhead became important to traditional practices, making them attractive targets for PE rather than traditional sources of funding.

In states that prohibit the **corporate practice of medicine**, such as Texas, California, and New York,<sup>5</sup> unlicensed entities cannot directly employ physicians or control or be paid for medical services.<sup>6</sup> There are statutory and structural exceptions to this prohibition that vary by state and that have been used by hospitals, and now PE firms, to exercise operational control over medical practices. Statutory exceptions allow nonprofit entities, such as critical access hospitals, federally qualified health centers, medical foundations, and similar nonprofit health corporations such as certified nonprofit health corporations in Texas, to function as a medical practice and employ physicians.<sup>6</sup> Structural exceptions use variations on a management services organization (MSO) that might contract with rather than own a practice or appoint a “friendly” MSO physician executive who has acquired an ownership stake in the practice to serve as its medical director.<sup>6</sup> Hospitals and other health care entities can de facto acquire a practice and employ its physicians using one or both of these models.

This commentary will address when and how patients should be informed of a potential acquisition of a clinical practice by a PE firm after briefly discussing ethical issues affecting patients and clinicians.

### **PE and Ethics**

For independent practices, there may be few options for accessing capital to relieve financial pressures, manage regulatory compliance requirements, and deal with the increasing cost of private practice operations. PE provides as an exit strategy that gives independent physicians a windfall from the sale while allowing the practice to continue under third-party management. The ethical implications of these transactions have been a secondary consideration and have not often been addressed in the context of the relationship of a physician to their patient. Yet there are often increased costs of and decreased quality of services following PE investment.<sup>7,8,9</sup> The research raises concerns about the relationship between PE funding and health care costs, as well as about how certain investment structures affect patients.<sup>10</sup> Because both patients and payers face higher costs under PE arrangements, both **cost and quality of care** are key ethical considerations of which Dr W should be aware.

### **When Should Dr W Respond?**

PE transactions involve a detailed due diligence review of the practice, which focuses on financial and compliance issues rather than any ethical considerations, by the PE company. These ethical issues are often overlooked or not even recognized, as the

practice and its practitioners often remain in place after the transaction and the practice has come under PE management. Unless the transaction involves a merger with another entity, considerations of new funding and management support may not be recognized by either party to the transaction, although they can affect cost and quality of care. Therefore, it should be the physician's responsibility to consider not only the financial and regulatory issues related to the transaction, but also the ethical implications and consequences of the proposed transaction for the patient. Many PE transactions do not result in a sale, and it should not be assumed that Dr W will sell her practice. The transaction process is always preceded by a mutual nondisclosure agreement among the parties. These transactions are long, tedious, and require extensive negotiation.

However, once the purchase agreement has been fully negotiated and closing is imminent, the physicians will inform their staff, but often not their patients. Yet the patient has an interest in the transaction outcome, which is arguably no different than when a physician relocates their practice or retires. Most state laws require patient notice if a physician leaves a practice. Some states require disclosure to the state of any transaction of a certain value involving the change of ownership or control of a health care business.<sup>11</sup> Since loss of staff and patients can significantly affect the value of the practice and negotiated purchase price, an ethical dilemma arises of when to disclose. Considering the sale's potential effects on quality and cost of services early in the process can not only guide the decision of when to disclose but also allow for inclusion of these ethical implications in the transaction.

Patients may have questions about the new management whether they are voiced or not. Once the agreement has been finalized, Dr W should inform her patient immediately and honestly, consistent with the terms of any agreement. Indeed, she should have considered this issue prior to facing such a question in the exam room. Dr W has an ethical obligation to consider the **impacts of a sale** of her practice on her patients, to try to address these in the negotiations, and to respond to patients' concerns.

### **What Should Dr W Care About?**

*Patients.* Trust is a part of the patient-clinician relationship and is acknowledged as essential because of the vulnerability of patients.<sup>12</sup> Trust between the patient and health care organization is necessary because it both is desirable in itself and allows for better health care to ensue.<sup>13</sup> Research suggests that hospital-acquired adverse events have increased by as much as 25% for Medicare beneficiaries admitted to hospitals in which PE holds a controlling ownership interest.<sup>14</sup> Keeping patients' interests in mind when considering a transaction, physicians should try to anticipate and address their patients' concerns about the transaction's potential effects on cost and quality of care to maintain their trust.

While patients may not be aware of the cost and quality impacts of PE investment, Dr W has an obligation to inform herself of the potential consequences before she discloses the transaction to her patients. How she responds to patients when she does disclose will depend on the stage and nature of the transaction—specifically, if she is to continue to personally provide services to her patients. She should provide information, either verbally or in writing, notifying patients of any administrative changes and be prepared to answer their questions. Best communication practices in this case would be to have an informational handout ready to be provided once the transaction has closed. If Dr W is leaving the practice, state law will specify the required steps for notification. If she is staying, a handout that explains the nature of the changes should suffice. Patients

always have the right to change their clinician. Even if patients do not need to be specifically informed about the potential impact of PE on costs or quality of care, the practitioner should be a patient advocate by addressing any concerns that might arise and presenting the requested information honestly.

Many patients are likely to have questions about their health records' storage, confidentiality, and usage by a PE entity. Generally, the practice will retain custody of patient records, and a notice to patients of that fact is appropriate. If a new practice takes over as part of an acquisition of assets, a change in ownership or clinician could require patient authorization for transfer of records to any new entity. Dr W should understand how the practice will handle its custody of the records, particularly if she plans to leave. Under that scenario, patients who desire to stay with the practice need to know whom they will see in the future to avoid abandonment and ensure continuity of care.

*Regulators.* PE transactions can also present issues of concern to regulators, which is another reason Dr W should consider the transaction's potential effects on quality of care. In addition to malpractice claims associated with poor outcomes, poor quality of care and medical errors can result in reduced reimbursement to practitioners and penalties to hospitals,<sup>15</sup> including loss of Medicare provider status.<sup>16</sup> Recent concerns about patient safety and outcomes associated with PE involvement in health care have been raised by Congress and several state legislatures.<sup>17,18</sup>

*Insurers.* Insurers are also concerned about the increased presence of PE but for reasons related to contract negotiation and compliance with government programs. Although beyond the scope of this article, insurance can be a consideration in a practice's decision to embrace PE management. Payers contracted with government programs, such as Medicare or Medicaid, are subject to compliance requirements that may become difficult to address in a PE-managed practice. Physicians who have delegated management to PE firms may find themselves responsible for the actions of management and unaware of the ethical, financial, and quality issues associated with a PE-managed practice. For these reasons, they should involve a qualified health lawyer to represent them early in the transaction and to advise on specific issues unique to their own situation.

### **Content of Disclosure**

The disclosure of a known or foreseeable PE sale should be regarded as clinically and ethically relevant to patients, as it has the potential to impact their care or continued access to professional services or clinicians at the practice. The disclosure should inform patients about any changes in practice policies or processes under the new arrangement. Changes to scheduling, fees, insurance coverage, and staffing should be provided. If new business arrangements could adversely affect patients requiring continuity of acute care, these should be disclosed and addressed immediately. Upon request, patients should be provided with referral options and assistance as available under their respective health plans.

### **Balancing Patients' and Physicians' Interests**

Patients rely on their doctors for candid information regarding all aspects of their care. While sale of a practice to a PE company might be financially appealing to physicians, it should not compromise the needs of patients for continuity and quality of care. Ethical considerations related to the potential sale of a practice should be addressed during

negotiations, with attention to how overhead costs are allocated to the practice and how billed charges are determined, as these processes affect patient co-pays and deductibles.

Physicians in solo or small practice settings might not have access to specially trained health care lawyers who are familiar with the considerations involved in these types of transactions. It is advisable for any physician who is in this position to **consult with an attorney** prior to entering negotiations and to consider other arrangements that could be more beneficial to patients and to the community where the practice is located.

Physicians also should consider the potential effects of PE investment in a hospital where they are employed or to which they refer. These should be disclosed to the patient, who should be given a choice, if available, to seek care at a different hospital. The content of that disclosure, the timing, and the method of providing information to patients should be considered prior to admission, as the hospital is unlikely to make such a disclosure at admission.

In summary, not all PE transactions are alike. Not all circumstances involving a physician or practice are the same. However, it is the physician's responsibility to take patients into consideration when contemplating a PE or other transaction involving a change in ownership or control of a practice.

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