



## BHB INVEST: Top Legal Issues That Could Make or Break Your Next Behavioral Health Transaction

*This article is sponsored by Polsinelli, a national Healthcare and M&A law firm. This article is based on a Behavioral Health Business discussion with Nathaniel 'Tani' Weiner, and Bragg Hemme, who along with Paul Gomez, chair Polsinelli's Behavioral Health Law Group.*

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**Behavioral Health Business:** We're going to talk a little bit about the top legal issues that are coming up in M&A deals in the behavioral health space. Tani, why don't you give a quick intro of yourself and your background for everyone?

**Tani Weiner:** My focus is Healthcare M&A, and I have been in the behavioral space for 20 years, including as in-house counsel for Aspen Education Group, then via acquisitions CRC Health and Acadia, and for the past several years at the Polsinelli law firm. I spend most of my time representing investors and providers in behavioral M&A deals and other issues unique to the space.

**Bragg Hemme:** I focus on regulatory compliance and reimbursement issues, and over the last 10 or so years, have focused a lot on behavioral healthcare providers. In short, I help providers get paid and keep their money. That's my goal, supporting compliance and helping keep the revenue streams open.

**BHB:** Getting paid and keeping money is always a good thing. The last panel of CEOs said everybody's ready, there's opportunity there, but some people might be out over their skis. Feels like everything is in the right place and there's plenty of capital providers here. Talk to us a little bit about some of the structural issues that you're seeing out in the market.

**Weiner:** The issues depend on which neighborhood within behavioral health you're in, as each have different regulatory, legal and reimbursement characteristics that are important to keep in mind when you're structuring and diligencing the deal.

For example, many states have a corporate practice of medicine prohibition, which requires ownership of medical practices and similar providers to be with licensed clinicians or operated through what is commonly referred to as a "friendly PC" model.

While this model is common for physician and dental practices, differences in clinical model and regulation – often by service line, and/or state of operation – make behavioral health much less susceptible to a 1-size fits all structure. Figuring out which structure fits with licensure, regulation is where we start, and then add in other layers. For example, payor sources, how sustainable is the revenue stream, and other recent regulatory focus areas such as admissions/marketing practices and ancillary revenue streams like labs. These can often be where the diligence and execution hot spots come up.

**BHB:** Bragg, do you want to add anything?

**Hemme:** On the reimbursement front, knowing which sector you're in is also very important, because it changes your payer mix, and what rules come along with that. For instance, if you are strictly commercial pay and private pay, you want to make sure to look at the payor contracts. Will they transition in the deal or require approval before closing? Are there issues with the business model that create recoupment risk? Where is the entity on the transition to value-based care and how does that impact expected revenue streams and valuation?

If you're dealing with Medicare and Medicaid, for instance, your risk profile goes up because there are greater compliance requirements. Penalties can be stiff when you have government payers, requiring extra vigilance on chart review and structure issues that can impact or delay the all-important timing to close.

**BHB:** I think back to setting up the morning, everyone's ready to do a deal, but how do you get started? How do you prepare to go there? Because it just doesn't happen overnight. Tani, you and I discussed a little bit about this. There's a journey to get to those conversations. Tell us about what you think is part of that process of preparation.

**Weiner:** Having the right team is fundamental, on both sides of the deal. With owner/operator sellers, we often see a need for competent representation to manage expectations and help guide them through the process, as many of them are first time participants in an M&A process. Getting a head start on packaging the business – not just to support the valuation, but also making sure the business is legally presentable and can withstand diligence from a sophisticated buyer's counsel. The same goes on the buyer's side and

given the structure and reimbursement issues we touched earlier, buyers will benefit from advisors who know how the pieces fit together and what corners to look around.

An example of a reimbursement issue we have seen in recent deals involving physician services billed to government payors is what we have come to call “the iceberg issue”. Be it due to high clinician turnover, or inattention to detail on the billing/credentialing, providers sometimes rely on a small number of credentialed providers to bill services rendered by a larger group of clinicians. A well-advised buyer that catches this will want to know how Dr. Smith was in seven places on the same day with the same billing number being used for all services – an issue that could have audit and recoupment issues and create risk allocation issues that can put deals on pause or derail them.

Issues like this are generally fixable, but are a good example on the sell side of what you want to be prepared to have a plan to remediate, and the sooner that you identify an issue and have a solution ready, the greater the chances to get a deal done as opposed to running headlong into it later innings in the process.

Good financial and legal advisors can help parties identify and navigate issues like this by helping support realistic expectations and attention to diligence preparedness. We usually see this paying dividends in addressing unexpected issues that come up, and help get to closing timely.

**BHB:** I was going to say, on the buy side, a little bit next door, Steve Gold said, diligence the heck out of it. I wrote that down and it was so true. Tell us a little bit about your point of view on that.

**Hemme:** Diligence is incredibly important. I echo what Tani said, and I would add to our top issues that the seller ensure appropriate licensing and credentials at both at the individual clinician level and at the facility level. With increase in telehealth in behavioral, you need to confirm that clinicians appropriately licensed in the states in which they’re operating.

During COVID, when the floodgates of telehealth opened, there were lots of state waivers allowing people to practice across state lines. Particularly, in the behavioral healthcare world. Those waivers have ended for the most part at the state level, and states are, again, digging in on the rule that you have to be licensed in the state where the patient is to provide care. There’s some leeway for short-term things or if you already have a patient relationship, but these types of things are really important.

Also, with telehealth, you need to be aware of whether you have a facility that needs to be licensed, and that varies state by state. An IOP program may require licensing in one state, but not another. You have to go through and really figure out where you need to be licensed for the services that you’re providing, and what services are allowed across state lines.

We've had a number of issues come up where a behavioral health company furnishing IOP or PHP via telehealth, and they don't have bricks and mortar in, say, Florida. The Florida government still wants you to be licensed there, but they also want you to have a mailbox there. Working through those issues and being able to explain them is important. On the buy side, you really need to focus licensure and credentialing in diligence to ensure that both the facility and the individual practitioners are licensed appropriately in all of the ways that they practice in each state.

**Weiner:** The credentialing point Bragg raised is heightened by the fact payers are increasingly focusing on their spend in behavioral, and financially motivated to try to recoup and reverse revenue, and on the lookout for recoupment opportunities where there are actual or arguable mismatches in licensure or credentialing.

Related to credentialing, where the provider holds state or federal license credentials (ie, beyond those held by individual practitioners) government agencies will often require new applications or approvals. There is lots that can be said on this key determinant of timing to close, which is often a key deal point for both sides of the deal.

**BHB:** Earlier today, we talked a little bit about the M&A market with Dexter and we talked a little bit about how, in the past, it was more of a trailing 12 months look, and now it's almost more of a current 12-month forecast look with everything thrown in very down to the money, down to the penny. Talk to us about, maybe from a reimbursement side, how you look at that kind of maybe transition a little bit from the trailing 12 months to that and then how that plays into some of the legal reimbursement issues.

**Hemme:** Yes, it's really through claims audit, through the financial audits, and legal diligence. It's making sure that you're able to substantiate the appropriateness of claims and revenue at whichever time period you're looking at and making sure that income is sustainable, that revenue is sustainable, it's compliant, and that, on the buy side, you're going to be able to continue to collect at that level without significant risk. Some issues you can cover through indemnification and some you cannot.

Some issues are resolvable only through either discontinuing billing for that service, or perhaps refunding some services or restructuring, and all of that can come with a cost. Really making sure that you're digging into those numbers and understanding the extent to which they are supportable/sustainable based on payer mix and applicable rules.

**Weiner:** Totally agree – smart buyers will want to check these boxes, and in addition to addressing and mitigating risk for practices that may have recoup risk, modeling in the pro forma results from changes that may be needed going forward. IE, if a dollar in the business model, revaluing the deal based on lost EBITDA dollars and impact to valuation.

Issues in this bucket can include scope of payer contract coverage for lab or ancillary services, payments that are tied into marketing activity and patient acquisition, be it bonuses to admissions personnel or subsidizing travel and/or housing costs.

**Hemme:** A lot of sell-side entities are not as familiar with their payer contracts as you might like them to be, and so it's really important to diligence those payer contracts to make sure that you really understand what all is included, what's not, what the trajectory of that payment system is. You should also pay attention to denial rates and pre-auth rates and timing as all of those things are going to be important to make sure that those dollars are replicable.

**BHB:** Have you ever dealt with a seller in a state that doesn't have the proper license for care being given and they're unlicensed? How do you look at that? How do you rectify them?

**Weiner:** I'm dealing with that in a deal we are working on now. The first question is why. There are cases, and the one that we're in the middle of now, like the state just doesn't have a license for level of care X, and they're pursuing a license for a level of care that would encompass X, which is what they're doing now. There are levels of care, which are recovery residents, that are outside of licensure.

If there's a reasonable rationale or there's a plan in place to fix this, and this is okay with the state authority, and in this exact case, our advice to our client was, "Well, hey, great, they've started the process of becoming compliant." That's probably the best-case scenario.

If it's a "Whoops, it never occurred to us, and we don't plan to get licensed and we've been flying under the radar and we expect you to pay for our business and fly it under the radar," I'm afraid you're not going to be successful transacting unless you have a buyer with a high appetite for risk.

**BHB:** Tani, last year you and I were on stage and we were talking about all the different segments of behavioral health. In that last 12 months, where are some of the segments that you've been more involved in transactional-wise?

**Weiner:** Addiction, a lot of outpatient care, including getting into TMS and almost crossover into mental health and it's other ways of dealing with it. There are new modalities like Spravato and there's a little bit of that coming in. SUD, mental health, eating disorders, and ABA. I'd say those are the big ones and have been keeping us pretty busy.

**BHB:** Bragg, how about you?

**Hemme:** Yes, same. I think, even just as we see on the news, the adolescent mental health needs across the country are really heating things up. It's just a big need and there are not enough people to provide the service. I think that that's another key space.

**BHB:** The topic of the day is ‘invest’ and investment in the space. Tell us a little bit about some of the things that you’re seeing asked from private equity that come into deals when you’re representing clients on whatever side that it is. What’s some of the areas of interest that they’ve got in terms of from a legal and structural standpoint in some of these deals?

**Weiner:** Because of the rapid evolution within behavioral, from social need, to treatment models, regulation and how the services are paid for, it is really key to have a handle on what is moving the levers, but how they play out in the different sub-sectors within behavioral.

In terms of where the puck is heading, people who are thoughtful about this might ask “How do I build a bridge from bricks and mortar care to telehealth as a means of expanding the continuum of care and that can successfully operate across both, and/or integrate more seamlessly to primary health care”.

I think there’s a really great opportunity for a hybrid model to work and build value via greater adaptation of the right technology and innovation in reimbursement via value-based care.

**Hemme:** Good relationships with the payers are also going to help that as well. It’s hard sometimes to have good relationships with payers but I think being able to come in and show the effectiveness of your program, how you step down patient care, for example, can resolve a lot of issues that we see as well, such as, only getting authorization for one level of care but not for long enough. Providers struggle with what to do. Do we get rid of our clinical model and step down because the payer tells us to, or do we bill differently?

If you keep them at a higher level of care and bill them for the lower level of care, payers are retracting that money. Being able to go in and say, “This is our model, pay us for the episode of care.” Internally, you are able to manage that care from residential all the way down to outpatient telehealth, that sort of thing, manage those costs and manage that population internally.

**BHB:** Can you give us your thoughts on staffing?

**Weiner:** Look out for recasting the Q of E based on what is being paid to the workforce, and buyer’s view of current market-based costs, for this to depress valuation. We’ve seen that as tough to resolve because from the seller’s view, it is different from their operational reality. This is in addition to the increased focus on management talent as an aspect of a selling provider’s desirability. So, yes, I think that staffing has increasingly become a deal point.

**Hemme:** Yes, I think particularly as we see individual providers fleeing, due to burnout and all those different things, and we don't have the pipeline, marketability and salaries comes into closer focus. The added cost and strain impacts organizational health as well as the financial valuation, and is a key challenge and opportunity area for providers going forward.

Behavioral health providers have unique business model, care delivery and regulatory issues that require focused legal expertise informed by real-world experience in the behavioral health space. Polsinelli's Behavioral Health Law Group, one of the largest in the country, is a cross-functional team with significant experience completing major transactions and resolving complex regulatory matters involving behavioral health providers. <https://www.polsinelli.com/behavioral-health-law>.