

hfma southern california chapter
healthcare financial management association

September 11, 2011
Fall Conference

Dan Settelmayer
LATHAM & WATKINS LLP

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Constitutional Challenges

Breaking: 4th Circuit Rejects Two Obamacare Challenges on Procedural Grounds

Sep. 8 2011 - 12:37 pm | 382 views | 0 recommendations | 0 [comments](#)

By AVIK ROY ([Forbes](#))

Today, the U.S. Court of Appeals for the Fourth District has rejected two Obamacare constitutional challenges, on the creative premise that the individual mandate is a tax, and that the Anti-Injunction Act of 1867 requires that a tax already be implemented in order for plaintiffs to have standing to sue on the basis that a tax is unconstitutional.

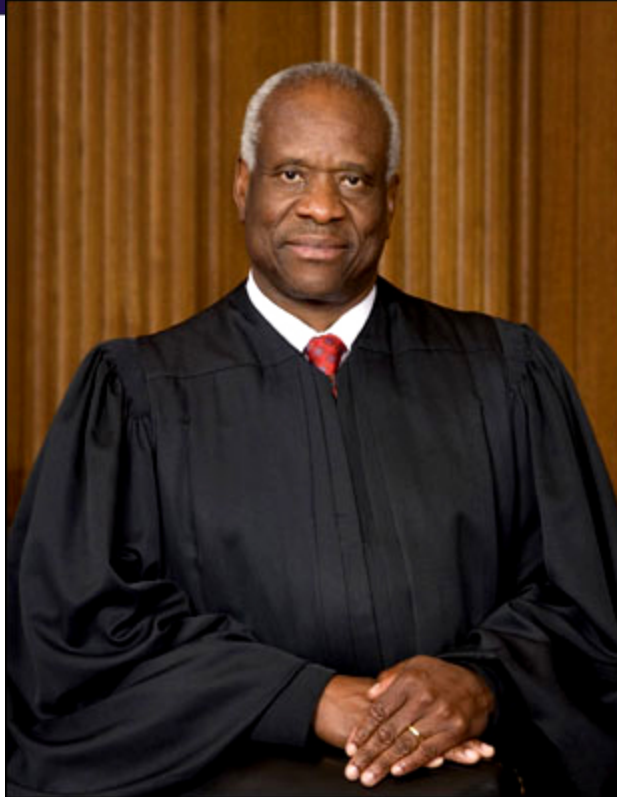
Constitutional Challenges

11th Circuit Rules ObamaCare Individual Mandate Unconstitutional

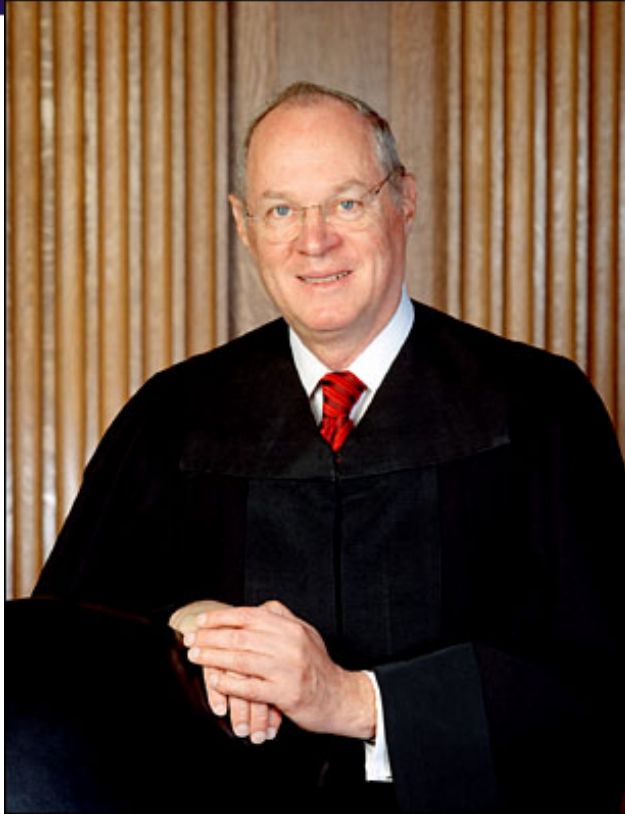
WRITTEN BY MICHAEL TENNANT *The New American*

On August 12 the 11th Circuit Court of Appeals delivered what the *Milwaukee Journal Sentinel* termed “a stinging blow to [President Barack] Obama’s signature achievement,” declaring the ObamaCare individual mandate unconstitutional. The court thus “sided with 26 states ... that had sued to stop the law from taking effect,” the paper said.

A three-judge panel of the court split in favor of the states — and the Constitution — and against the Obama administration. Chief Judge Joel Dubina, an appointee of President George H.W. Bush, and Circuit Judge Frank Hull, an appointee of President Bill Clinton, authored the panel’s 207-page opinion. Circuit Judge Stanley Marcus, also a Clinton appointee (though he was first appointed to the federal bench by President Ronald Reagan), penned a 96-page dissent.







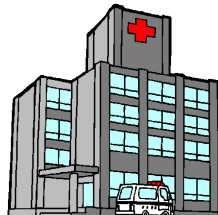
Health Maintenance Organizations (HMOs) 1970s and 1980s



- Emergence of Capitated and Percentage of Premium Models
- Providers at Financial Risk

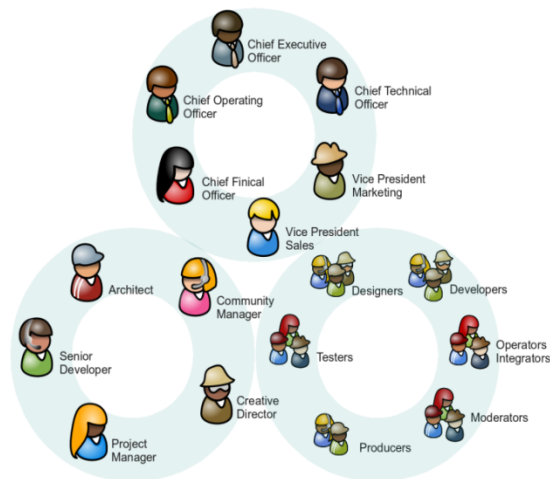
Initial Hospital Consolidation 1980s

- Transformation from a cottage industry with free-standing hospitals with independent medical staffs to health systems

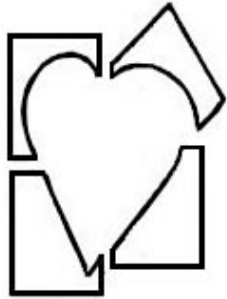


Emergence of Models to Put Hospitals and Physicians Together – 1980s and 1990s

- Management Services Organization (MSO)
- Physician Hospital Organizations (PHO)
- Physician Employment
- Medical Foundation Models



Physician Practice Management (PPMs) Companies Gain Steam (1990s)



FPA Medical Management, Inc.



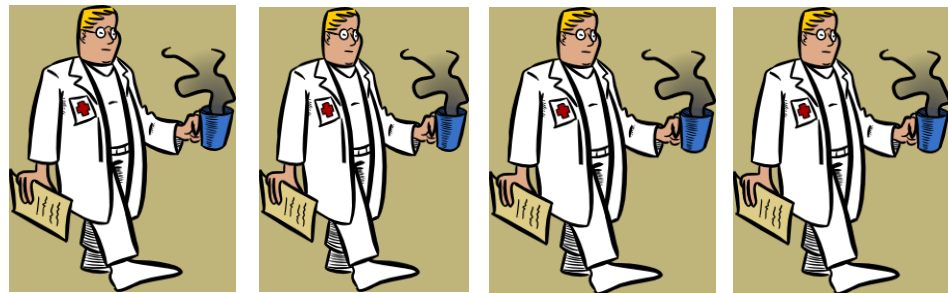
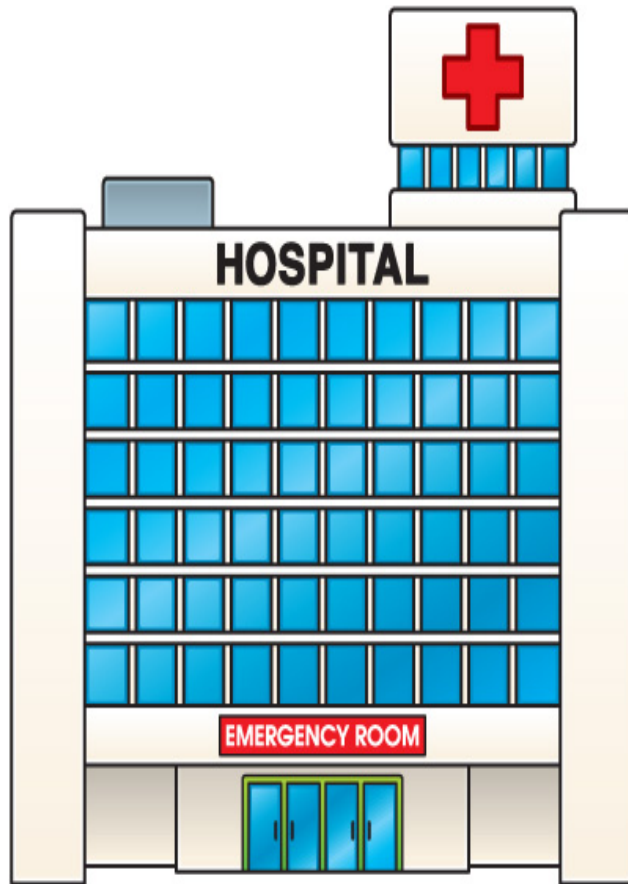
PHYCOR



The Concept of Clinical Integration is introduced by the Federal Trade Commission (FTC) – mid 1990s



Spin-offs of Physician Practices – 1990s through early 2000s



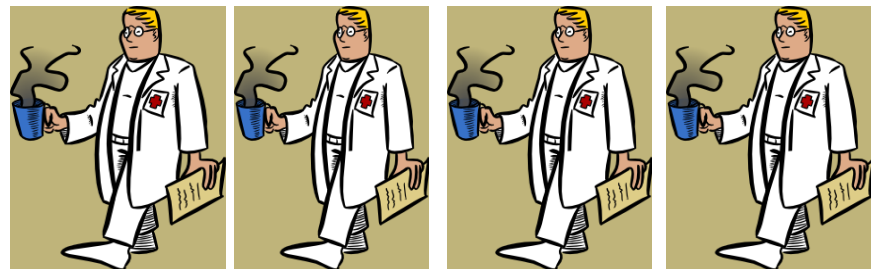
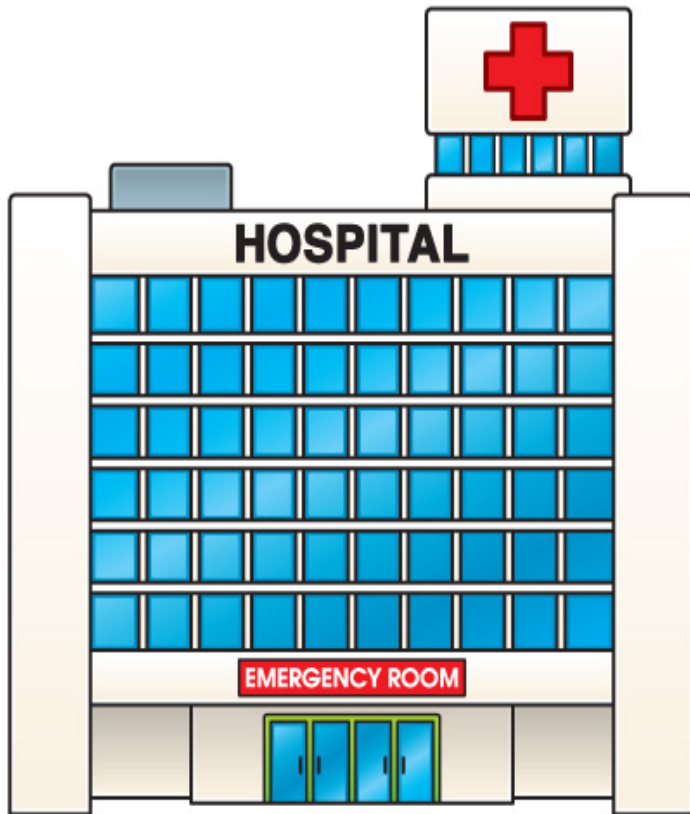
Greater M & A Activity with selective acquisitions and spin-offs
and/or sales of non-performing assets – 2000s through today



Emergence of Preliminary Value-Based Purchasing Models and Pilots and Accountable Care - 2000s



Physicians Become Employed in Doves – 2000s through today



Accountable Care Act and Accountable Care Organizations – 2010

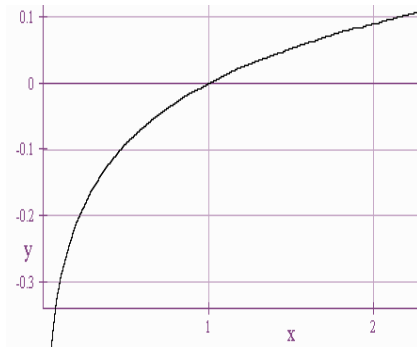


Transformation from Fee-For-Service to Value-Based Purchasing

- Increasing quality

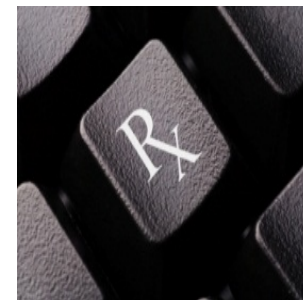
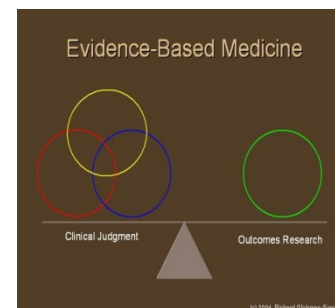
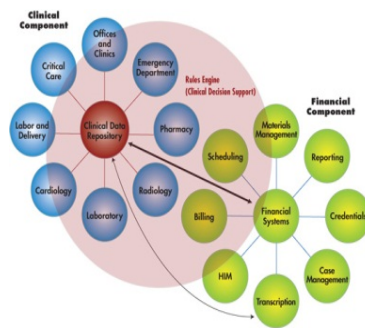
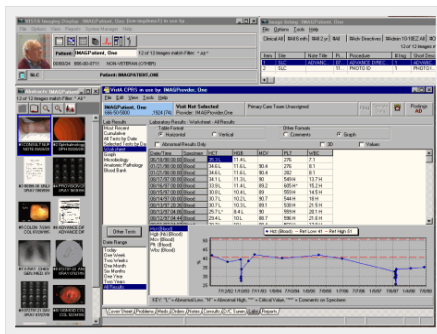


- Reducing the increase in cost by “bending the cost curve”



Biomedical and Clinical Informatics Take Center Stage

- Electronic and Personal Health Records (EHR and PHR)
- Clinical Decision Support Systems (CDSS)
- Evidence-Based Medicine (EBM)
- E Prescribing



Accountable Care Organizations

Key Legal Impediments / Concerns ACO Development by Provider Organizations

- Nonprofit / Tax-exempt status
- Fraud & Abuse laws
- Corporate Practice of Medicine
- Health Plan Licensing



ACO Fraud and Abuse Provisions

March 31, 2011, Proposed ACO Rule

CMS OIG HHS propose waiver of existing federal fraud and abuse laws for qualifying participating ACOs:

Stark Law

Anti-Kickback Statute

CMP

ACO Fraud and Abuse Provisions

Stark Law and AKS waived for distributions of Medicare shared savings to ACO participants during year earned

- Waiver would not apply to physician's referrals outside ACO
- OIG would waive application of AKS if arrangement complies with Stark exception.

ACO Fraud and Abuse Provisions

CMP waivers

- Distributions of shared savings where payments not made knowingly to induce physician to reduce or limit *medically necessary* items or services
- Stark Law Compliance Required

ACO Fraud and Abuse Provisions

Solicitation of Comments

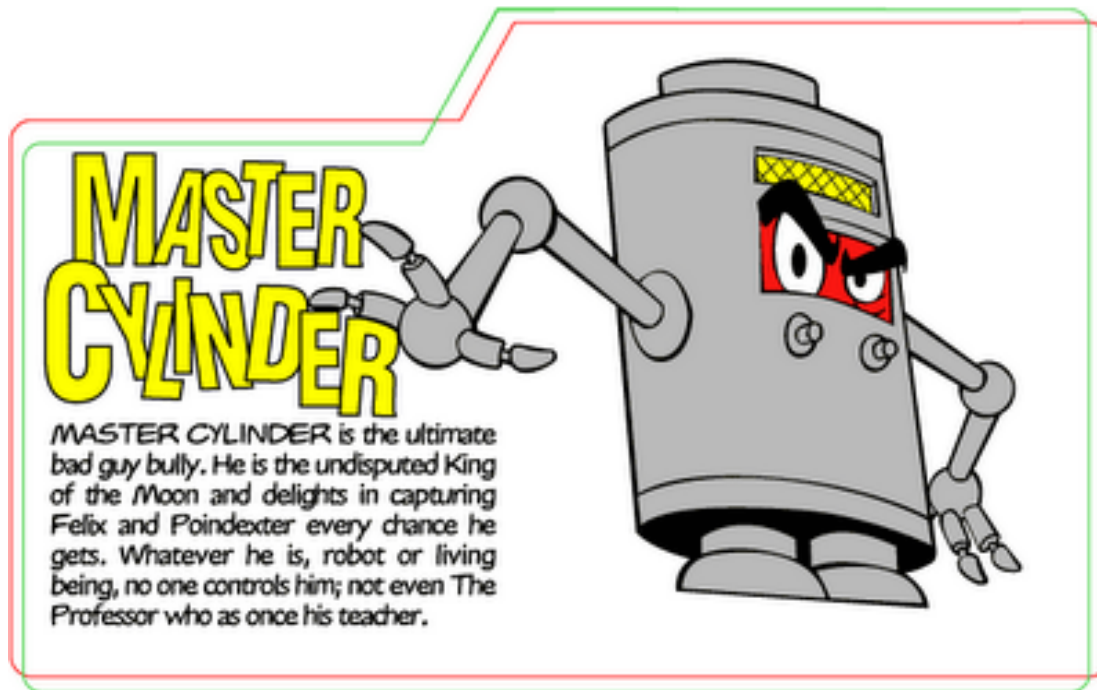
- uncertainty surrounding technical requirements, breadth, and shape of waivers

ACO Program Integrity Requirements

- Compliance Plans
- Certifications of compliance and accuracy of information
- Conflict of Interest Policies
- ACO screening
- Prohibition of certain required referrals and cost-shifting

“Master Medical Foundation”

- HASC / HCNCC



“Master Medical Foundation”

Goals

Enhance strength of community-based physician networks

- Patient access to care
- Care coordination
- Succession planning

“Master Medical Foundation”

CMA Response ?

Physician-Hospital Alignment Technical Advisory Committee proposed

RESOLVED:

That CMA take whatever action is necessary (including legal, legislative and/or regulatory action) to ensure that “1206(l) medical foundations” comply with current law requiring that they be governed by a board of directors comprised of a majority of independent community members; and be if further

RESOLVED:

That CMA take whatever action is necessary (including legal, legislative and/or regulatory action) to ensure that medical foundations “1206(l) medical foundations” comply with current law requiring that they contract with an independent and self-governing medical group with at least the minimally required number and type of physicians and that the medical group retains authority over all clinical and administrative decisions that impact quality, including but not limited to membership in the medical group



Corporate Practice Reform

Oregon Revised Statute, Chapter 58 (ORS 58.375)

58.375 Requirements for professional corporations organized to practice medicine

(1) In a professional corporation organized for the purpose of practicing medicine:

(a) The holders of the majority of each class of shares entitled to vote shall be physicians who are licensed in this state to practice medicine.

(b) A majority of the directors shall be physicians who are licensed in this state to practice medicine.

(c) All officers except the secretary and treasurer, if any, must be physicians who are licensed in this state to practice medicine. Any two or more offices may be held by the same person.

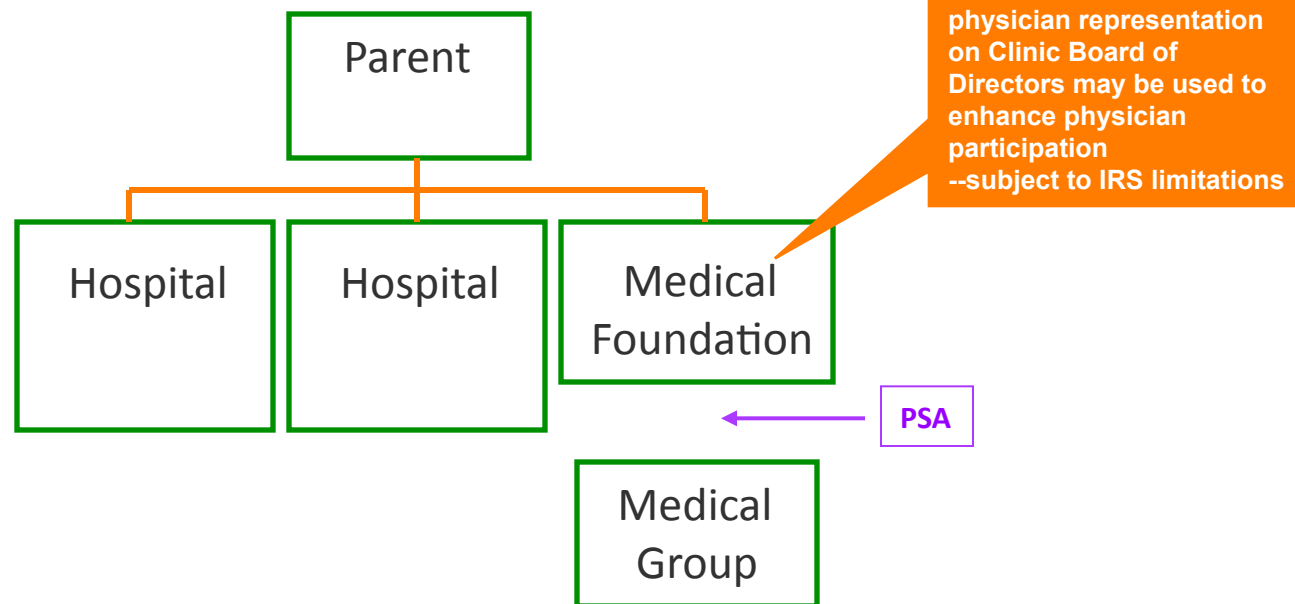
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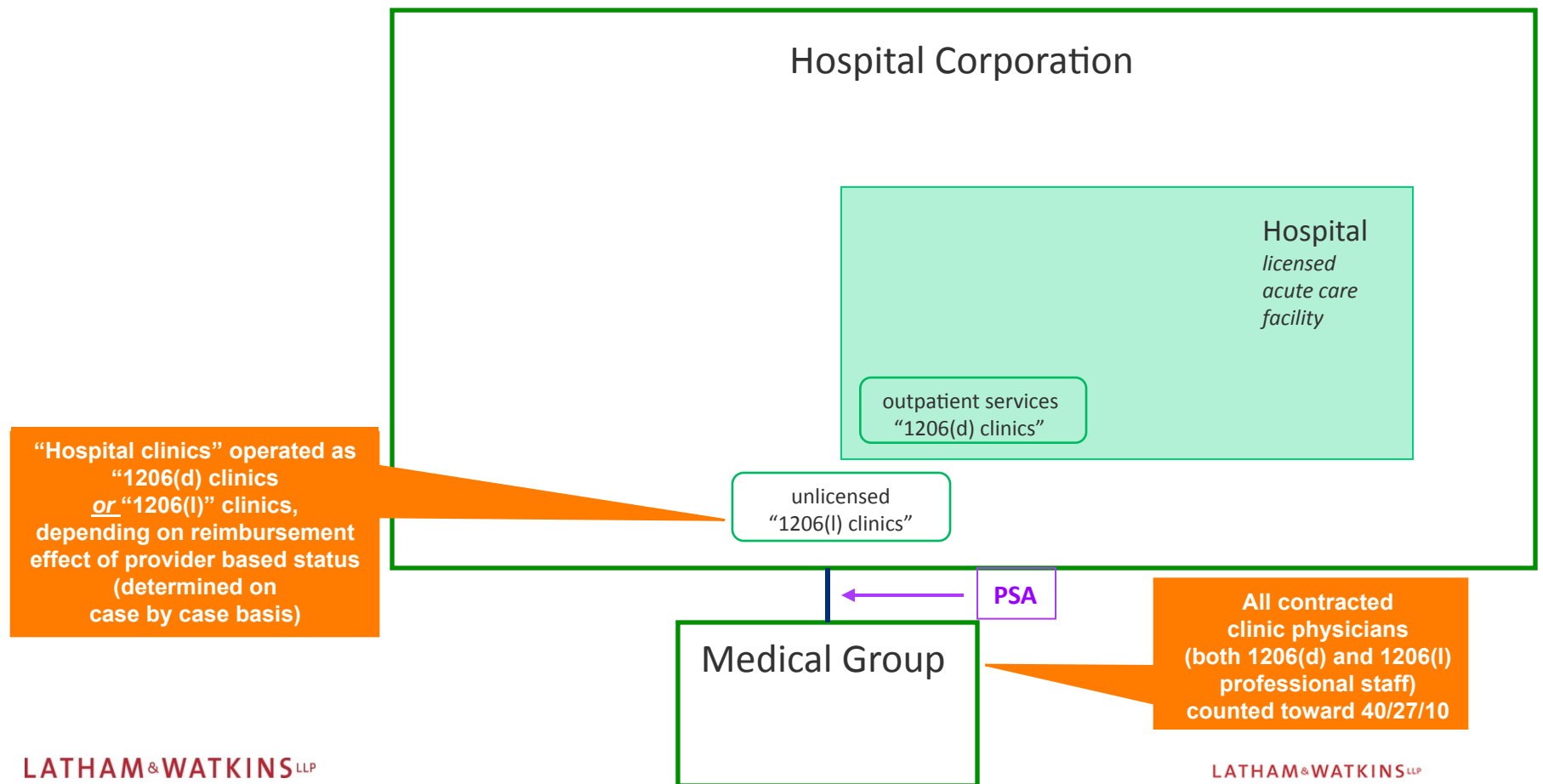
1206(1) “Medical Foundation” Defined:

A clinic operated by a nonprofit corporation exempt from federal income taxation under IRC§ 501(c)(3) that conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, who are independent contractors representing not less than 10 board-certified specialties, and not less than two-thirds of whom practice on a full-time basis at the clinic [i.e., 40/27/10]

1206(1) Clinic Corporate Structure in Multi-Hospital Health System

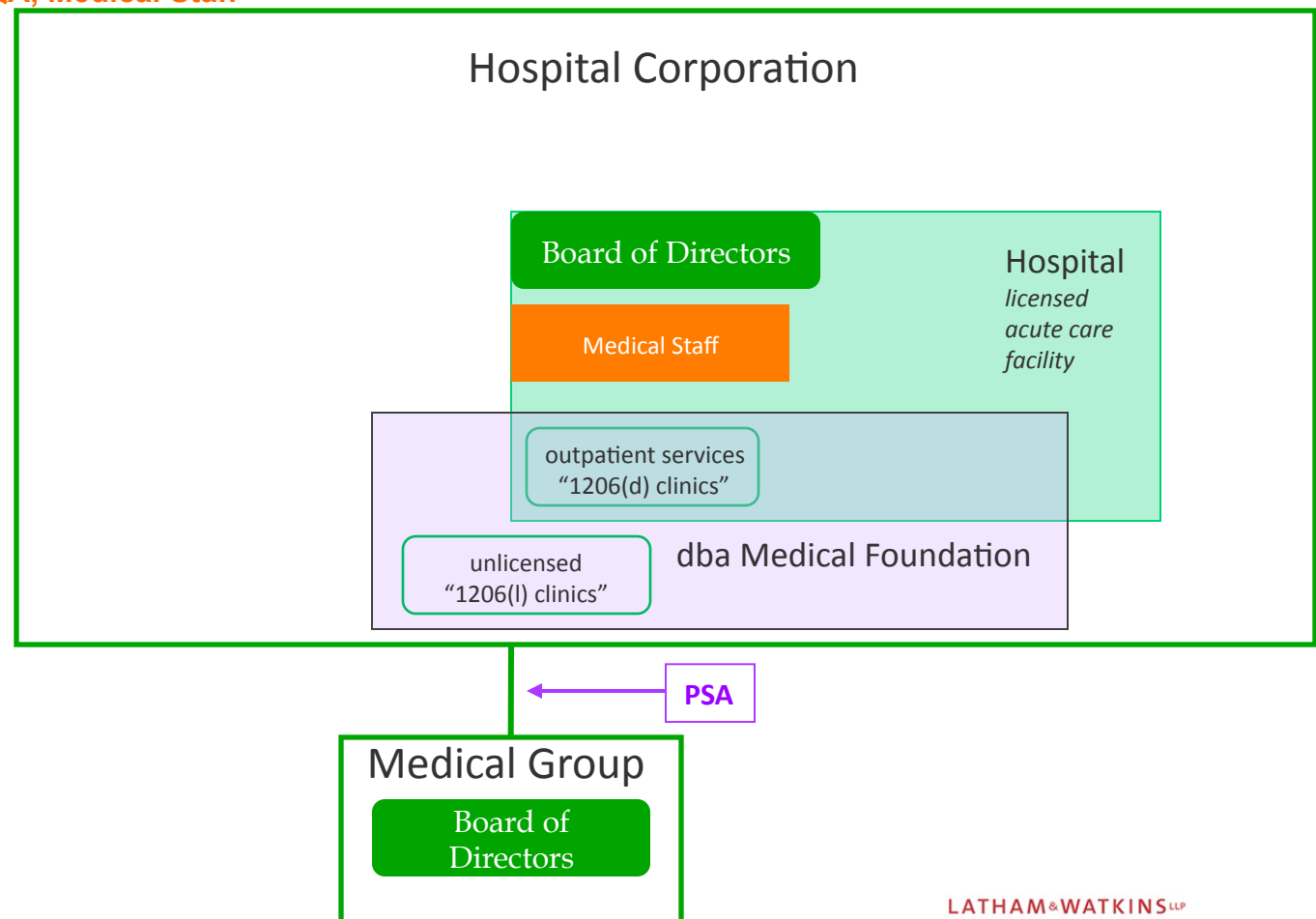


Hospital Corporation as Hospital *and* 1206(1) Medical Foundation



Fully Integrated "Foundation" Model

- No Separate Entity-Single Provider Organization
- No Separate Administrative Functions
- Single Credentialing, QA, Medical Staff



City of Hope

Alleged “Friendly PC” - Violation of CPOM

See also:

Feather River Anesthesia Medical Group v. Fremont Rideout Medical Group
(2007), Unpublished

San Joaquin Community Hospital V. Heritage Provider Network
(2004), Unpublished

City of Hope

Business & Professions Code

2401. (a) Notwithstanding Section 2400, a clinic operated primarily for the purpose of medical education by a public or private nonprofit university medical school, which is approved by the Division of Licensing or the Osteopathic Medical Board of California, may charge for professional services rendered to teaching patients by licensees who hold academic appointments on the faculty of the university, if the charges are approved by the physician and surgeon in whose name the charges are made.

