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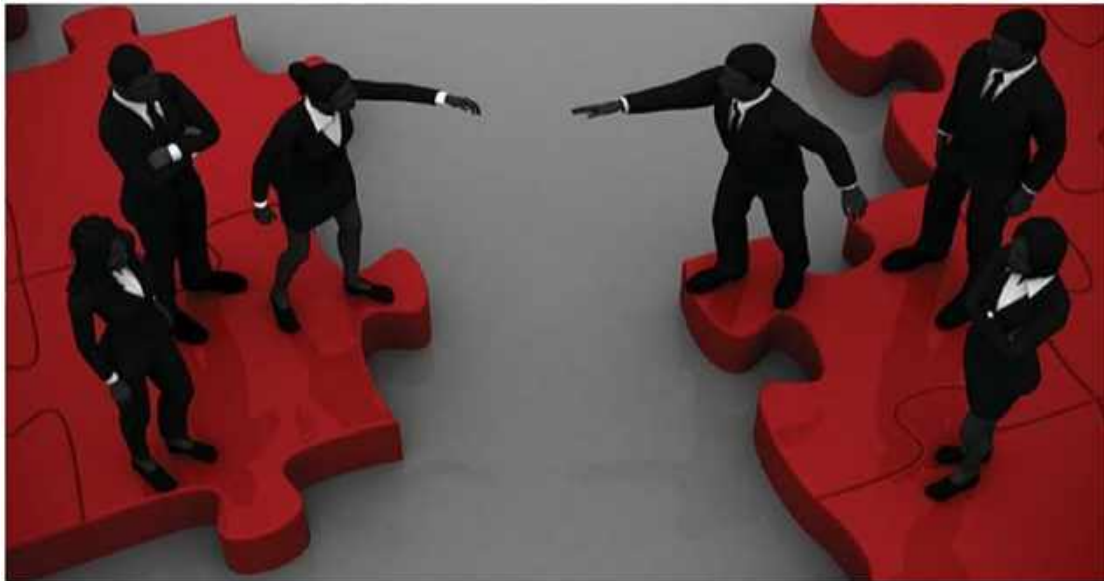
Top Pointers for Successfully Merging Independent Anesthesia Groups

Mark F. Weiss, JD, and Will Latham, MBA

Over the past decade, there's been tremendous consolidation in the market for anesthesia services. It's estimated that a relatively small number of large national entities control approximately 25% of the market.

Several factors have driven this consolidation:

First, consolidation has been fueled by the rush of investor money into the industry, creating an environment in which anesthesia group shareholders can cash out—a gift from heaven for those in their 50s and 60s—who, when they began practicing decades ago, correctly foresaw no potential opportunity for a practice sale, ever.



Second, as the business of medicine has become increasingly complex, many anesthesia groups have been unwilling or unable to create the required infrastructure, either in-house or outsourced, that is necessary to compete. For some groups, selling out is easier (and on the level of first order of thinking, far more profitable) than investing in oneself.

However, as many anesthesiologists have come to realize, selling out is not necessarily a panacea.

Promises of “revenue repair” are just that, promises; the reality might be very different. Anesthesiologists selling who foolishly believed their compensation would magically return to presale levels after their initial five- to seven-year employment term, are increasingly disappointed when confronted with reality—the reality being that there might not be any employment after those years. Or, if there is an offer of continued employment, there may be little to no increase—or worse, a decrease—in compensation. As one of us (Latham) has heard it put, “If you want more money, you can move to a different city. Go home and ask your spouse about that.”



Mark F. Weiss, JD

In addition, large groups are no less immune to disasters, such as losing hospital contracts, than large ships are immune to sinking: Witness the Titanic-like loss by the Mednax-acquired Southeast Anesthesia Consultants of its multihospital exclusive contract with Atrium Health.

Note that it's *absolutely not* the case that all practice sales are bad deals. Depending on who you are as a shareholder and what your future plans are, a practice sale can be a fantastic opportunity for you. For your younger colleagues, well, let's be charitable and say the jury's still out.

To be complete, there's another large class of consolidator of sorts: hospitals. However, when compared with acquisition deals with anesthesia practice management companies, deals with hospitals are saddled with a plethora of compliance issues, from federal anti-kickback statute concerns to preserving non-profits' tax-exempt status.



Will Latham, MBA

However, one of us (Weiss) has been involved in situations in which shifting entire groups of anesthesiologists from private practice to hospital-affiliated employment does make tremendous economic sense. As in a sale to a large consolidator, the essential factor is that the specific facts drive both the evaluation of the options and the decision to either move in one direction or another, or to simply stay put and focus on organic improvement and growth.

Importantly, there are other alternatives for you to consider. This article discusses one of them, the merger of independent anesthesia groups.

Independent Group Mergers

The concept of a merger of independent groups combines the elements of preserving a large degree of independence *and* growing the size and geographic footprint of the group.

Preserving independence allows the physician owners to:

Have Actual Participation in Governance

You get to decide how your governance system is structured and can vote on who will lead the group.

Decide With Whom You'll Practice

You get to decide whom to add to, and remove from, the practice.

Retain Control

You maintain control over the business, including such items as staffing levels, scheduling, vacation, the compensation and benefit plans, and the retirement plan.

Maintain Undiluted Contact With Facility Leadership

You contract directly with hospitals, surgery centers and other facilities. You choose how much risk to take in negotiations.

Be Protected From Arbitrary Termination

Most independent group owners are protected from being arbitrarily terminated by the provisions of the group's organizational documents.

And, at the same time as preserving a high level of autonomy, mergers of independent groups can strengthen the combined, post-merger independent group's market position:

Gain Market Clout

By growing the size of the group within the current market or by expanding into a different market, the merged groups can gain clout in the market.

Create Economies of Scale

Often, centralizing administrative functions and professional advice can reduce the combined group's investment in its business operations by spreading the investment over a larger number of providers.

Seek to Grow Revenues and Decrease Costs

By gaining a greater share in the market, the group can take advantage of opportunities that require large numbers of providers and create a structure for further add-on mergers, both of which grow revenues. Additionally, the increased purchasing power of the combined group presents an opportunity to decrease costs on a per-capita basis.

Gain Protection

The combined entity is less prone to being easily bullied by hospitals, insurers or managed care companies.

Facilitate True Business Structure

The larger “business engine” of the combined group provides the ability and resources to create a true, internal, professionally managed business operation and/or to acquire needed outside management and professional expertise.

Position for Payment Models and Reporting

Increased internal resources and the ability to invest in systems and expertise better position the group both for new payment models (e.g., value-based payment) and for current and future data reporting requirements.

Structuring the Merger

When we use the term “merger” in this article, we’re referring to one of various structures in which formerly separate anesthesia groups become one group.

From a legal perspective, there are multiple ways to structure a merger. In general terms, the newly combined organization has the following characteristics:

- Professional services are delivered under a single tax identification number and a single provider number.
- The owners of the constituent entities become the owners of the combined entity.
- All physicians (and whatever lay employees are to continue) from the previously independent practices become employees of the new entity.
- Operations are conducted by the new entity, which bills and collects for the physicians’ services in its own name.
- The combined entity owns the funds and revenues created by the work of its physicians.
- The merged entity holds all exclusive provider agreements.
- The physicians become subject to one governing entity.

Merger Process

The process of merging involves a number of discrete yet interrelated steps.

In general terms, the process typically begins on a very informal basis with the constituent groups’ leaders making initial overtures, becoming comfortable with each other, understanding each other’s philosophy of practice, and committing to move forward.

It’s extremely important to note that there are a multitude of state and federal antitrust issues involved in any merger. In common parlance, these laws prohibit price fixing and monopoly.

Due to antitrust restrictions, it's of the utmost importance that beginning at the initial stage of the discussions, the groups obtain antitrust legal advice. What you might think are innocent remarks and communications (e.g., concerning pricing or even the ability to increase pricing) can doom any potential merger and lead to criminal prosecution.

As the merger discussions move forward, the process begins to be shepherded by legal counsel, both with respect to the structure of the transaction and continuing antitrust compliance concerns. In the course of the process, the parties discuss, often with the assistance of facilitators, consultants and experts, negotiating the key issues.

In addition to a host of other issues, merger negotiations must resolve multiple practical and operational issues, including the following:

- overall practice philosophies
- governance
- physician compensation system, retirement plans, benefits
- physician contract issues, buy-in/buy-out
- value of capital contribution/ownership
- call/workload
- midlevel utilization and protocols
- administrative management and personnel
- operational infrastructure
- billing and collections
- relationships with professional service providers (lawyers, accountants, etc.)

Although the parties may enter into an interim letter of intent, they always enter into a fully detailed merger agreement and related formal documents.

Again, integral to the overall structure of the merger, the parties' counsel must engage in a detailed antitrust review. Depending on a number of facts too specific to particular situations to be discussed in this article—for example, the structure of the proposed merger (e.g., a tight combination or a more autonomous divisional structure), the determination of the relevant geographic market, and the combined market power of the merged groups—the merger may or may not present regulatory concerns.

Once the key issues and formal documents are negotiated and documented, the deal moves forward, although a “due diligence” process may occur, in which the parties' attorneys and accountants review a number of underlying documents to identify any issue that might affect the merger from a factual, legal, financial or tax perspective.

The deal then moves to the closing, at which time the formal merger documents are filed (if required) with the state and other required agencies, and steps are taken to wrap up the predecessor entities, as appropriate.

Even though the merger might legally be “complete” at that point, from a practical perspective, it has only just begun. That’s because the real work of integrating the operations of the former constituent entities must now take place.

Pitfalls to Avoid

Although correctly evaluated, negotiated, structured and implemented mergers can be extremely beneficial for all parties involved, there are challenges to overcome and pitfalls to avoid. Here are a few examples.

Lack of a Planned, Controlled Approach

It’s our observation that merger efforts are more likely abandoned because they drag on and on rather than because of disagreements over particular issues. It’s essential that you use an organized, systematic approach when negotiating a merger.

Failure to Engage in Antitrust Issue Prevention

Often, in the parties’ excitement over a potential merger, they venture into discussions of pricing and other issues that can trigger antitrust liability. Even worse, they sometimes create evidence that later will be used against them. Each party must engage legal counsel at the outset, not later when it may be too late.

Lack of Recognition That Changes Will Be Needed

Changes are required to make the combined organization work. If members of the constituent practices are not open to change and compromise, they should not embark on the merger process because they will be disappointed in the outcome.

Inability to Compromise

When physicians begin negotiations, each one typically has his or her own viewpoint, opinion and expectation for the outcome. Each physician typically recognizes that there are a number of benefits to be gained from a merger (or they would not have initiated the merger negotiations to begin with), but in the heat of negotiations, they often lose sight of the benefits to be gained and focus only on that they are not getting exactly what they want. When this occurs, whoever is facilitating the merger negotiations must be vigilant to remind the physicians of the benefits of the merger. The facilitator should always ask, “Are you willing to give up all the benefits of the merger over this one issue, or can compromises be made?”

Too Much Conflict Avoidance

In our experience, many physicians tend to want to avoid conflict. This hinders the ability to move a merger forward because when the groups come upon an issue that they don't fully agree on, they back away from it and start talking about other, less important issues. This can cause the negotiations to go on and on without making true progress. An objective third party is often needed to help the groups overcome this stalemate and make the compromises necessary to merge.

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