SEASON 2, EPISODE 20

ALL THINGS ASC FEATURING ATTORNEY JASON GREIS

David Mandell:

Hello, this is David Mandell, host of the podcast. Thanks for joining us. Today, we've got a really interesting topic and guest. Let me tell you about Jason Greis, and then we will bring him on.

Jason is an attorney at Benesch Law Firm. He'll tell us about that in a minute. Let me tell you about what he does there. So he regularly represents a variety of dialysis nephrology providers, dialysis vascular access centers, office space labs, cardiac cath labs, ASCs, which what we're going to talk about today, physician group practices, academic medical centers, post-acute care facilities, lab companies, healthcare IT companies, and other healthcare providers in M&A joint ventures, compliance, other types of transactions. He is full-service healthcare attorney.

He regularly speaks at a variety of industry trade group events, and we're going to be speaking together in June at a conference in Chicago that his law firm is hosting, but he speaks at other events sponsored by the Renal Physicians Association, The National Renal Administrative Association, MedAxiom, The American Society of Diagnostic and Interventional Nephrology, The Vascular Access Society of the Americas, the Outpatient Endovascular and Interventional Society, and others.

He was recognized as a leading lawyer by Chambers USA in 2019 and 20. He's a former president of the Illinois Association of Healthcare Attorneys, where he also served as a member of the board of directors for many years. And he has served as editor-in-chief of Healthcare Law Monthly, LexisNexis Publication. So with that, Jason, welcome to the program.

Jason Greis:

Thanks so much for having me. Appreciate it.

David Mandell:

So there's a lot of things we can talk about. And as I'll mention, as we conclude today, we are going to have you back on another topic, which I'm excited about as well because I haven't really heard anyone speak on that. But today, we're really going to focus on ASCs, the why, what, who, et cetera of ASC. So before we get into that, first, I gave your bio, but tell us about the law firm in general. It's a large firm, experienced in a lot of areas and your practice. Just give us an overview.

Jason Greis:

Sure. Thanks for the great intro. Benesch is a national law firm. We've about 300 attorneys in a variety of states. On the healthcare side of the house, we do everything from soup to nuts, commercial M&A healthcare helping clients to set up joint ventures, a lot of the M&A in healthcare, healthcare, private equity work. And then unfortunately, people also have to call us from time to time when they're dealing with governmental investigations, fraud and abuse issues as well, and we regularly handle those sorts of

things as well, as working with a variety of our other colleagues and experts on tax related matters, Arissa issues, labor and employment issues. So we really have the full service across the country.

My practice, I'm a corporate healthcare attorney. I focus a lot in the outpatient setting, doing a lot of work over the last few years, helping clients buy and sell their businesses, setting up dialysis joint ventures, setting up ambulatory surgery centers and office space labs and ASC hybrids, which we'll talk a little bit more about today, but that's, what's been keeping me busy the last couple years during COVID.

David Mandell:

Yeah, yeah. I'm sure, we've had some other speakers and we know the transactions are, just growing and growing and consolidation and a lot of healthcare business, plus that regulatory element never goes away, so whether it's preventive and making sure folks are doing it right, or as you said, sometimes, unfortunately, coming in when there's already a problem, that's just, that's not going to go anywhere. That's the nature of really any business, especially one like healthcare that has a lot of regulations around it. So let's get to the topic for today, which is ASCs.

Jason Greis:

Sure.

David Mandell:

Give us, high level, some of the key benefits, some risks of why physicians would want to own an ASC and many of our listeners I'm sure do.

Jason Greis:

That as Medicare and Medicaid reimbursement and commercial payers are just tightening up reimbursement. Doctors are looking for additional ways to, you know, additional revenue sources. Right? And they're doing it in a variety of different ways. They're looking to research medical device and pharma real estate is a popular one for the doctors and then ancillary joint ventures, whether it's things like labs or an ambulatory surgery center. So I really think, why doctors are doing it? Financial independence. They all came out or many of them came out with significant loans out of medical school. And this is a nice way to supplement your E&M physician practice, hospital rounding, et cetera. A lot of doctors also look at it as a legacy project, something to leave behind a name on a building. Just to be able to point to it in the community and say, "That's mine. I built that."

And that's a pretty strong motivator for a lot of doctors. And then I think there's always the frustration of potentially dealing with your local hospital at times where, you've got cases, especially during Covid, quite frankly, where certain patients, certain cases were prioritized over other types of, we call it elective surgeries. And sometimes, I'll use elective with quotes around it because some of those surgeries weren't necessarily elective where hospitals always making triage based sorts of choices about who's going to get OR time who's going to be able to do cases. If you have your own ASC, you're the boss you're in charge. You decide the scheduling and you're responsible for either the efficiency or lack

thereof. So those are some of, I think the benefits that we frequently see in terms of why doctors are, are thinking about developing an ASC.

David Mandell:

That makes sense to me. I'd say from our perspective and dealing with so many docs on the financial side, we hear the reasons why people do it, which you started with, which is, "Hey, this can be profitable." It's an area. Why give it away? Meaning if we're going to be doing procedures, why not be the house? Right? Now sometimes that doesn't make sense, but in many cases it does, takes an investment. It takes some diligence, it takes, legal structure, it takes doing it right. But if it is done right, I know none of our clients have been, it's been very profitable for them.

I think the third reason also, being the boss of the place where you do the procedures, I think is also just, no, not no headaches, because you still got partners, you still got employees and you still got patients. So there's payers and all that, but maybe fewer headaches when you can own it rather than be dictated to on, "Hey, this is how it's going to be." So that matches our experience. So what are you seeing in terms of trends now in terms of ASC development and ownership across the country?

Jason Greis:

Yeah, it's an interesting. Every couple years you start to see different trends and oftentimes it's the either Medicare or the payers that are kind of pushing providers along certain causes of action or certain paths. And so the ones that we've seen in the last couple years are cardiac ambulatory surgery centers and the growth of the cardiac model, Becca, in what was it, 2021. Medicare allowed PCIs peripheral cardiac interventions for the first time and in ASC. And so state laws are getting caught up with that. So even though the federal laws allow at some states still don't allow PCIS and ambulatory surgery center ASCs. And part of that is driven, quite frankly, by the hospitals who originally made the rules. So there's a tension as you start taking some of those lucrative ASC cases, I'm sorry, lucrative hospital cases and maybe moving them into an ASC setting.

So it's some agita for many of many hospital systems. We're also seeing the growth of IR's, interventional radiologists and vascular surgeons getting involved in ASC ownership where they historically haven't done that. And the rationale there is many of the cases that IR's and VA surgeons have traditionally performed in an office based setting are now starting to, even out in terms of Medicare reimbursement, between an OBL setting office based lab setting and an ASC. So more docs are now taking a hard look at ASC ownership in those specialties and then hospital ownership in ASCs. The hospitals have always been owners in ASCs. There's about 4,500 or so ASCs around the country. But you know, sometimes they've been reluctant partners and there's, I think hospitals are either falling into one of two camps in the past, any number of years, those that are being dragged along or those that are looking with vision into the future to say, "If we can't beat them, we're going to join them."

And we're going to be the doctors partners in developing these ASCs as more in different types of surgical services are moving out of the hospital and into different outpatient settings, whether it's a surgery center, an office-based lab, an urgent care center, free standing ER suite, whatever it may be. So, you still have those hospitals that are getting pulled along, but increasingly you have more strategic types of hospitals and health systems, Banner Health out in Arizona is a perfect example of a really

entrepreneurial group and a really entrepreneurial health system where they've really gotten out ahead of the trend.

David Mandell:

I learned something right there. I didn't realize the extent to which the ASC is becoming attractive to other non-surgeon specialists. Physicians who are doing different interventional stuff. And I mean, cardiologist and radiologists are interesting to me, because my father's a radiologist, my brother's a cardiologist. So they probably know and see some of this themselves – it's news to me, though. And I think certainly our listeners are appreciate that.

So we talked about the benefits and why physicians would want to own an ASC for the reasons, we already talked about. But there's some restrictions, there's rules just like anything in medicine. And that's what, why two lawyers are talking right now. So give us some of the limitations and referral rules. I mean, we don't go all the way down. We don't have to go totally into that rabbit hole because I know that's a whole topic, probably referrals, but give us kind of high level, what are the kind of red flags or things should people should be thinking about?

Jason Greis:

Yeah, no, that's a really good question. I'll try and keep it at the 30,000 foot level. So I think the general rule of thumb is ASC ownership isn't for everyone and really not everyone is eligible to be an owner in an ASC because when you're a doctor who is an owner in an ASC, you're trying to satisfy the antikickback statute, which is a federal statute that has criminal implications. You're trying to satisfy a safe harbor for physician ownership. And the nuts in the bolts of the applicable safe Harbor are intended to ensure that only proceduralists are owners in an ASC under the thought that the government has longstanding concern that non proceduralists, primary care doctors, for example, shouldn't be able to benefit financially in the form of profits distributions from their referrals to the ASC, that's really kind of 30,000 foot level of everything you need to know about what is the purpose of the ASC safe Harbor.

So as things have changed and as we're moving into more of a value-based care sort of structure over the years, and there's new safe harbors for value-based things have started to change in terms of those ownership types of issues. And we've increasingly seen another trend over the last five years that maybe not only proceduralists are investing in ambulatory surgery centers, which actually moves things down further on the risk spectrum. And it really a risk spectrum. It's not as though you're either breaking the law or you're not. When you're dealing with the antikickback statute, it's shades of gray, it's likely to orange jumpsuit, gray and somewhere in between. And it's very difficult at times to figure out where the risk falls.

So, general rule of thumb is more interventionists you have in your ownership structure, the all of whom or most of whom are trying to satisfy or satisfying the investment safe harbor for ambulatory surgery centers. That's going to be a lower risk structure than maybe having a physician group that's comprised 95% of non interventionists and has one or two interventional physicians. That's looks very different from, from the risk spectrum. And so it's very, very fact dependent analysis.

David Mandell:

Sure. Well, that's why people need attorneys because it is fact based and there is gray area and, ultimately, sometimes comes down to an entrepreneurial business decision, but we also want to make sure all of our clients stay out of trouble. There's ones that clearly go over the black line and then there's others that might say, "Well, you know, based on this structure, I think you guys can, can do it." What are other key mistakes you see docs making when they develop an ASC? Maybe not on the regulatory or the compliance, but just general business mistakes or other things you've seen that say, you just shake your head. Say, "I can't believe these guys are doing this again. I've seen this already."

Jason Greis:

Yeah, no, and these are not legal issues. I think I can put them all under the umbrella of failure of planning if I had to do such. So there's really four or five that we see consistently where doctors are making the same, same mistakes that can be avoided. The first, I think, is taking a "Field of Dreams", approach to development. "If you build it, they will come." We see doctors do that and not just doctors, quite frankly. And I don't mean to point a finger at anyone. We see hospitals do it. We see management companies do it where they look around and say, "Hey, there's nobody here." Without really doing that, taking that next step of failing to perform a market needs analysis and figuring out whether there's no one here for a reason. I think doctors sometimes underestimate failure.

Some of the blow back that they're going to get in the community. You have to remember that when you put up an ASC, there's only a certain number of patients and are those patients that you're potentially taking from another ASC, from a hospital outpatient department. So it's again important to do that needs analysis and figure out where those patients are coming from, especially in states that are certificate of need states where you actually have to go to a certificate or a need board or a planning board to get an approval to do, to put up an ASC. And they're oftentimes going to want to know about where your volume is coming from. So that's, that's important. Another key mistake that we see is overbuilding either in the form of having an ASC with two men, many surgical suites, or just building the Taj Mahal, when your clients, aren't looking for the Taj Mahal, they're looking for a Target.

It can just be the degree of finishings. And if you're a Park Avenue West doctor, maybe that's what you need for your clientele versus someone in rural Mississippi who doesn't need that, or it's just not appropriate. So it's important to think about the optics of the build.

And then I last one is syndication. When, oftentimes you go out to other like-minded physicians and friends who are looking to do the same thing as you, and you say, "Hey, I want to be part of this ASC. And I want to be part of the ownership structure." Those are great conversations to have before you start your build. When you're sitting down to figure out what are the finances going to look like? What percentage of equity do I want? How are we going to make that determination? Oh, and by the way, we got to do an operating agreement too, and make sure we're on the same page with how we're going to own and operate the company and operating. Agreement's really, it's a legal prenup of how are we going to get along and how are we going to break up if we ever need to.

So those are some of the key mistakes that we oftentimes see and help our clients to work with. And it's not just us, oftentimes the lawyers, the smallest piece of the puzzle, and it's just us putting our clients in touch with the right mix of consultants and other advisors.

David Mandell:

Nothing shocking there, but all things that I think are kind of business 101, right? Do the marketing research! Even in startups, I have buddy who consult with startups; he says -- you don't build that software until you know that there's really a need for this thing, build what they call the MVP, the minimally viable product. You can't really do that with a surgery center, right? You can't do half a surgery center or half a suite or whatever. So, getting all that really ironed out and locked in as much as you can. At the get go, I think, is all those things make, make sense.

And of course, no reason to build the Taj Mahal, as you said, that I could see happening quite often. People get excited. A lot of physicians are real estate developers in their either spare time or in their own mind.

And so they want to create something really nice. And sometimes there's the fit there. Like you said, if you're doing it in Westchester or some kind of high end neighborhood, but not for everybody so that it all tracks for me. So, I'm going to combine two questions here just for time period. Tell us about your thoughts on joint adventures, with a local hospital or an ASC management company. That's one issue, which I know is very timely, so don't go quickly through it, but just, that's an important one. And then also payers. How are they dealing with? How are they looking at this? And, is there a reason to partner with them in some way? So take those. Yeah.

Jason Greis:

Yeah. So, hospital or physician joint ventures in the ASC setting are, are very common. There's very few physicians, unless you're part of a mid or large size physician practice that have the volume to support an ASC practice full time. And with notable exceptions for maybe some gastro practices or some derm practices, but oftentimes you want to get together with like-minded physicians to join venture. So that's always a good idea. You know, the hospital, the management companies, I think they're not all created equal and you can take your pick, you just have to know and understand and learn about your local hospital. You know, are they, as I mentioned, one of these hospital or health systems that has vision and really wants to partner with you, or are they going to be big brother, 800-pound gorilla hospital where they come in and say, "Yeah, we'll join venture with you, but we're going to tell you how it's going to be done."

And that's exactly the sort of thing that entrepreneurial physicians are looking to get away from. if the hospital has a value proposition, either in the form of some hospitals are intentionally trying to exit certain types of less profitable cases that are better performed in an ASC, that's a great hospital partner to have. Hospital partners that have good payer contracts that maybe you can take advantage of again, another great hospital partner to have. Management companies I think also aren't all created equally, you need to ask questions and just make sure that you're asking questions about what strengths do they have in terms of financial reporting, marketing, claims processing, back office support, and most importantly, payer contracting. A perfect example is SCA Optum. SCA was bought out by Optum about gosh, five or six years ago.

And they have very intentionally tried to create narrow networks that funnel Optum's patients into SCA surgery center. So, therefore, increasing the volume to those affiliated joint venture surgery centers, helping to bring down cost in the community as compared to, performing those surgical services in a

hospital outpatient department, because it's usually the cost is it's typically about 60 to 65% of what it would be in an HOPD. So again, an SCA Optum might look very different in terms of a partner than someone else they really do potentially bring to bear higher reimbursement rates for their Optum contracts potentially and help to drive volumes. So again, very, just again, asking questions before you decide to partner with, with one or both of those,

David Mandell:

It all makes sense. I mean, we hear in all different types of deals. It's who you're getting in bed with, right? I mean, that's the key is the facts and circumstances. Who it is and what their goals are and how they align with yours and all of that. So in theory, it can go very well, but we've all seen ones that don't right? And that's typically, it's just not a fit. And it was not seen or recognized early on enough. What about on the payer side? How are they dealing with ASCs? Do they have a fight on their hands when they create one to get what they should get or are they saying, "We see this as a cost efficient way to deal with some of these procedures rather than a hospital. So we're not going to nickel and dime you to too much and you can make a profit and we can lower cost." Tell us where we are on that spectrum, what you're seeing.

Jason Greis:

Yeah. It's interesting. The ASCs are not as high on the payers' radar as hospital systems are, or other types of high-cost outliers dial analysis is a perfect example. Dialysis centers are very high-cost patients, L tax are high cost. Patient settings, ASCs are a cost effective method of care or treatment. Certainly as compared to hospitals. In many cases, there are still things that are going to be more efficiently performed in a hospital. However, we're starting to see more interest among payers and creating bundled care arrangements. Payers and ASCs are starting to look at accountable care organizations. There are starting to look at capitation based arrangements where the ASC is starting to take on additional risk, but you've got to be a high performing at ASC and have some history under your belt before you start taking on capitation. You got to know what you do well, where you fall down and paint yourself in into a corner, by taking on risk where you otherwise haven't been comfortable or, or successful previously.

David Mandell:

I understand, and that makes sense. I've got two questions left for you. The first one, just dive for a second into the financials for a second. So what kind of rate of return on ASC investment or multiples when exiting or selling out a piece of the transaction or a piece of the ownership to a partner? What's out there now? What, what, what's the range? What are you seeing? What's a key takeaway in that regard?

Jason Greis:

So because I'm a lawyer, I'm going to say it depends, but of course I'll follow it up with some actual helpful information. So there's tremendous variability. I'll deal with the question first about rates of return and some of the factors that help to drive the answer to that question are, what state are you in?

It's just more expensive in California than just about everywhere else. And same thing with New York. What's your case mix? There are certain types of procedures and specialties that are going to be higher profitability. Cardiology's a great one versus maybe podiatry, which falls on the lower end and orthopedics, which falls somewhere in the middle. So it really depends. Or maybe you're a multi-specialty center. That's got a little bit of everything. Typically, however, a well-run ASC will have returns, 20% year over year rate of returns.

And some of the really well runs that are just kind of chugging out. And you see this a lot in orthopedics, quite frankly, have rates of return in excess of 40% per year. So they can be very, very profitable. On the exit side. Again, it depends. And some of those factors are, are you in a certificate of need state, if you, our CON tends to be protective to help prevent new market entrance. So you get a bit of a bump in premiums on EBITDA to multiples when someone exits.

Single specialty tends to produce a lower multiple, when you leave versus multi-specialty minority ownership, meaning 50% or less versus majority will produce again, lower multiples as well. But generally what we're seeing for on the low end call it for a single specialty ASC owner, who's minority in a non-certificate of need state, call it a three to four X on the exit versus someone who's really going to get a high premium will be a multi-specialty center with maybe 10 or 20, doctors performing cases in the center and a certificate of need state with really strong payer contract.

It's not uncommon to see eight to 10 X on the high end. So there's a lot of variability there. I'd say most of it falls somewhere in between there. Call it to five to seven X range on a sale.

David Mandell:

So in terms of the last question here, it's kind of a broad takeaway question. What would you give as kind of a pearl or takeaway message to our listeners, maybe one for those already in an ASC and operating it, maybe considering, some kind of exit or partial exit and then maybe to a doc who is not yet part of one, but is considering maybe you can give us two kinds of thoughts?

Jason Greis:

So I think for those who are on the sidelines and thinking about it, going back to what I said, do your homework, it can be a really, really great investment and just make sure you have your team lined up, don't try and do everything on your own. Especially if you haven't done this before, you're going to want a good consultant, a good architect, a good attorney, shameless plug there. But someone who's done it before. And quite frankly, someone who can put you in touch with others who have learned from those who've come before you, there's a couple of really great resource is out there in terms of trade organizations. The ASCA is just a wealth of information. They put out a lot of great materials in their annual meeting. And my former colleague, Scott Becker, through Scott Becker's ASC review.

If you, if you don't read that every day, it's a must read in the ASC industry and it's just a wealth of information and, just plan, plan, plan. You can, you can't go wrong if, if you plan.

For those, I guess, who are thinking about an exit, depending upon if you're thinking about exiting entirely, or just exiting partially, do your homework there too. There's a lot of different players out there in terms of potential partners, either in the form of ASC management companies. Private equity

investment is rampant in certain sectors of the ASC world right now. And think about, before you start going out and having those conversations, what are your goals? Are you looking to hand over the reins to someone else and let them run it, how they see fit, or are you looking for a financial partner and then, just start dating, figuring out who you like, because again, you're going to be with those people for a long time.

David Mandell:

Great advice. I like both pieces. I learned a lot today, but a lot of it made sense. It's just, kind of intuitive business knowledge for those of us who are attorneys and business people. But I think there's a lot of nuggets here that those who maybe can improve their operations a little bit. Who are maybe thinking about, or going down the path of this new venture?

Obviously, Jason is a good resource and we'll put all of his bio and contact information in the show notes we are going to have of Jason back on. It might be season three. I'm not sure yet based on the schedule, but he's going to be speaking with me on how to exit partners. And I think that's a really interesting topic. Meaning how do you successfully deal with older partners and their exit? And that is something I've heard a lot of docs complain about. So I think we'll all tune in to listen to what Jason has to say on that. So that with Jason, thanks for being on. Really appreciate it!

Jason Greis:

David, thanks for having me. It was a pleasure.

David Mandell:

And to all the listeners, thanks for being on as always in a couple weeks, we'll have another episode, two things, one tell all your colleagues and friends about us. We'd love to have more listeners growing every week. And then number two, if you were someone who thinks you have some interesting things to say, and some knowledge your colleagues might be interested in hearing about contact me, just shoot me an email. I'd love to have you on. We're always looking for new guests. So with thank you, Jason, thanks to everybody listening and look for another episode in a couple weeks.