

Healthcare Leaders Association of Alabama
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Administrator's Guide on How to Obtain the Best Contracting Results and Avoid Problems

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By the end of this session, you will be able to:

- Define and clearly document the scope of services in physician and physician practice agreements.
- Negotiate compensation, term, termination, representations and warranties and other provisions that balance flexibility and stability.
- Spot risks in restrictive covenants, indemnity and insurance provisions and develop negotiation skills.



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Big Picture: What "Good" Contracting Looks Like

- Aligned Incentives: services, financial, term, termination and restrictions.
- Predictable Economics: understandable compensation formulas and clear risk allocation.
- Operational Clarity: who does what, where, when and using which resources.
- Exit/Termination: paths that are fair, workable and documented up front.



These Principles Apply to all Manner of Contracts

- Physician Contracts: employment, independent contractor, recruitment, medical director, call coverage and telehealth.
- Payor/Managed Care Contracts: insurance company, ACO and CIN.
- Business Operations: management service agreements, equipment leases, billing and collection agreements, office leases, purchasing contracts, vendor agreements, software and technology licensing agreements, and staffing agreements.
- Other Agreements: joint ventures and equity investment.



Scope of Services: Why It Matters

- Drives everything else: term, termination, compensation, risk allocation and compliance.
- Vague scope leads to disputes over services provided to and from the contracting parties.
- Regulators expect accurate descriptions of services for Stark Law, Anti-Kickback Statute and billing compliance.
- There must be a legitimate business purpose for the arrangement, especially between referral sources.



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Defining Scope of Services: Content

- Site of Service: at practice, hospital, outreach clinic, third-party location or remote/telehealth.
- Deliverables: what are each party's obligations under the agreement.
- Time Expectations: 24/7, FTE status, schedule bands (e.g., 8 sessions/week) and/or after-hours availability.
- Performance Standards: productivity, quality metrics, performance metrics, and/or documentation of timeliness.



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Scope of Services: Best Practices

- Use Attachments: detailed job descriptions and statement of work in an exhibit that can be updated by mutual written agreement of the contracting parties.
- Avoid “other duties as assigned” without limits.
- If clinical services involved, align with credentialing and privileges; do not promise services the physician is not privileged to perform. Also, ensure scope matches payor enrollment and billing setup to avoid denied claims.

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Scope of Services: Sample Provision (Physician Services Agreement)

Physician shall provide professional medical services in the specialty of [_____] at the following locations: [_____] (the “Practice Sites”). Physician’s duties include:

- outpatient clinic sessions averaging [___] half-days per week;
- inpatient rounds and call coverage as scheduled by mutual, written agreement of the parties;
- performance of procedures consistent with Physician’s training, privileges, and credentialing; and
- participation in quality improvement, documentation, and administrative activities reasonably related to Physician’s clinical work.

The detailed description of duties and schedule is set forth in Exhibit A and may be updated by mutual written agreement of the parties, provided that any change remains consistent with applicable licensure, credentialing, and payor enrollment requirements.

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Scope of Services: Sample Provision (Management Agreement)

On the terms and subject to the conditions contained in this Agreement, Practice hereby engages Management Company and Management Company hereby accepts engagement by Practice, to provide and/or arrange for the provision of the Management Services (as such term is defined in Exhibit A) to Practice. Management Company shall provide all Management Services at the direction of Practice.



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Compensation & Financial Terms: Key Principles

- Compensation must be:
 - Commercially reasonable.
 - Within fair market value.
 - Not based on volume or value of referrals (critical for Stark Law and Anti-Kickback Statute compliance).
- Clarity and transparency prevent business issues and legal disputes.



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Compensation: Drafting Tips

- Base Pay and Frequency: Specific amount, payment method (e.g., direct deposit) and schedule (e.g., bi-weekly).
- Incentive Compensation: Clear formulas for bonuses, commissions or stock options, including milestones and payment timing.
- Expense Reimbursement: Procedures for submitting and qualifying for expense reimbursements. Define what qualifies as a reimbursable expense.
- Performance Metrics: Defined standards required to earn base incentive and/or performance compensation.
- Termination and Severance: Compensation details regarding final pay, unused PTO, and potential severance or deferred compensation, especially in “for cause” scenarios.

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Other Financial Terms for Personal Service Contracts

- Benefits: health, retirement, paid time off, CME days and dollars, relocation stipend.
- Signing Bonuses and Retention Bonuses: vesting schedules and repayment obligations.
- Ownership/Partner Track: if applicable, set expectations about timing and criteria.



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Compensation – Sample Provision (Physician Services)

In consideration for the services provided, Group shall pay Physician annual compensation of \$[_____], payable in accordance with Group’s standard payroll practices. Physician will also be eligible for productivity compensation calculated as 20% of annual collections for Physician’s personally performed services in excess of [insert collection target], as further described in Exhibit A. Productivity compensation shall be based solely on personally performed services and shall not vary with the volume or value of referrals for Stark Law covered designated health services.

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Compensation – Sample Provision (Management Agreement)

During the Term of this Agreement, in consideration of the Management Services to be performed by Management Company pursuant to this Agreement, Practice shall pay Management Company, and Management Company agrees to accept as full compensation, an amount equal to \$[_____] per month (the “Management Company Fee”). The Management Company Fee shall be paid by the fifth (5th) day of each month in arrears. In addition to the Management Company Fee, Management Company shall be entitled to reimbursement of Management Company Expenses which are consistent with the Expense Budget approved by the parties or otherwise approved by Practice in writing.

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Term of Agreement: Basics

- Initial Term: often 1–3 years.
- Renewal Term: fixed renewal periods or evergreen (automatic year-to-year renewal).



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Fixed Term vs. Evergreen

Fixed Term:

- Agreement ends on a specific date unless renewed by mutual, written agreement of the parties.
- Forces deliberate review and renegotiation.
- Can include initial term and defined renewal terms.

Evergreen Term:

- Automatically renews after the initial term for successive periods unless either party provides notice of termination.
- Reduces administrative burden but can let outdated terms linger.



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Term of Agreement (Fixed v. Evergreen) – Sample Provisions

- **Fixed:** The term of this Agreement will commence on [insert date] and continue for three (3) years, subject to the termination provisions herein.
- **Evergreen:** The initial term of this Agreement will commence on [insert date] and continue for three (3) years, subject to the termination provisions set forth herein (the “**Initial Term**”). Thereafter, this Agreement shall automatically renew for successive one (1) year terms, subject to the termination provisions set forth herein (each, a “**Renewal Term**”, and together with the Initial Term, the “**Term**”).



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Term: Best Practices

- Pair longer terms with "without cause" termination rights.
- Build in a scheduled “contract review” point (e.g., 9–12 months before end of term).
- Confirm how term interacts with restrictive covenants, tail coverage and bonus payments.



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Representations and Warranties

- **Regulatory Compliance:** Affirmation that the contracting parties comply with all applicable federal and state laws.
- **Licensure and Accreditation:** Guarantees that all necessary permits, licenses and accreditations are in good standing.
- **Fraud and Abuse:** Representations that neither party has violated the Anti-Kickback Statute or Stark Law, and is not an excluded party from Federal Health Care Programs.
- **Billing and Reimbursement:** Promises that all claims submitted to Medicare, Medicaid or private insurers will be accurate, valid and properly documented.
- **Data Privacy and Security:** Representation regarding compliance with HIPAA and other privacy regulations regarding patient information.



Termination Provisions: Overview

Key types of termination:

- Without cause.
- With cause.
- Automatic termination.
- Special triggers: bankruptcy, change in law/regulations or exclusion.

Goal: clear, predictable and administratively workable exit paths.

Termination Without Cause

- Allows either party to end the contractual relationship for any reason or no stated reason.
- Typical notice period: 30–180 days.
- Drafting points:
 - Symmetry (both parties should have this right).
 - Clear written notice method.
 - Obligation to continue services during notice period (but does not prevent either party from terminating early with cause.)



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Termination Without Cause – Sample Provision

Either party may terminate this Agreement without cause upon at least [___ (___)] days' prior written notice to the other party. During the notice period, the parties shall continue to provide services pursuant to this Agreement, unless the parties agree otherwise or either party terminates this Agreement as provided herein.



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Termination With Cause

- Common “For Cause” Grounds:
 - Material breach of the agreement terms not cured within a defined cure period (e.g., 30 days).
 - Criminal conduct, fraud or serious professional misconduct.
- Drafting Tips:
 - Be specific, not vague.
 - Include cure rights where feasible, except for egregious conduct or legal disqualification.



Termination For Cause – Sample Provision

Either party may terminate this Agreement upon written notice if the other party materially breaches any term of this Agreement and fails to cure such breach within thirty (30) days after receiving written notice describing the breach in reasonable detail. No cure period is required for breaches that cannot reasonably be cured or for conduct involving fraud, violence or serious patient safety concerns.



Automatic Termination

- Agreement ends automatically upon:
 - Death or permanent disability (define “permanent disability”) if for services of an individual.
 - Loss of required license or authorization that is not curable.
 - Change in ownership if agreement is explicitly tied to a specific entity.
 - Exclusion from a Federal Health Care Program.
 - Breach of specific provisions, such as confidentiality or non-compete covenants.
- Clarify timing, final pay and continuing obligations.



Special Termination: Bankruptcy & Change of Laws

- Bankruptcy/Insolvency:
 - Right to terminate if the other party files for bankruptcy or cannot meet financial or cannot meet financial obligations.
- Change of Laws/Regulations:
 - If law changes and makes performance illegal or non-compliant, parties should:
 - Negotiate in good faith to amend the Agreement.
 - If amendment not possible within a defined period, permit termination without penalty.



Termination due to Bankruptcy – Sample Provision

Either party may terminate this Agreement immediately upon written notice if the other party becomes insolvent, makes a general assignment for the benefit of creditors, or becomes the subject of any bankruptcy or receivership proceeding, to the extent permitted by applicable bankruptcy law.



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Termination due to Change of Laws – Sample Provision

If any change in applicable federal or state law, regulation or government or payor policy materially affects the legality or enforceability of any provision of this Agreement, the parties shall negotiate in good faith for a period of thirty (30) days to amend this Agreement to comply with such change while preserving, to the extent possible, the original economic intent of the parties. If the parties are unable to reach agreement within such period, either party may terminate this Agreement upon thirty (30) days' prior written notice.



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Termination: Operational Considerations

- Transition of patient care and handoff responsibilities, as applicable.
- Return or destruction of PHI and property (charts, computers, badges, confidential information, intellectual property).
- Communication Plan: notices to third-parties.
- Final Accounting: final compensation payment (pro-rated as applicable), bonuses, repayments and post-termination payment obligations (e.g., deferred compensation).



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Restrictive Covenants

- Non-compete agreements.
- Non-solicitation agreements.
- No-hire (no-poach) agreements.
- Confidentiality agreements.
- Non-disparagement agreements.

State laws increasingly scrutinize and sometimes restrict these covenants.



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Non-Compete Agreements

- Restrict where and how a party to a contract can compete during and after termination.
- Common Variables:
 - Geography (e.g., X-mile radius from a specific location, a specific county or within a different geographic area).
 - Duration (e.g., during the term of the Agreement and 1–2 years after termination).
- Physician Non-Compete Covenants: Alabama law treats physicians as “professionals” and therefore prohibits non-competes against physicians that restrict their practice of medicine. However, a non-compete involving a physician may be enforceable if it does not restrict the physician’s practice of medicine, but rather restricts owning, managing, developing, etc. a competitor.



Non-Compete: Best Practices

- Make the restriction no broader than necessary:
 - Narrow geographic radius tied to actual work or service locations.
 - Reasonable duration (often 12–24 months maximum).
 - Limit to the party’s actual services under the agreement.
- Ensure consistency with state law.



Non-Compete Agreement – Sample Provision

During the term of this Agreement and for a period of twelve (12) months following the termination of this Agreement (the “Restricted Period”), the Management Company shall not, directly or indirectly (i) in any manner whatsoever engage in any capacity with any business competitive with the Practice’s current lines of business or any business then engaged in by the Practice, any of its subsidiaries or any of its affiliates (the “Practice’s Business”) within thirty (30) miles from the Practice’s office located at [insert address] (the “Restricted Territory”); or (ii) have any interest as owner, sole proprietor, stockholder, partner, lender, director, officer, manager, employee, consultant, agent or otherwise in any business competitive with the Practice’s Business in the Restricted Territory.

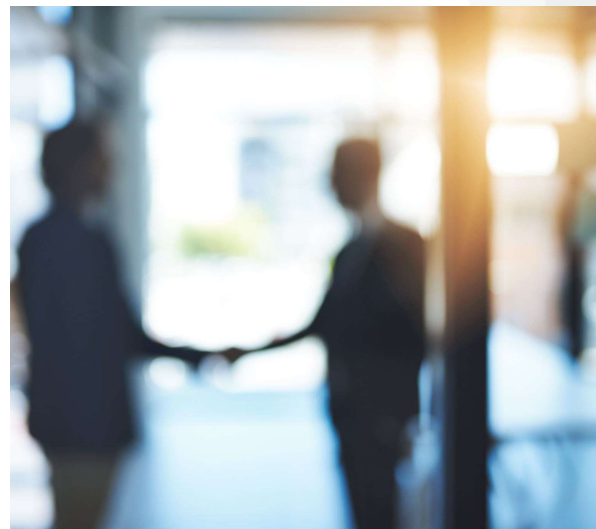
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Non-Solicitation Agreements

- Prohibits soliciting or actively recruiting individuals away from a business.
- Typically more enforceable and less controversial than non-competes when reasonably drafted.
- Drafting tips:
 - Define “solicit” (active outreach vs. passive outreach).
 - Limit duration and scope (e.g., during term of agreement and 1–2 years after).
 - If related to patients, protect patient choice by allowing patients to follow the provider if they independently seek them out.



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No-Hire (No-Poach) Agreements

- Prohibits a party from hiring or employing staff of the other party for a set period of time.
- Easier to enforce than non-solicit covenants. More objective.
- Risks: antitrust and labor-law scrutiny, especially broad “no-poach” between competing entities.
- Best Practices:
 - Limit to staff directly involved in providing services under the agreement.
 - Use reasonable duration; avoid blanket system-wide no-hire language.



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Non-Solicit and No-Hire Agreements – Sample Provision

During the Term of this Agreement and for a continuous period of two (2) years thereafter, neither party shall, directly or indirectly, through any individual, person or entity, without the prior written consent of the other party: (i) solicit, induce or attempt to solicit or induce away any employee of the other party who provided services pursuant to this Agreement or attempt to interfere with the relationship between the other party and such employees, or (ii) employ, hire or contract for services with any employee of the other party who provided services pursuant to this Agreement, or any person who was such an employee of the other party during the six (6) month period prior to the date of attempted hire or contracting.

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Confidentiality Agreements

- Protect:
 - Patient information and PHI (already required by HIPAA and state law).
 - Business Information: contracts, forms, financials, policies and procedures, strategic plans, marketing plans, trade secrets, etc.
- Drafting Tips:
 - Define “Confidential Information” clearly.
 - Carve-outs: information that is public, independently developed, or legally required to be disclosed.
 - Address post-termination obligations and duration.



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Confidentiality Agreement – Sample Provision

For purposes of this Agreement, the term “Confidential Information” shall mean any written or oral information of either party, as applicable, including, without limitation, this Agreement, all business, management or economic studies, proprietary forms, proprietary business or management methods, marketing data, documents provided or made available by either party to the other, fee schedules, payor contracts, employee and operating manuals, trade secrets or trademarks. Confidential Information does not include any information that the receiving party can establish (a) is or becomes generally available to and known by the public, other than as a result of an unpermitted disclosure directly or indirectly by the receiving party or its affiliates, (b) is or becomes available to the receiving party on a non-confidential basis from a source other than the furnishing party or its affiliates, provided that such source is not and was not bound by a confidentiality obligation to the furnishing party of which the receiving party has knowledge, or (c) has already been or is hereafter independently acquired or developed by the receiving party without violating any confidentiality obligation to the furnishing party.

Neither party will disclose any Confidential Information of the other party without the other party’s express written authorization, except as otherwise required by law. Neither party shall use Confidential Information obtained from the other party for any purpose other than to carry out its duties and responsibilities under this Agreement. Upon termination of this Agreement, the party receiving Confidential Information from the other party shall return to the furnishing party or destroy all of the furnishing’s party’s Confidential Information, and if such Confidential Information is destroyed, the receiving party shall attest to such destruction in a writing provided to the furnishing party.

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Non-Disparagement Agreements

- Prohibit parties from making false or harmful statements about each other.
- Goals: protect reputation, minimize public conflict.
- Caution:
 - Avoid language that could be construed as restricting legally protected speech (e.g., reporting safety concerns, whistleblowing).
 - Include exceptions for truthful statements or statements required by law or legal proceedings.



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Non-Disparagement Agreement – Sample Provision

Each party agrees that, during and after the term of this Agreement, it will not knowingly make any false statement that is injurious to the professional reputation or business of the other party. Nothing in this Section shall be construed to limit either party's ability to provide truthful information in response to lawful process, to cooperate with government investigations, or to report in good faith concerns regarding quality of care, patient safety or legal compliance.

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The logo for Burr & Forman, featuring the company name in a vertical orientation next to a red graphic element consisting of a vertical line of dots.

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Indemnity Provisions: What They Do

- Indemnity: one party's obligation to reimburse the other party for certain losses, damages or claims caused by the indemnifying party.
- Common in contracts to allocate risk for misconduct, breach or regulatory violations.
- Key concepts:
 - Scope of covered claims.
 - Who controls the defense.
 - Caps and exclusions.

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Indemnity: Drafting Considerations

- Avoid broad “one-way” indemnities that shift all risk to one side without limits.
- Tie Indemnity Obligations To:
 - Negligence, willful misconduct or breach of the agreement.
 - Conduct within the party's control.
- Clarify:
 - Notice and cooperation requirements.
 - Defense and settlement control (who chooses counsel; consent to settle).
 - Insurance coverage interplay (malpractice and general liability).
- Seek legal review to ensure provisions comply with state law.
- Most indemnity obligations are not covered by insurance.

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Indemnity – Sample Provision

Except to the extent covered by insurance maintained by either party, each party (the “Indemnifying Party”) will indemnify, defend and hold harmless the other party and its affiliates and each of their respective directors, managers, officers, equity holders, members, employees, agents, successors and permitted assigns (collectively, the “Indemnified Party”) from and against all third-party losses, liabilities, demands, claims, actions or causes of action, regulatory, legislative or judicial proceedings or investigations, assessments, levies, fines, penalties, damages, costs and expenses (including reasonable attorneys’, accountants’, investigators’ and experts’ fees and expenses) (collectively, “Damages”) sustained or incurred by any Indemnified Party arising from or related to: (i) illegal activity, intentional misconduct, fraud or gross negligence by the Indemnifying Party; or (ii) breach of this Agreement by the Indemnifying Party.

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Insurance Provisions: Overview

Key coverages to address:

- Professional liability (malpractice).
- General liability.
- Workers’ compensation (if applicable).
- Cyber/privacy coverage where relevant.

Specify: limits, carrier standards, who pays premiums and proof of coverage requirements.



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Insurance: Practical Clauses

- Establish minimum limits of liability (e.g., per claim and annual aggregate).
- Requirement to maintain coverage throughout the term of the agreement and during any tail period.
- Notice of cancellation or material change in insurance (e.g., 30 days' notice).
- Right to request certificates of insurance.



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Pulling It Together: Negotiation Strategy

- Prepare:
 - Understand your practice's risk tolerance, business needs and goals and negotiating power.
 - Identify "must-have" vs. "nice-to-have" terms.
- Use trade-offs:
 - Slightly higher (or lower) compensation in exchange for more flexible termination provisions.
 - Narrower (or expanded) restrictive covenants in exchange for other concessions.
- Involve Experts: healthcare counsel, accountants, valuation professionals, and compliance officers when needed.



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Common Pitfalls to Avoid

- Vague or missing scope of services.
- Compensation formulas that are vague, subjective or misaligned with compliance.
- Overly broad non-competes or non-solicits that are difficult to enforce.
- Indemnity clauses that create uninsurable risk.
- Failing to address post-termination rights and obligations.



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Questions and Discussions

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Our Firm

Burr & Forman’s experienced legal team serves clients with local, national, and international legal needs. With particular industry strengths in the financial institutions, manufacturing, health care, and food and beverage sectors, our attorneys draw from a diverse range of backgrounds and experience to serve as trusted business advisors and legal counsel to help clients achieve their goals. Burr & Forman is a full-service law firm with 370 attorneys in Alabama, Delaware, the District of Columbia, Florida, Georgia, Illinois, Mississippi, North Carolina, South Carolina, and Tennessee.

Our firm’s century-strong success is credited to our lawyers’ forward-thinking approach to crafting innovative solutions for the challenging situations encountered by our clients. The firm’s growth through the years is directly correlated to the success of our clients.

We invest our time and talents in our Clients, Colleagues, and Communities. They define the way we do business. Each of the three builds upon and reinforces the others. To deliver the highest client service, we invest in our people through training, mentoring, and professional development. To recruit the best people, we are active leaders in our local communities through civic participation, charitable work, and community service. To be active leaders in our communities, we grow and nurture strong relationships with our clients and colleagues. It’s a virtuous cycle that drives our approach to client service. It’s the Burr way.

It is not just hard work, knowledge, and experience that are integral to the quality and delivery of our legal services. It is also a diverse, creative, and future-focused approach that enables us to achieve exceptional results that matter.

Our Footprint



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Our Services

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- Consumer Finance Litigation & Compliance
- Consumer Product Safety
- Corporate Finance
- Creditors' Rights & Bankruptcy
- Cybersecurity
- Data Privacy
- Employee Benefits & Executive Compensation
- Employment Advising & Litigation
- Environmental
- Government Contracts
- Government Investigations
- Government Relations
- Health Care Litigation & Compliance
- Immigration
- Insurance Litigation & Coverage
- Intellectual Property
- Land Use & Zoning
- Lending
- Mass Torts
- Mediation & Arbitration
- Medical Malpractice
- Mergers & Acquisitions
- Multidistrict Litigation
- Non-Compete & Trade Secrets
- Occupational Safety
- Procurement
- Product Liability
- Public Finance
- Securities
- Tax Incentives
- Tax Law
- Traditional Labor
- Trusts & Estates
- White Collar Crime
- Workouts & Restructuring

Our Industries

- Aerospace
- Automotive
- Banking & Finance
- Economic Development
- Education
- Energy & Natural Resources
- Food & Beverage
- Franchise & Distribution
- Health Care
- Hospitality
- Infrastructure
- Life Sciences
- Manufacturing
- Maritime
- Multifamily Housing
- Private Clients
- Private Equity
- Real Estate
- Retail
- Sports & Entertainment
- Technology
- Transportation & Logistics
- Utilities

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Today's Speaker



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Bio

Howard's practice involves corporate and regulatory health care matters, including Stark, Anti-kickback, and False Claims Act compliance, facility and professional licensure matters, HIPAA, physician practice formation, joint venture arrangements, mergers and acquisitions, private equity representation and transactions, certificate of need issues, Medicare and third-party audits and investigations, corporate compliance, and contract negotiations. Howard represents a variety of health care clients including hospitals, surgery centers, clinical labs, physician practices, medical staffs, academic medical centers, imaging centers, and other health care providers.

Howard is a member of the Health Care Practice Group and serves as the firm's HIPAA Privacy Officer. Howard loves the challenges that health care law brings and the impact the field can have on society in general. He enjoys distilling complex topics down for his clients. Detail-oriented, strategic, and responsive, no matter what size client, Howard seamlessly partners with his clients to enable better decision making.

Howard is the former President of the Alabama Bar Health Law Section (having served 2020 through 2025) and is a regular writer for the *Birmingham Medical News*. Howard is also a frequent speaker on various health care topics both locally and nationally and is an adjunct professor at Cumberland Law School, Birmingham, Alabama teaching courses in health care law and transactions.

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