The Future of Independent Anesthesia Practice

SAMBA 2023 ASC Medical Directors & Leaders Summit

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SOCIETY FOR AMBULATORY ANESTHESIA
Outpatient • Office Based • Non-Operating Room

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Disclosures

- Am an attorney in private practice
- I have the following financial relationships to disclose:
  - Owner of Judith Jurin Semo, PLLC
    - Private law practice
  - Diversified portfolio that includes investment in health care companies (no active role)
  - Will not be discussing off-label uses of drugs/devices

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Learning Objectives

- Understand the changes in the health care industry that adversely affect the independent anesthesia practice model
- Demonstrate the pressures on independent anesthesia practice
- Identify strategies to assist anesthesia practices to compete in the current evolving health care environment

** A note: Not legal advice

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Presentation Summary

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Health Care Industry Issues Affecting the Independent Anesthesia Practice Model

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#1: Anesthesiology Services Are Not Self-Supporting

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Anesthesiology Services Are Not Self-Supporting

- Undervaluation of anesthesiology services by government payor programs
  - Medicare
  - Medicaid
  - Tricare

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Anesthesiology Services Are Not Self-Supporting

- GAO – 2020 Report
  - https://www.gao.gov/products/gao-21-41
- References three studies of private insurance payments ("PIS"):
  - Yale: PIS were 3.67 times Medicare payments (2015)
  - Health Care Cost Institute: PIS were 2 to 7 times Medicare payments for six services commonly provided by anesthesiologists (2017)
  - ASA: PIS were 3.46 times Medicare payments (2019 survey of members)

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Anesthesiology Services Are Not Self-Supporting

- Updates the 2007 GAO Report (https://www.gao.gov/assets/gao-07-463.pdf)
  - Average Medicare payments were lower than average PIS in 41 Medicare payment localities in 2004
    - From 51% to 77% lower than PIS
  - For all 41 payment localities, Medicare payments were lower than PIS by average of 67%
    - Average Medicare payment: $216
    - Average PIS: $658

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#2: Hospitals/ASCs Are Facing Financial Pressures

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Hospitals/ASCs Are Facing Financial Pressure

- Multiple pressures on hospitals & ASCs
  - Sharply increasing staffing costs
  - Uncertain interruptions in elective surgery (Covid surges)
  - Supply chain woes
  - Uncertainty regarding federal payments
    - Changing policies (*e.g.*, "inpatient only" list)
  - Penalties – *e.g.*, for
    - Noncompliance with rules

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#3: Payors Using Strong-Arm Tactics to Pressure Anesthesiology Practices to Accept Lower Rates . . . or Go OON

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Payors Forcing Anesthesiologists OON

- ASA survey February 2020:
  - 42% respondents had contracts terminated in the prior 6 months
  - 43% experienced dramatic payments cuts from insurers
    - Both mid-contract and at renewal
    - In some cases, by 60%
- Nov. 2021 – NC BCBS uses No Surprises Act IFR as basis to push for reductions in rates
  - Letters to 54 practices
  - Threatening contract termination unless practices agree to payment reductions of 10% to 30%

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#4: Increasing Trend Away From Private Practice & Toward Hospital/Health System Employment/ Practice Acquisitions

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Trends in Physician Employment

- PAI (Physicians Advocacy Institute)-Avalere Health Report
  - Trends in Physician Employment & Acq'ns of Medical Practices in 2019-2020
    - Only 30% of physicians in US practice independently (as of beginning of 2021)
    - 70% of US physicians employed by hospital systems or other corporate entities (PE & health insurers)
    - See http://www.physiciansadvocacyinstitute.org/PAI-Research/Physician-Employment-and-Practice-Acquisitions-Trends-2019-20

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Trends in Physician Employment

- AMA:
  - Private practice dropped to <50% of physicians in 2020
  - 2020 data are largely consistent with trends since 2012 – but
    - Magnitude of changes since 2018 suggest acceleration of:
      - Shift toward larger practices
      - Away from physician-owned practices
      - See https://www.ama-assn.org/system/files/2021-05/2020-prp-physician-practice-arrangements.pdf

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Trends in Hospital/ASC Employment of Anesthesiologists

- Continuing reports of hospital/health system employment of previously independent anesthesiology practices
  - Groups of all sizes – from larger groups (over 100 anesthesiologists) to smaller practices (15-25 anesthesiologists)
  - Seemingly in response to or otherwise resulting from hospital/ASC contract & stipend negotiations
- Just heard of three more on Thursday (Jan. 12, 2023) alone

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Trends in Hospital/ASC Employment of Anesthesiologists

- HCA Physician Services Group transitioned several hospitals in Florida to an employed group – *e.g.,*
  - Memorial Hospital, Jacksonville, FL: https://careers.hcahealthcare.com/jobs/7810274-anesthesia-medical-director-opportunity-in-jacksonville-fl

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Knee-Jerk Reaction to Stipend Negotiations
(In Some Cases)

- Increasingly seeing hospitals insist on an employment model
  - Following request for compensation or
  - Unsuccessful negotiation for compensation
- Fewer stipends for ASC work, but they are increasing
- Also seeing hospitals/ASCs/health systems move to employment for strategic reasons

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#5: Personnel Shortages and Rapidly Increasing Compensation Rates for Anesthesia Personnel

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Personnel Shortages/Increasing Comp

- Combination of factors leading to shortages
  - Covid-related burnout & early retirements
  - Aging of anesthesiologists
    - In 2019, baby boomers represented 37.6% of active ASA members
    - Estimated: 1/3 of practicing physicians will be >65 in next 10 years
      - https://www.pyapc.com/wp-content/uploads/2021/02/PYA-Compensation-Study-Spotlight-on-Anesthesiology.pdf
  - Ability to earn more compensation by changing jobs
  - In some cases, response to hospital contract negotiations

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Personnel Shortages/Increasing Comp

- In one consultant's words, CRNA compensation is changing by the week
- Merritt Hawkins: In 2022: "advertised starting salaries for CRNA positions through Merritt Hawkins range from $185,000 to more than $300,000 per year"
  - https://www.merritthawkins.com/news-and-insights/blog/healthcare-news-and-trends/2022-CRNA-Week/
- FMV assessments in recent negotiations support comp packages for CRNAs for 40-hours/week/no-call positions in the $250-$280K/year
  - Not including signing bonuses

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#6: Competition for Anesthesia Services Continues/Facility RFPs Continue

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Competition in Anesthesia

- New anesthesia practices continue to emerge
  - Privately owned
  - PE ownership
  - Both physician and CRNA ownership
- Anesthesia groups continue to solicit hospitals & ASCs

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Competition in Anesthesia

- Hospitals & ASCs continue to issue RFPs
  - Even with longtime relationships
- Means that potential for change is ever-present
- Interestingly, in recent times, reports of some large groups declining to bid on RFPs
  - Unsure of reasons, but lack of staffing capability seems to be a prevailing concern

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#7: Some Hospitals/ASCs Willing To Allow Practice Models Involving No Anesthesiologists or Few Anesthesiologists

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Some Hospitals/ASCs Moving to All/More CRNAs

- Reports in 2021 of a hospital in WI shifting to an all-CRNA model from anesthesiologist model
  - https://www.beckersasc.com/anesthesia/wisconsin-hospital-replaces-anesthesiology-staff-with-crnas.html
  - https://www.dailyunion.com/news/jefferson_county_area/changes-to-anesthesia-administration-at-wrmc-elicit-outrage-comment/article_8eeee5a4-10b7-5f9a-a2e9-492e2903ddd5.html
- Anecdotal reports of moves to "zone" model
  - Some zones involve one anesthesiologist overseeing two separate hospitals 30 minutes apart
  - Not just a single anesthesiologist overseeing 4-8 concurrent rooms

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Report of One Hospital Moving to Test Having Family Practice Anesthetists

- Recent (January 6, 2023) report of a hospital in Canada looking to test using "family practice anesthetists"
  - Family doctors with additional training and certification in anesthesia
  - To provide local and general anesthetics "for cases that do not require a subspecialist. That means they would work on non-complex cases in general surgery, obstetrics and ophthalmology."
  - See https://www.cbc.ca/news/canada/nova-scotia/health-care-doctors-family-practice-anesthesiologists-1.6704376

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#8: Consolidation Among Hospitals/Health Systems/ASCs Creates New Pressures

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Consolidation Among Hospitals/Health Systems/ASCs Creates New Pressures

- As hospitals, health systems, & ASCs consolidate, more pressure to
  - Have a single group
  - Have master agreements covering multiple facilities
    - Fewer anesthesia practices in the system
  - Can lead to loss of practice opportunities for some anesthesia practices

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#9: CMS Waiver of CRNA Supervision & State Opt-Outs

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CMS Waiver/State Opt-Outs

- CMS Emergency Declaration Blanket Waivers for Health Care Providers
  - Beginning in March 2020, CMS waived requirements for physician supervision of CRNAs
    - Applies to hospitals, CAHs, & ASCs
  - To terminate as of end of the public health emergency ("PHE")
  - HHS extended the PHE again on January 11, 2023
    - See https://aspr.hhs.gov/legal/PHE/Pages/covid19-11Jan23.aspx
    - https://www.cms.gov/files/document/covid-19-emergency-declaration-waivers.pdf

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CMS Waiver/State Opt-Outs

- As of May 2022, 22 states & Guam opted out of federal physician supervision requirement

AZ	NH	OR	KY
OK	NM	MT	AR (May 22)
IA	KS	SD	MI (May 22)
NE	ND	WI	UT* (Feb. 22)
ID	WA	CA	Guam
MN	AK	CO*	

* For CAHs & specified rural hospitals

https://www.aana.com/advocacy/state-government-affairs/federal-supervision-rule-opt-out-information

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#10: Continuing Burden of Regulatory Compliance & Lawsuits

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Regulatory Compliance

- New laws – new regulations & policy
  - During initial COVID wave:
    - Understanding scope/limitations of federal aid programs
    - CMS waivers
  - No Surprises Act – effective Jan. 2022
  - State employment laws
  - Changing policy
    - *E.g.*, Biden focus on noncompetes & no-poaching clauses

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Regulatory Compliance

- Other regulations/requirements
  - HIPAA
  - Billing requirements
  - Telephone Consumer Protection Act
  - DOJ/FTC 2016 guidance on no-poaching clauses
    - Criminal enforcement of no-poaching provisions if parties are competitors
    - Caution on no-poaching provisions in hospital agreements if the health system employs anesthesiologists/CRNAs/CAAs

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Other Types of Antitrust Claims in HC

Bellingham medical providers must end illegal non-compete contracts, pay $110K as a result of AG Ferguson consent decree

FOR IMMEDIATE RELEASE:
Aug 26 2021

Ending exclusive contracts with area-medical clinics saves patients money

BELLINGHAM — Attorney General Bob Ferguson today announced that, as a result of his antitrust consent decree, Bellingham Anesthesia Associates (BAA) must end its illegal dominance of the local health care market and pay $110,000 in costs and fees. BAA used unlawful non-compete clauses and exclusive contracts with area medical providers to take about 90 percent of the market share for physician-administered anesthesia services in Whatcom and Skagit counties. This legally enforceable agreement requires BAA to cease illegally requiring physicians to sign three-year non-compete contracts.

"Bellingham Anesthesia Associates' illegal actions decreased competition and prevented lower cost options," Ferguson said. "The firm did this at the expense of patients. Today's agreement holds it accountable and ensures Whatcom and Skagit counties will have better options for local medical care."

Ferguson filed an antitrust consent decree in Whatcom County Superior Court, alleging BAA's anticompetitive conduct violates the Washington Consumer Protection Act. The consent decree, if approved by the court, will resolve it lawsuit by remedying the competitive harms alleged in the complaint.

BAA used exclusive contracts with hospitals and clinics over the course of at least the last two decades to make itself the de facto anesthesia provider in Whatcom and Skagit counties. BAA also forced all of its doctors to sign overly broad non-compete agreements. Many physicians are also shareholders in BAA; their non-competes barred them from practicing anesthesia in medical procedures in the area for three years. Doctors who do not own shares of the business had 18-month non-competes.

The non-competes allowed anesthesiologists to work during dental procedures, but those opportunities were limited.

The Attorney General's Office alleged that because health care is highly localized and patients

- August 26, 2021, WA State Atty Gen issued a press release:

> "**BELLINGHAM —** Attorney General Bob Ferguson today announced that . . . Bellingham Anesthesia Associates (BAA) must end its illegal dominance of the local health care market and pay $110,000 in costs and fees. BAA used unlawful non-compete clauses and exclusive contracts with area medical providers to take about 90 percent of the market share for physician-administered anesthesia services in Whatcom and Skagit counties. This legally enforceable agreement requires BAA to cease illegally requiring physicians to sign three-year non-compete contracts."

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Antitrust Consent Decree Against BAA

- "BAA used exclusive contracts with hospitals and clinics over the course of at least the last two decades to make itself the de facto anesthesia provider in Whatcom and Skagit counties. BAA also forced all of its doctors to sign overly broad non-compete agreements. Many physicians are also shareholders in BAA; their non-competes barred them from practicing anesthesia in medical procedures in the area for three years. Doctors who do not own shares of the business had 18-month non-competes."
  - https://www.atg.wa.gov/print/14099

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Recent Enforcement: "No-Poaching" Agreements

- August 2021: Class action lawsuit filed against Munson Healthcare and Traverse Anesthesia Associates (WD Mich)
  - Alleged antitrust violation based on no-poaching agreement
  - Allegation: No-poaching agreement between the parties intended to drive down competition in the job market and suppress pay for anesthesiologists & CRNAs
  - Hospital moved to dismiss; lawsuit still pending

Case 1:21-cv-00888-PLM ECF No. 1, PageID.1 Filed 09/03/21 Page 1 of 14

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
Northern Division

JOSH SCHNACKERS, individually and on behalf of all others similarly situated,
Plaintiff,
v.
MUNSON HEALTHCARE and TRAVERSE ANESTHESIA ASSOCIATES, P.C.,
Defendants.

Civil Action No. _____
CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

Plaintiff Josh Schnackers ("Plaintiff"), on his behalf and on behalf of a proposed class of similarly situated individuals, hereby alleges as follows against defendants Munson Healthcare ("Munson") and Traverse Anesthesia Associates, P.C. ("TAA").

INTRODUCTION

1. This action addresses an agreement between Munson, which bills itself as "northern Michigan's largest and leading healthcare system" and TAA, which is a "medical professional corporation that provides anesthesia and pain management services at several generic hospitals and outpatient sites in the Grand Traverse region," to restrain competition and reduce compensation for providers of anesthesia services. Plaintiff is a Certified Registered Nurse Anesthetist ("CRNA") who brings this suit individually and on behalf of the Proposed Class to enjoin Defendants from maintaining and enforcing their unlawful "no-poach" agreement, and to recover damages.

2. Defendants Munson and TAA (collectively "Defendants") compete with one another to hire and retain qualified providers of anesthesia services, including CRNAs. Beginning

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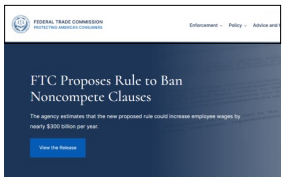
FTC Proposes to Ban Noncompetes in Employment

- Jan. 5, 2023: FTC proposed to ban noncompetes in employment
  - Published as a Notice of Proposed Rulemaking ("NPRM"), which will be published in the *Federal Register*
  - 60-day comment period
  - Potential for significant change before adoption



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#11: Questionable Arrangements to Capture Anesthesia Revenue Persist

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Questionable Arrangements Persist

- Still seeing arrangements in which referring physicians retain anesthesia fees, despite recent enforcement
  - Apr. 2022: DOJ $7.2M settlement with physicians & 18 anesthesia entities owned by a management company
    - https://www.justice.gov/usao-ndga/pr/paul-d-weir-john-r-morgan-md-care-plus-management-llc-and-anesthesia-entities-pay-72
    - "A physician's selection of an anesthesia provider for the patients he or she treats should be motivated by the quality of the anesthesia provider rather than by the income the physician can generate for him or herself" (U.S. Attorney Kurt R. Erskine)

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Questionable Arrangements Persist

- Nov. 2021: DOJ $28M settlement with three anesthesia providers & ASCs
  - https://www.justice.gov/usao-ndga/pr/anesthesia-providers-and-outpatient-surgery-centers-pay-more-28-million-resolve
- July 2020: Tenet $72.3M settlement of whistleblower suit
  - https://www.fiercehealthcare.com/hospitals/tenet-hospital-agrees-to-72-3m-settlement-doj-over-kickback-suit
  - https://blog.weisspc.com/tenet-to-pay-66-plus-million-to-settle-fca-suit-involving-company-model-of-anesthesia-services/

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Pressures on Independent Anesthesia Practice

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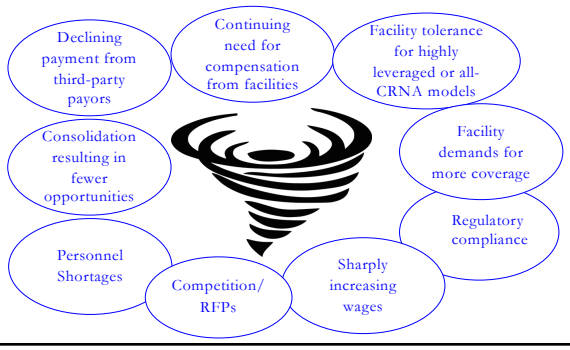

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Pressure on Independent Anesthesia Practice

- Increasingly hard to make a go of independent practice
- Increasingly important to pursue all practice opportunities
  - Must diversify
    - Continued Hospital insistence on noncompetes can limit a group's ability to pursue those opportunities

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Strategies to Compete in the Current Evolving Health Care Environment

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Strategies to Compete: Excellence

- Independent groups must continue to be the best at what they do
  - Provide excellent care
  - Provide excellent service
  - Document their excellence
    - Clinical quality metrics
    - Efficiency metrics
    - Surgeon-proceduralist/patient/facility staff satisfaction

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Strategies to Compete: Take Care of Group Problems

- Independent groups must take care of internal Group problems
  - Deal with tough Group issues:
    - Physicians/anesthetists who have clinical deficiencies
    - Clinical personnel who have interpersonal issues
      - Based on 360 review, survey results, other data
  - Either:
    - Work with them to improve, or
    - Make tough decisions
- Do not wait for the Facility to request removal

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Strategies to Compete: Be a Problem-Solver

- Independent groups must be problem solvers for their facilities
  - Work with facilities to address
    - Operational issues and
    - New challenges
- Best if the Group demonstrates initiative to suggest solutions before the facility identifies the need

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Strategies to Compete: Pursue Opportunities

- Must pursue new opportunities to provide anesthesia services
  - Are facilities issuing any RFPs?
  - Are there other opportunities to pursue?
    - Office-based anesthesia?
    - Providing staffing to other groups?
      - If your group has any excess capacity, can be a way to minimize losses

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Strategies to Compete: Plan Ahead

- More important than ever to plan ahead
  - Recruit early – especially given nationwide shortage of anesthesia personnel
  - Consider resources your group needs
    - Assistance with surgeon/patient/other satisfaction surveys
    - Assistance with valuing anesthesia services
      - For purposes of negotiating facility agreements

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Strategies to Compete: Develop Leaders

- Consider leadership training for your personnel
  - Multiple resources
- If individuals in the group are not stepping up to assist, take action
  - Do you need to recruit talent?
- Consider succession issues
  - Who are the current leaders?
  - Who is available to fill any gaps?
  - Who in the group is best-suited to fill any void?

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Strategies to Compete: The Right People

- Bring the right people to the table
  - Not everyone in the Group is suited to be the public "face" of the group

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Conclusion

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Demonstrate Your Value Every Day

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Be Prepared for Change

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Pursue All Opportunities

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Create Your Own Opportunities

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