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Hospital-Physician Employment Agreements and Medical Staff Bylaws: Potential Issues Resulting from Overlapping Contractual Obligations

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The prevalence of physician employment directly with hospitals or hospital-related entities has experienced a dramatic increase with the continued evolution of health care delivery models. A recent study shows that hospitals have increased efforts to employ physicians, particularly specialists.[1] Multiple drivers account for the shift to a closer working relationship between the parties. Federal and state health care initiatives, such as those in the Affordable Care Act,[2] impact both the physician and the hospital. Hospitals look for legal methods to capture market share as well as referrals. Physicians determine that the headaches of operating a private practice are becoming burdensome in the current health care environment. These motivating factors, in conjunction with decreasing payer reimbursement, have incentivized the parties to come together.[3]

For physicians whose practice commonly utilizes a hospital, the transition to an employment model seems like a natural progression. This more closely aligned relationship is advantageous for both the physician and the hospital; however, with the increase in these types of alignments, the agreement in place becomes critical. Multiple layers of contractual relationship between the parties may become problematic, especially when the employed physician also maintains staff privileges at the hospital or a hospital-affiliated facility.

Conflicting contractual interpretations will likely result if a dispute is now governed by the terms of a new contractual relationship rather than what governed in the past when the parties were in different positions. Many times these flawed interpretations result from past working relationships between the parties that were dictated by only one agreement. Other times, they result from the belief that the contractual provision most beneficial to one party will be the one that controls. The likelihood of these types of disputes and the resulting unintended consequences increases dramatically when one agreement references or incorporates the

provisions of another agreement between the same parties. In all probability, the parties have not recognized the different positions each holds in the multiple agreements. For example, one agreement may automatically terminate if the other agreement terminates even though the two agreements pertain to different subject matters. Therefore, the parties should have a clear understanding of the effect of overlapping agreements when establishing and reducing their relationships to writing.

Physician Employment Agreements

A written employment agreement between the parties will govern the physician's employment relationship. The agreement generally will resemble a standard employment agreement for the physician. It does not substantially differ from the previous employment agreements the physician may have executed in private practice. The agreement addresses usual matters such as job responsibilities, salary, benefits, and time off. However, it also may contain references to or incorporate terms uncommon to agreements physicians have historically used in private practice. When the hospital's medical staff bylaws are incorporated into or otherwise made a condition of the employment agreement, it commonly serves as the basis for misinterpretations by the parties. Language such as making the employment agreement "subject to," "except as otherwise stated," or "except as otherwise permitted" by the bylaws creates the situation where the terms of the employment agreement are superseded.[4] It also is possible that the terms of the bylaws will control in the event of a conflict between the two agreements.[5]

While this may seem like an issue primarily for the physician, it may negatively impact both parties when one believes it has certain rights, duties, and obligations that are, in fact, affected or limited due to this controlling language. Depending on the terms of both documents, numerous conflicts may result from these agreements. For example, the physician may believe the due process rights set forth in the bylaws will control the terms of the employment agreement when a dispute arises. The hospital may not understand when and how it needs to take certain steps when disciplining the physician from different employment or medical staff viewpoints. The impact of the two separate documents with overlapping subject matters causes these issues.

Hospital Medical Staff Bylaws

Courts have long noted that possessing hospital staff privileges is not equivalent to being employed by the hospital granting the privileges.[6] The basis for this position is that the medical staff membership and any clinical privileges arising from such membership does not encompass those elements common to an employment relationship.[7] The bylaws establish a separate and distinct relationship between the physician and the hospital even if an employer-employee relationship exists. Rather than address employment issues, the bylaws regulate the circumstances surrounding matters such as when staff privileges may be awarded and maintained. If the bylaws serve as the basis for establishing a physician's staff membership and corresponding clinical privileges, they lack the material terms needed to establish an employment relationship.[8] However, it has been held that bylaws alone were not sufficient to be a contract, but in the scope of a larger relationship, such as one involving employment, they could be enforceable as a part of a larger contractual relationship.[9]

As previously noted, physician employment agreements may incorporate into, or otherwise condition employment on, matters addressed in the bylaws. While the employment agreement is a contract, does incorporating the bylaws into the agreement affect whether its terms are contractual in nature as it relates to employment? Unfortunately, the answer to this question depends on other terms of the employment agreement, such as term and termination provisions. The answer also depends on a particular state's law as it relates to "at-will" employment.

In *Woodruff v. Hawaii Pacific Health*, Woodruff's employment agreement contained language indicating that the physician's employment was conditioned upon her maintaining medical staff privileges with the hospital under the terms of its bylaws.[10] The bylaws provided an opportunity for a hearing if a practitioner's clinical privileges and medical staff membership were affected.[11] However, the court held that the bylaws did not provide such relief as related to the employment relationship.[12] The court's rationale was that employment and staff privileges are separate and distinct.[13] The employment contract did not state that the hospital must comply with bylaws as a condition of employment.[14] Even if it did, hearing rights under the bylaws only applied to adverse actions relating to staff membership and clinical privileges and not to terms of employment.[15] In *Bryant v. Glen Oaks Medical Center*,[16] the court reviewed whether the bylaws were a contract and their impact on what procedures had to be followed to terminate a physician's employment agreement. The court held that where an "at-will" employment agree-

ment incorporated the bylaws, it did not offer the physician prehearing rights set forth in the bylaws.[17] The court reasoned that if the prehearing process was included in the employment agreement, it would be contrary to the intent of the parties in negotiating, and subsequently, executing an "at-will" employment relationship.[18]

These Relationships and Their Impact on Peer Review Privilege

When terminating the employment of a physician with staff privileges, the parties should recognize that some subsequent employment-related actions may focus on peer review activities and their impact on the termination. The intertwining of the relationships and underlying agreements may threaten the cloak of protection regarding production of peer review material. Commonly, peer review material is statutorily protected at the state level. However, in the event that a physician employee has an action under certain federal laws in a federal court, the state law privileges generally do not apply.[19] The Federal Rules of Civil Procedure provide that a party may seek discovery of non-privileged matters if it may otherwise lead to information relevant to the claims in the underlying litigation.[20] The Federal Rules of Evidence address this by holding that federal, rather than state, privilege law applies in a federal action in federal court.[21] In these instances, courts have found that peer review material that would usually be considered privileged is discoverable if relevant to the underlying federal action.[22]

Balancing the Interest of Each Party

In negotiating and drafting the employment agreement, the parties should recognize when it becomes necessary, if at all, to incorporate language from the bylaws into the employment agreement and if, in fact, conflicting issues or language between the two written documents exist. This exercise should be part of the pre-employment process. Taking such steps allows the parties the opportunity to consider how these agreements may impact the parties in the future and determine whether the two documents should be tied to each other even in limited circumstances.

Generally, interpretation of the agreed-upon relationship between parties will be easier if each document stands on its own. Incorporating language from other documents sets the stage for greater misunderstandings. However, instances will arise where it is necessary to incorporate one into the other, even if by reference. It is advisable though that incorporation of other documents in their entirety or provisions contained in those documents be limited unless: (1) necessary; (2) the arrangement requires it to occur; and (3) the parties clearly understand how such language may impact both agreements. In fact, the American Medical Association advocates that any physician employed by a hospital "should be subject to the bylaws of those medical staffs, and should conduct their professional activities according to the bylaws, standards, rules and regulations and policies adopted by those medical staffs."[23] There should be a clear understanding of each document's purpose beforehand and how each will interrelate with the other prior to moving forward with the relationship.

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1 Casalino, L.P. and November, Berenson and Pham, "Hospital-Physician Relations: Two Tracks And The Decline Of The Voluntary Medical Staff Model, 27 HEALTH AFFAIRS 1305-1314 (2008).

2 Pub. L. No. 111-148.

3 Danaher, M.G., *Physician Staffing Issues and Employment-Related Lawsuit: A Litigation Epidemic in the Making?*, The National Law Review. com, May 7, 2010, *available at* www.natlawreview.com/article/physician-staffing-issues-and-employment-related-lawsuits-litigation-epidemic-making.

4 Harris, S.M., *Hospital Bylaws Can Trip Up Employed Physicians*, amednews.com, May 13, 2013, *available at* www.amednews.com/article/20130513/business/130519968/5/.

5 *Id.*

6 *See* Dallon, C.W., *Understanding Judicial Review of Hospitals' Physicians Credentialing and Peer Review Decisions*, 73 TEMPLE L. REV. 597, fn. 45 *citing e.g., Johnson v. El Paso Pathology Group, P.A.*, 868 F. Supp. 852, 860 (W.D. Tex. 1994) ("Having staff privileges at a hospital is not the same as being employed by the hospital."); *Bryant v. Glen Oaks Med. Ctr.*, 650 N.E.2d 622, 630 (Ill. App. Ct. 1995) (stating that grant of staff privileges does not guarantee concurrent employment); *Sullivan v. Baptist Mem'l Hosp.-Golden Triangle, Inc.*, 722 So.2d 675, 679 (Miss. 1998) (observing that staff appointments and clinical privileges do not establish employment contract).

7 *Id.* at 605

8 *Id.* at 605.

9 *Gianetti v. Norwalk Hosp.*, 557 A.2d 1249, 1252-55 (Conn. 1989).

10 No. 29447, 2014 WL 128607, at *15 (Haw. Ct. App. Jan. 14, 2014).

11 *Id.* at *15-16.

12 *Id.* at *16.

13 *Id.*

14 *Id.*

15 *Id.*

16 650 N.E.2d 622, 272 Ill. App.3d 640 (1995).

17 *Id.* at 629.

18 *Id.*

19 Danaher, *supra* note 3.

20 *See* FED R. CIV. P. 26 "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

21 FED. R. EVID. 501 The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

22 *See, e.g. Sonnino v. University of Kansas Hosp. Auth.*, 220 F.R.D. 633 (D. Kans. 2004); *Williams v. University Med. Ctr. of S. Nev.*, 760 F. Supp. 2d 1026 (D. Nev. 2010).

23 American Medical Association, AMA Principles for Physician Employment, *available at* www.ama-assn.org/resources/doc/hod/ama-principles-for-physician-employment.pdf.