On the Horizon in

# HEALTH LAW

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## NON-COMPETE AGREEMENTS

### Virgina Supreme Court Refuses To Enforce Physician Non-Compete Agreement

The Supreme Court of Virginia, in the case of *Parikh v. Family Care Center, Inc.,* 641 S.E.2d 98, 2007, entered final judgment against a lay corporation that sought to enforce a non-compete agreement against a former physician-employee.

At the time the defendant physician originally entered into the non-compete with the corporation, it was a professional corporation owned by another licensed physician. When the physician-owner subsequently died in an automobile accident, his wife, who was not a licensed physician, took over ownership of the corporation. The Court ruled that once a lay person took over ownership of the corporation, it no longer qualified as a professional corporation, and therefore could not engage in the practice of medicine through the employment of licensed physicians. Since the corporation was, as a result, now engaged in the unauthorized practice of medicine, the Court concluded the corporation had no legitimate business interest to protect by enforcing the non-compete agreement against its former physician employee.

Many believe that the prohibition on the corporate practice of medicine is an antiquated doctrine in light of the realities of today's healthcare delivery system. Because of that, many non-physician entities (such as hospitals, urgent care centers, ambulatory care centers and clinics) have come to believe there is little risk employing physicians to provide professional services on behalf of such entities. The *Parikh* case is the latest in a series of state supreme court decisions over the last several years that have refused to enforce non-compete agreements between lay entities and their former physician-employees. In light of these cases, a lay entity entering into an employment agreement with a physician should carefully consider the enforceability of such an agreement (including, but not limited to, any non-competition clause) when evaluating the risks and benefits of entering into such an arrangement, and should take care to structure any such arrangement so as to comply with the medical licensure requirements of their state.

## FRAUD AND ABUSE

### Deadline For Publication Of Phase III Stark Rules Extended

The Centers for Medicare and Medicaid Services ("CMS") recently announced that its deadline for publishing the Phase III Stark regulations has been extended from March 26, 2007 to March 26, 2008. CMS indicated that in the meantime, its Phase II interim final rules published on March 26, 2004 will remain in effect. CMS indicated in its notice that it was not able to meet the three-year deadline for publication of the Phase III rules, due to the extensive amount of public comments it received requesting clarifications and revisions to the Phase II interim final rules, and because of the need for substantial interagency coordination between CMS and other agencies, including the Office of Inspector General and the Department of Justice. Until the Phase III rules are issued, healthcare providers entering into financial arrangements with referring physicians should consider the potential Stark implications of such arrangements under the existing Phase II rules until the Phase III rules become final.

### OIG Advises Hospital Not To Subsidize Ambulance Transportation For Patients Outside Hospital's Service Area

In Advisory Opinion No. 07-02, the Office of Inspector General (the "OIG") advised a non-profit hospital that its proposal to subsidize the ambulance transportation costs

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## Fraud and Abuse *Continued from page 1*

of patients from outside its local area would potentially violate the Anti-Kickback Statute.

The hospital in question treats patients transferred by ambulance to the hospital from outside the hospital's local area. Historically, the Medicare carrier had reimbursed patients for that cost. However, the Medicare carrier began refusing to pay the full amount of these claims, citing the rule that Medicare will only pay for local ambulance transportation, except where non-local transportation is necessary to take the patient to the "nearest institution with appropriate facilities." Patients complained to the hospital when they began receiving bills for the uncovered portion of non-local ambulance trips, and the hospital became concerned that physicians from outside the local area might be disinclined to refer patients to the hospital in light of the patient complaints.

In response, the hospital proposed to contract directly with various air and ground ambulance suppliers to transport patients to the hospital from outside its local area. The hospital would pay the ambulance suppliers a negotiated fee and submit claims for reimbursement directly to third-party payors, including Medicare and Medicaid. The hospital proposed to absorb any costs beyond those reimbursed by Medicare and other payors.

The OIG advised that it would likely take enforcement action against the proposed subsidy. The OIG stated that the payment for a subsidy of an expense normally borne by the patient constitutes a form of remuneration to the patient that would be likely to influence their choice of provider. The OIG concluded that the hospital's promise not to advertise the subsidy was not a significant safeguard since the availability of the subsidized ambulance service would be known to referring physicians who would likely serve as an indirect source of such information to the patients. The OIG also noted that the hospital candidly acknowledged that the whole point of the proposed subsidy was to induce the patients to choose the hospital for the services even though the hospital was located out of the patients' local area.

This opinion is the latest of several the OIG has issued in the last few years involving the provision of free or discounted items or services to patients. Significantly, unlike other proposed subsidy programs which the OIG had blessed in the past, this proposed subsidy was not limited to situations where a patient had a demonstrated financial need. This opinion points out the importance of providers carefully considering the fraud and abuse implications of any programs involving patient subsidies before implementing same. Any such arrangement should be carefully analyzed under the applicable fraud and abuse statutes, and the OIG Advisory Opinions dealing with same.

### OIG Will Not Challenge Use of Credit Card Rewards by Nursing Home

In Advisory Opinion No. 07-03, the Office of Inspector General (the "OIG") advised that it would not impose sanctions against a residential care facility that intended to use rewards from credit card issuers for its benefit and that of its employees.

Even though the nursing home would seek reimbursement from Medicare and Medicaid for some or all of the costs associated with goods and services purchased with the credit cards, the OIG concluded there was no violation of the Anti-Kickback Statute since there would be no referrals between the credit card issuers and the nursing home.

With regard to the nursing home's proposed use of some of the credit card rewards to compensate employees, the OIG concluded that any such rewards provided to employees would fall under the protection of the Anti-Kickback safe harbor for employee compensation.

## MEDICAL MALPRACTICE

### Ohio Hospital May Be Held Vicariously Liable For Negligent Act By Contract Nurse

An Ohio Court of Appeals held that a hospital may be vicariously liable for the alleged negligent acts of a nurse, despite the expiration of the statute of limitations for a direct action against the nurse. *Van Doros v. Marymount Hosp., Inc.*, 2007-Ohio-1140, 2007 WL 764728 (Cuyahoga Cty. March 15, 2007).

In *Van Doros*, Kathy Van Doros, the executrix of the estate of Donald Miller, filed an action against the nurse, Thomas Madej, Marymount Hospital, and the nurse's employer, Firstat Nursing Services. Van Doros alleged that the defendants negligently caused Miller's death when Miller died in the hospital with a low blood oxygen level. Madej was directly employed by Firstat, but was working at Marymount because of a staffing agreement between Marymount and Firstat. The trial court dismissed the action based on the Ohio Supreme Court's decision in *Comer v. Risko*, 106 Ohio St.3d 185 (2005). The *Comer* decision precluded a hospital from being held vicariously liable for medical malpractice if the attending physician could not be held primarily liable for malpractice. The physicians in *Comer* could not be held primarily liable because the statute of limitations had expired. Absent the physician's primary liability, liability could not flow through the physicians to the hospital, the Ohio Supreme Court found.

In *Van Doros*, the Court of Appeals reversed and remanded the trial court's decision, finding the *Comer* decision inapplicable because it addressed the liability of physicians, not nurses. The court distinguished physicians from nurses in the context of vicarious liability by reasoning that "physicians essentially serve as independent contractors, retaining primary control over their own actions and practices within a hospital setting," while "[n]urses are subject to the control of the hospital, they are not free to choose their own patients, and patients are not free to choose their nurses." The court found these distinctions held true whether or not the hospital directly employed the nurse, or, as in this case, the nurse worked at the hospital via a staffing contract with a third party.

Hospitals should take notice that the *Comer* decision protects hospitals when a physician is not primarily liable. However, a hospital can still be liable for the acts of its nurses even if an individual nurse is not primarily liable.

# MEDICAL STAFF CREDENTIALING

## Doctor Allowed to Pursue Claims Despite Application of California's Anti-SLAPP Law

In a recent opinion, the California Court of Appeal, Fourth District, held that the former chair of the Department of Orthopedic Surgery at Palomar Medical Center could pursue his various claims brought against the hospital and staff members who initiated a peer-review action against him despite the application of California's anti-SLAPP [Strategic Lawsuit Against Public Participation] law. *O'Meara v. Palomar-Pomerado Health System*, 2007 WL 731376 (Cal. App. 4 Dist. March 12, 2007).

The surgeon, Dr. Patrick O'Meara, filed suit against the hospital and staff members who initiated a peer review action against him after he was placed on probation as a disciplinary measure. Dr. O'Meara was disciplined because the hospital found he had made inappropriate comments to a patient's family regarding the involvement of a managed care company in the patient's medical treatment decisions. Each of Dr. O'Meara's claims arose as a result of two distinct actions: the initial probation imposed in February 2000, and a one-year extension of that probation imposed in April 2001.

The Court held that Dr. O'Meara's claims were governed by the anti-SLAPP law, which allows a special motion to strike lawsuits involving meritless claims that challenge the exercise of constitutionally protected speech on matters of public interest and/or in connection with an "official proceeding." In reaching its decision, the Court relied upon *Kibler v. Northern Inyo County Local Hospital Dist.*, 39 Cal. 4th 192 (Cal. 2006), where the California Supreme Court ruled that a hospital peer-review proceeding constitutes an "official proceeding" under the law.

Despite the applicability of the anti-SLAPP law, the Court concluded, "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." Dr. O'Meara's claims included unlawful retaliation in violation of Business and Professions Code section 2056(c), violation of his constitutional free speech right and common law right to fair procedure, and other tortious acts constituting defamation, intentional infliction of emotional distress, and interference with prospective economic relationships. Because each of Dr. O'Meara's claims could be supported based solely on the factual allegations pertaining to the second probation, the Court held that he had effectively established a probability of prevailing on his claims. Therefore, the court affirmed dismissal of the defendant's anti-SLAPP motion.

The defendant's only reprieve was a procedural tactic targeting Dr. O'Meara's failure to exhaust judicial and administrative remedies before filing an action for damages. The Court found that the defendants met their burden to show their asserted exhaustion defense would bar the claims associated with Dr. O'Meara's first probation. However, with respect to the second probation, the Court concluded that Dr. O'Meara was not required to exhaust his judicial remedy because he was not provided any form of quasi-judicial hearing. Dr. O'Meara was not provided any advance notice that his probation was being extended, and was given no opportunity to present his version of the facts or to challenge the charges before the probation was imposed. The Court concluded that under those circumstances, the exhaustion of judicial remedies would not bar a tort action.

# LABOR AND EMPLOYMENT

## Ohio Court Dismisses Hospital Employees' Claims For Violation Of Whistleblower Law, Wrongful Termination In Violation Of Public Policy, And Defamation

An Ohio Court of Appeals recently dismissed two hospital employees' complaints against Selby General Hospital for violation of Ohio's whistleblower statute, wrongful discharge, and defamation. *Galyean v. Greenwell*, 2007-Ohio-615, 2007 WL 453273 (Washington Cty. Jan. 29, 2007). Appellants Rhonda Galyean and Debra Cunningham held the positions of Credentials Coordinator and Vice President of Strategic Development for the hospital, respectively.

To be protected under Ohio's whistleblower statute, an employee must "reasonably believe that the violation either is a criminal offense likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony." In this case, the complaints alleged that Selby Hospital violated the law by permitting a physician, who was not credentialed by the Hospital, to perform surgery. Galyean and Cunningham further alleged that they were directed to backdate the physician's credentials to cover the procedure. The Court, however, found their depositions to contradict the allegations in their complaints. The deposition testimony indicated that while the employees may have believed the conduct to be improper, they did not know whether the conduct was illegal. Further, their testimony clearly showed that they were not motivated by concerns for public health or safety, but rather, by concern for their own liability. Therefore, the Court of Appeals upheld the dismissal of the claims under Ohio's whistleblower statute on summary judgment.

The Court also examined Galyean's claim for wrongful termination in violation of public policy. To succeed on her claim, Galyean had to prove that (1) a clear public policy existed, (2) her termination jeopardized the public policy, (3) her termination was motivated by conduct related to the public policy, and (4) there was no overriding legitimate business justification for termination. Galyean cited a variety of statutes as a source of public policy to support her claim, including a federal statute which promoted peer review, the state whistleblower statute, and a state statute dealing with the insurance of medical professionals. The Court held that Galyean failed to prove the existence of an applicable clear public policy in any of these statutes. As such, this claim was also dismissed on summary judgment.

Finally, the Court dismissed the employees' claims for defamation. Assuming the statements were defamatory, the Selby Hospital held a qualified privilege because the statements at issue were made in the employment context and

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were made to people with a common business interest. Accordingly, Galyean and Cunningham had to prove actual malice to overcome the privilege, which they failed to do.

### Nurse Who Performs Some Managerial Tasks Is Not A Supervisor Under National Labor Relations Act

In a recent District of Columbia Circuit Court decision, *Jochims v. NLRB*, 2007 WL 860854 (D.C. Cir. Mar. 23, 2007), the court reversed the National Labor Relations Board's ("NLRB") decision that a registered nurse who worked as a "weekend supervisor" at a Missouri nursing home was a supervisor under the National Labor Relations Act ("NLRA"). Because she was not a supervisor as defined by the NLRA, the nurse was legally protected from discharge because of her opposition to management's actions.

The case stems from an NLRB unfair labor practice charge filed by Lisa Jochims, a registered nurse whose employment was terminated for circulating a petition protesting a management proposal regarding a change in work conditions. The NLRB initially determined that Jochims was not a supervisor and that the nursing home violated the NLRA by terminating her employment. Prior to appellate review, the NLRB reconsidered its initial opinion and issued a supplemental decision, finding that Jochims was a supervisor as defined by the NLRA. Jochims appealed the NLRB's supplemental decision.

Under the NLRA, the definition of an "employee" covered by the Act specifically excludes "any individual employed as a supervisor." The Act defines a "supervisor" as "any individual having authority, in the interest of the employer" to, among other types of authority, hire, transfer, suspend, discharge or discipline "other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action." To be considered a supervisor, the individual must possess at least one of the types of authority listed, and her exercise of such authority must require the use of independent judgment.

On review, the District of Columbia Circuit Court disagreed with each of the four bases for the NLRB's decision that Jochim was a supervisor. First, the Court found that Jochim's authority to issue written reports about other employees' misconduct did not give her supervisory authority. The Court cited NLRB precedent establishing that written reprimands do not, in and of themselves, serve as evidence of supervisory authority. The Court found no evidence that Jochim's write-ups were a prerequisite to employee discipline or inevitably resulted in the initiation of discipline.

Second, the Court disagreed with the NLRB's finding that Jochim's authority to send employees home for gross misconduct established supervisory authority. On both occasions where Jochim sent an employee home, she first consulted with management. The Court found that Jochim neither made the decision nor recommended such action. She simply executed management's instructions, which amounted to a routine task not involving independent judgment.

Third, the Court disagreed that Jochim's decision to allow two employees to leave early due to family emergencies amounted to supervisory authority. The Court cited NLRB precedent holding that an employee's limited authority to excuse employees for emergencies, as exercised by Jochim, did not constitute supervisory authority.

Fourth, the Court held that Jochim's partial completion of a probationary employee's performance evaluation at the request of management did not render her a supervisor. The Court noted that such action does not indicate supervisory authority unless it effectively recommends discipline or directly affects the employee's job status.

Finally, the Court rejected the idea that "secondary indicia" such as Jochim's title as "weekend supervisor" or her status as the highest ranking employee present on the weekends were sufficient to render her a supervisor, particularly in light of the lack of primary evidence of supervisory authority.

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