**LOUISIANA HEALTH LAW UPDATE**

**AUGUST 17, 1999**

**NEW ORLEANS, LA**

# IV. PHYSICIAN SERVICE ORGANIZATIONS - WHAT'S NEXT?

**FRANKLIN D. BEAHM, ESQ.**

**JULIE G. HAMNER, ESQ.**

**BEAHM & GREEN**

**NEW ORLEANS, LA**

The theoretical goal of physician practice management company (also known as medical service organization) was to increase the amount of disposable revenue to the owner of the practice. The models for a PPM vary greatly and it is not the intention to discuss the various economic models and units that have been attempted for the management of physicians practices. However, the theoretical goal has not been obtained as a general rule. Failing to realize the economic benefits many companies have abandoned the acquisition of practices and in some instances have or will divest physician practices.

## Refocused New Strategy - Crystal Ball

The primary culprit for the companies that acquired physician's practices has been identified as excessive acquisition price and the failure to instill financial incentive for the physician. In refocusing the strategic plan, some organizations have begun divesting physician practices and concentrating on single specialty groups as well as ancillary services including clinical drug trials. Whether the economy of scale will decrease practice overhead thereby enhancing income revenues still remains to be seen. The effort to bring big business and big business strategy to the private practice of medicine will continue.

## Physician and PSO Divestiture

Divesting a practice from a management company is as complicated as the due diligence required in the acquisition of same. Issues to be addressed in the strategic planning of divestiture , but in no particular order, include:

- Ownership and control of the physician office lease;
- Ownership and control of the patient records;
- Ownership and control of hard assets of the practice;
- Control over office personnel;
- Accounts receivable;
- Control and ownership of current assets, cash on had, etc.;
- Restrictive covenants (non-compete)within the management contract;
- Control and ownership in billing and collection;
    - The timing of the divestiture whether it is by mutual agreement through a unilateral cancellation/breach of contract.
    - Will the parties end up in court?
    -

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**V. HOSPITALS/PEER REVIEW AND MEDICAL STAFF BY-LAWS**

**FRANKLIN D. BEAHM, ESQ.**

**JULIE G. HAMNER. ESQ.**

**BEAHM & GREEN**

**NEW ORLEANS, LA**

- **Hospitals/Peer Review and Medical Staff By-Laws**

Peer review is a vital part of the credentialing process and is essential to the function of the medical staff. Peer review provides for honest, self-critical analysis, and allows the medical staff to strive toward higher standards and better quality patient care. It is important, from the legal standpoint, that the medical staff act reasonably in deciding to whom they will grant privileges. Although the evaluation of medical staff may vary from setting to setting, certain general guidelines should be followed in the peer review process.

HCQIA credentialing requirements

Hospitals, as well as other health care providers and health care entities, must perform certain credentialing procedures mandated by the Health Care Quality Improvement Act of 1986, or HCQIA, 42 U.S.C. 11101 et seq., as it is amended.

These minimum credentialing procedures are set forth in the HCQIA, 42 U.S.C. 11135, as well as in 45 C.F.R. 60.10:

***42 U.S.C.*** Sec. ***11135***

Sec. 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title), on and after the date information is first required to be reported under section 11134(a) of this title

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital,
information reported under this subchapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this subchapter concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times.

(b) Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

***45 C.F.R. 60.10***

60.10 Information which hospitals must request from the National Practitioner Data Bank.

(a) When information must be requested.

Each hospital, either directly or through an authorized agent, must request information from the Data Bank concerning a physician, dentist or other health care practitioner as follows:

(1) At the time a physician, dentist or other health care practitioner applies for a position on its medical staff (courtesy or otherwise), or for clinical privileges at the hospital; and

(2) Every 2 years concerning any physician, dentist, or other health care practitioner who is on its medical staff (courtesy or otherwise), or has clinical privileges at the hospital.

(b) Failure to request information.

Any hospital which does not request the information as required in paragraph (a) of this section is presumed to have knowledge of any information reported to the Data Bank concerning this physician, dentist or other health care practitioner.

(c) Reliance on the obtained information. Each hospital may rely upon the information provided by the Data Bank to the hospital. A hospital shall not be held liable for this reliance unless the hospital has knowledge that the information provided was false.

## Physician challenges of adverse decisions

It is possible that a physician faced with an adverse decision will challenge the validity and legality of the credentialing procedures and adverse privilege actions taken by a medical staff against him or her. In that instance, it is relevant to discuss the levels of exposure which may exist for the members of the medical staff involved in the review of that physician. Equally important are the due process rights of the physician throughout the administrative process, and then in court, if a lawsuit is filed in challenge of a privilege or credentialing decision. As will be stated below, certain requirements must be followed by the medical staff in making these privilege or credentialing determinations in order to preserve immunity granted by state and federal law to participants in the peer review process.

There is some concern about exposure through antitrust actions. To avoid this type of exposure, strict compliance with the HCQIA to qualify for immunity as well as use of physicians who are not the direct economic competitors of the adversely affected physician are warranted. Also, objective criteria should be used in evaluating a physician.

Immunity for participants in self-critical analysis; due process

The HCQIA, as well as Louisiana state law at LSA-R.S. 15:3715.3 provides a broad immunity to peer review process participants. Generally, these statutes will provide for limitation of liability for members of the medical staff who take an action adverse to a peer; however, certain requirements must be met. The requirements which must be followed for limitation of liability to attach are set forth at 42 U.S.C. 11112. The requirements for adequate notice and hearing set forth in 42 U.S.C. 11112 must be adhered to so that peer review participants will be afforded the limitation on liability and so that the due process rights of the physician under review may be honored. The medical staff by laws should track the language of the statute so the HCQIA requirements for immunity are always in place. Also, the bylaws should be followed rigorously to avoid the possibility of a challenge of an adverse decision for failure to comply with the bylaws. There should be a "fair hearing plan" contained within the bylaws which guarantees due process to the physician under review and which, if followed, will protect the members of the review committee from liability for any adverse action taken. Due process protections granted under state and U.S. constitutions should also be considered.

**Sec. 11112. Standards for professional review actions**

(a) In general

For purposes of the protection set forth in section 11111(a) of
this title, a professional review action must be taken -
(1) in the reasonable belief that the action was in the furtherance of quality health care,
(2) after a reasonable effort to obtain the facts of the
matter,
(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a
preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are
waived voluntarily by the physician):

(1) Notice of proposed action
The physician has been given notice stating -
(A)(i) that a professional review action has been proposed to be taken against the physician,
(ii) reasons for the proposed action,
(B)(i) that the physician has the right to request a hearing on the proposed action, (ii) any time limit (of not less than 30 days) within which to request such a hearing, and
(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing
If a hearing is requested on a timely basis under paragraph

(1)(B), the physician involved must be given notice stating -
(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and
(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice
If a hearing is requested on a timely basis under paragraph
(1)(B) -
(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) -
(i) before an arbitrator mutually acceptable to the physician and the health care entity,
(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or
(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;
(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;
(C) in the hearing the physician involved has the right -
(i) to representation by an attorney or other person of the physician's choice,
(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,
(iii) to call, examine, and cross-examine witnesses,
(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
(v) to submit a written statement at the close of the hearing; and
(D) upon completion of the hearing, the physician involved has the right -
(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and
(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.
A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.
(c) Adequate procedures in investigations or health emergencies
For purposes of section 11111(a) of this title, nothing in this
section shall be construed as -
(1) requiring the procedures referred to in subsection (a)(3) of this section -
(A) where there is no adverse professional review action taken, or
(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need
for a professional review action; or
(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

As stated previously, Louisiana state law provides for immunity as well in LSA-R.S. 13:3715.3, stating:

C. No member of any such committee designated in Subsection A of this Section or any sponsoring entity, organization, or association on whose behalf the committee is conducting its review shall be liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee if such committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him.

nder Louisiana's law, the requirement for statutory immunity is less specific than in the HCQIA, requiring only lack of malice and reasonable belief that the action is warranted under the facts known to the peer review (or similar) committee member. The seminal Louisiana case on this is

***Smith v. Our Lady of the Lake Hosp., Inc***., (La. 7/5/94), 639 So.2d 730, rehearing denied.

Confidentiality of the peer review process under statute

A concern in the self-critical analysis employed by peer review, credentialing, and other such committee is that the proceedings and findings of such committees be kept confidential. Louisiana Revised Statutes 44:7(D) and 13:3715.3(A) provide for confidentiality of peer review committee records in Louisiana. They provide that peer review committee records are confidential, not subject to discovery, and that they cannot be obtained through a court subpoena. The legislature granted these protections so that hospitals and other health care providers could engage in honest, self-critical analysis without fear that their analysis via the peer review committee could be used against them in legal proceedings.

The Health Care Quality Improvement Act, found at 42 U.S.C. 11111, et seq. provides additional protections of confidentiality for the peer review process. The Act provides, at 42 U.S.C. 11137 that information reported under the Act will be kept confidential *except with respect to professional review activity*.

There are few Louisiana cases interpreting the state statutes as to the scope of the protections which they provide. In the case ***Smith v. Louisiana Health and Human Resources Admin***, 477b So.2d 1118 (la. 1985), the Supreme Court considered the extent to which hospital committee records are protected by statute and decided that records pertaining to both policy-making and personnel matters fell within the protective scope of La. R.S. 13:3715.3 and 44:7(D). However, in ***Smith v. Lincoln General Hospital***, 605 So.2d 1347 (La. 1992), the Louisiana Supreme Court held:

When a plaintiff seeks information relevant to his case that is not information regarding the action taken by a committee or its exchange of honest self-critical study but merely factual accountings of otherwise discoverable facts, such information is not protected by any privilege as it does not come within the scope of information entitled to that privilege. (Id., at 1348)

The above was upheld in a second Louisiana Supreme Court decision, ***Gauthreaux v. Frank,*** 95-1033 (La. 6/16/95); 656 So.2d 634. In these decisions, the Louisiana Supreme Court ruled that some information discussed within the peer review process may be subject to discovery. The court noted in the Smith v. Lincoln General case"

These provisions are intended to provide confidentiality to the records and proceedings of hospital committees, not to insulate from discovery certain facts merely because they have come under the review of any particular committee. Such an interpretation could cause any fact which a hospital chooses to unilaterally characterize as involving information relied upon by one of the sundry committees formed to regulate and operate the hospital to be barred from an opposing litigants discovery, regardless of the nature of that information. Such could not have been the intent of the legislature especially in light of the broad scope given to discovery in general. La. C.C.P. 1442. Further, privileges, which are in derogation of such broad exchange of facts, are to be strictly interpreted.

Id. 1348

Reiterating the above portion of its decision in the Smith v. Lincoln General matter, the court stated in ***Gauthreaux v. Frank***:

In the present case, the trial court interpreted La. R.S. 13:3715.3 as protecting form discovery any information passing before a hospital committee or otherwise discussed in a committee meeting. Such a reading of the peer review committee privilege is clearly too expansive in light of our decision in Smith, supra.

***Gauthreaux***, at 634.

Generally, these cases are interpreted to mean that documents generated by the committee itself are privileged and should be kept confidential and are not subject to discovery or court subpoena, but those simply used by the committee in its investigation

remain discoverable. The courts generally opt to conduct an *in camera* inspection of documents in disputes to determine which are discoverable and which are not.

Reporting requirements; National Practitioner Data Bank

The National Practitioner Data Bank was created by the HCQIA, and licensing boards, hospitals, and other entities are required to report certain information to the Data Bank which could have detrimental impact on the physician concerned. Also, as stated above, hospitals must consult the Data Bank in making decisions regarding granting or expanding medical staff privileges and must follow up with the data bank every two years for physicians with staff privileges.

It is advisable for the physician to consult with his attorney prior to filing the required reports, particularly because the definitions set forth at 45 C.F.R. 60.3, are quite broad. Generally the information that must be reported to the Data Bank includes reporting medical malpractice payments, reporting licensure actions taken by Boards of Medical Examiners, and reporting "adverse actions on clinical privileges."

**Sec. 60.3 Definitions.**

Act means the Health Care Quality Improvement Act of 1986, title IV of Pub. L. 99-660, as amended.

Adversely affecting means reducing, restricting, suspending, revoking, or denying clinical privileges or membership in a health care entity.

Board of Medical Examiners, or Board, means a body or subdivision of such body which is designated by a State for the purpose of licensing, monitoring and disciplining physicians or dentists. This term includes a Board of Osteopathic Examiners or its subdivision, a Board of Dentistry or its subdivision, or an equivalent body as determined by the State. Where the Secretary, pursuant to section 423(c)(2) of the Act, has designated an alternate entity to carry out the reporting activities of Sec. 60.9 due to a Board's failure to comply with Sec. 60.8, the term Board of Medical Examiners or Board refers to this alternate entity.

Clinical privileges means the authorization by a health care entity to a physician, dentist or other health care practitioner for the provision of health care services, including privileges and membership on the medical staff.

Dentist means a doctor of dental surgery, doctor of dental medicine, or the equivalent who is legally authorized to practice dentistry by a State (or who, without authority, holds himself or herself out to be so authorized).

Formal peer review process means the conduct of professional review activities through formally adopted written procedures which provide for adequate notice and an opportunity for a hearing.

Health care entity means: (a) A hospital; (b) An entity that provides health care services, and engages in professional review activity through a formal peer review process for the purpose of furthering quality health care, or a committee of that entity; or (c) A professional society or a committee or agent thereof, including those at the national, State, or local level, of physicians, dentists, or other health care practitioners that engages in professional review activity through a formal peer review process, for the purpose of furthering quality health care. For purposes of paragraph (b) of this definition, an entity includes: a health maintenance organization which is licensed by a State or determined to be qualified as such by the Department of Health and Human Services; and any group or prepaid medical or dental practice which meets the criteria of paragraph (b).

Health care practitioner means an individual other than a physician or dentist, who is licensed or otherwise authorized by a State to provide health care services. Hospital means an entity described in paragraphs (1) and (7) of section 1861(e) of the Social Security Act.

Medical malpractice action or claim means a written complaint or claim demanding payment based on a physician's, dentists or other health care practitioner's provision of or failure to provide health care services, and includes the filing of a cause of action based on the law of tort, brought in any State or Federal Court or other adjudicative body.

Physician means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery by a State (or who, without authority, holds himself or herself out to be so authorized).

Professional review action means an action or recommendation of a health care entity: (a) Taken in the course of professional review activity; (b) Based on the professional competence or professional conduct of an individual physician, dentist or other health care practitioner which affects or could affect adversely the health or welfare of a patient or patients; and (c) Which adversely affects or may adversely affect the clinical privileges or membership in a professional society of the physician, dentist or other health care practitioner. (d) This term excludes actions which are primarily based on: (1) The physician's, dentist's or other health care practitioner's association, or lack of association, with a professional society or association; (2) The physician's, dentist's or other health care practitioner's

fees or the physician's, dentist's or other health care practitioner's advertising or engaging in other competitive acts intended to solicit or retain business; (**3**) The physician's, dentist's or other health care practitioner's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis; (4) A physician's, dentist's or other health care practitioner's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional; or (5) Any other matter that does not relate to the competence or professional conduct of a physician, dentist or other health care practitioner.

Professional review activity means an activity of a health care entity with respect to an individual physician, dentist or other health care practitioner: (a) To determine whether the physician, dentist or other health care practitioner may have clinical privileges with respect to, or membership in, the entity;(b) To determine the scope or conditions of such privileges or membership; or (c) To change or modify such privileges or membership. Secretary means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

State means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

JCAHO Requirements

The requirements of the JCAHO must also be followed.

Medical Staff Bylaws

While there is no Louisiana case on point, there are a number of cases from

other jurisdictions which hold that the medical staff bylaws create a contract between the hospital and its medical staff and may be enforceable as a contract. See, for example, the federal court cases, ***Pariser v. Christian Health Care Systems, Inc.,*** 681 F.Supp. 1381 (E.D. Mo. 1988); ***Robinson v. Magovern***, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd 688 F.2d 824 (3rd Cir. 1982). However, there are courts in several states, including Texas, which have failed to recognize that the medical staff bylaws are contracts. See ***Weary v. Baylor University Hospital***, 360 S.W. 2d 895. Considering the controversy, the hospital bylaws should contain a provision addressing whether the medical staff bylaws constitute a contract between the members of the medical staff and the hospital. Similarly, the medical staff bylaws should contain a statement of the nature of the relationship between the medical staff and the hospital.

The medical staff bylaws should make appropriate reference to the HCQIA and to state legislation, discussed above, which provides for privileges and immunities as well as for due process and fair hearing rights for members of the medical staff. There should be a section in the bylaws covering what law governs the medical staff bylaws and what conflict of laws principles should apply. All professional review committees or bodies should be defined and identified as such in the medical staff bylaws, thus invoking privileges and immunities granted to professional review committee members by HCQIA and LSA-R.S. 3715.3. Additionally, hospital committees such as risk management, should be identified so that these committees are afforded the

privileges set forth in the above laws. Appropriate releases should also be included within the medical staff bylaws themselves, granting immunity to those who make decisions regarding applications or re-applications for privileges.

Additionally, the medical staff bylaws should clearly state the scope of clinical privileges granted to members of the medical staff, under whose authority and with whose approval such privileges are granted (the governing board of the hospital), and the bylaws should clearly set forth the hospital's ability to limit membership of the medical staff in various departments and specialties. Similarly, the medical staff bylaws should clearly denote who may initiate taking any corrective action against a member and should clearly denote that the governing body of the hospital does not give up or waive its own prerogative to institute corrective action of its own. In the case of an adverse action, it is important that the medical staff bylaws clearly have set forth the identify of the individual person or group who may impose suspension, termination of staff privileges, or other such adverse action against a physician.

There should also be clearly set forth and very limited provisions for automatic termination. These provisions must be carefully drafted due to potential derogation of the due process rights of the affected professionals. For the same reason, as stated above, it is important that a hearing procedure be outlined in the medical staff bylaws, clearly stating what the hearing and appeals process is in the case of professional review activity.

Additionally, the medical staff bylaws should clearly articulate the methods by which they may be amended, the medical staff's policy on alternative dispute resolution, its appointment and reappointment procedure and the processes by which applications and re-applications for privileges are reviewed.

The bylaws of the medical staff outline the powers and duties of the body;

however, they are also a protective tool. If the bylaws are properly drafted and strictly followed, they should offer vast protections to those members the medical staff participating in professional review activities.