July 2008 Vol. 18, No. 7

THE NEWSLETTER FOR MEDICAL STAFF LEADERS

medical staff briefing

***Kadlec verdict reversed***

# The effect on exclusive contracts

Hospitals that engage physicians in exclusive contracts or employment agreements need to be aware that such arrangements—if not crafted carefully—can create potentially dangerous loopholes. **Michael Callahan, Esq.,** a senior healthcare attorney at Chicago-based Katten Muchin Rosenman, LLP, says Robert Lee Berry, the anesthesiologist at the center of the Kadlec case (see "Kadlec overview" on p. 3), fell through a pretty big one.

Berry was a member of Covington, LA–based Lakeview Anesthesia Associates, which had an exclusive contract with Lakeview Regional Medical Center. Callahan says physicians under exclusive contracts with hospitals typically waive their fair hearing rights. If an impaired physician leaves the specialty group that has an exclusive contract with a hospital without an investigation or hearing, the hospital might not report that individual to the state health board (depending on state law) or to the National Practitioner Data Bank (NPDB). The Kadlec case highlights the need for hospitals to be careful when arranging exclusive contracts and employment agreements to ensure that impaired physicians don't slip through the cracks.

## The lure of exclusive contracts

Traditionally, independent physicians have constituted the majority of medical staff members, but more and more hospitals are arranging exclusive contracts with physicians. One of the benefits to a hospital if a physician under an exclusive contract proves to be incompetent, disruptive, or impaired is that the physician can be terminated without going through the usual corrective action and hearing procedures, says Callahan. When dealing with a disruptive or impaired independent physician on the medical staff, hospitals generally have three options. They can:

> **"We have to ask, 'How forthcoming are these groups in disclosing issues or problems that aren't otherwise identified by the hospital?' "**
>
> *—Michael Callahan, Esq.*

- **Explain the code of conduct:** Medical staff leaders explain the hospital's policies regarding inappropriate behavior to the disruptive or impaired physician and ask the physician to self-correct or be subject to more-severe disciplinary action.
- **Take corrective action:** The medical staff investigates allegations that a physician is disruptive or impaired, creates committees to review data, and potentially initiates the fair hearing process.
- **Recommend physician wellness programs:** Medical staff leaders recognize that a physician is disruptive or impaired and ask the physician to be evaluated by a mental health professional and to participate in a

> *continued on p. 2*

**IN THIS ISSUE**

## Kadlec

< continued from p. 1

treatment program. If the physician successfully completes the treatment program, he or she is not reported to the NPDB but may have to be reported to the state.

Although these are the fairest options for physicians, they are not the easiest options for the hospital, which has to form committees, shuffle paperwork, and wait patiently for the physician to get back on track. Thus, the ability to terminate a contract physician or request that the physician resign without taking one of these actions is an attractive alternative.

**William K. Cors, MD, MMM, FACPE,** vice president of medical staff services at The Greeley Company, a division of HCPro, Inc., in Marblehead, MA, says exclusive contracts and employment agreements can be attractive to physicians as well. Such agreements can:

- Enable physicians to control the number of hours they work, affording them a greater work-life balance
- Give physicians the security of a guaranteed paycheck at regular intervals
- Protect each specialist's market share by limiting the number of specialists who can practice at the hospital

In addition, exclusive contracts and employment agreements are attractive to physicians because such agreements give them an easy way out should the going get tough, Callahan says. "They can walk. There is no data bank report, and they see if they can land on their feet somewhere else," he explains.

### The downside of exclusive contracts

Despite the benefits for hospitals and physicians, potential problems lie within the contract's or employment agreement's fine print: Physicians under such agreements are not always afforded the same rights as independent physicians. For example, contracted and employed physicians are not always given the right to a fair hearing. "Normally, what you see in these agreements between the hospital and the group—and the group with its individual physicians—is that if the group or a physician is terminated, they automatically waive their right to a fair hearing," says Callahan.

He adds that the hospital is spared from the hearing process, and it doesn't have to worry about a physician suing. "Even if the hospital knows of or suspects quality of care or impairment problems, it oftentimes looks the other way and requests the contracted group to take care of the problem, which could include termination, because the contract allows them to," he says.

But because hospitals can simply terminate disruptive or impaired physicians (or ask the specialty group under contract to terminate the physician) without taking formal corrective or disciplinary action, the hospital almost never reports the physician to the NPDB or to the state board of health, Cors and Callahan say. Without a fair hearing, hospitals are not entitled to the immunity protections under the Health Care Quality Improvement Act.

Also, hospital-based groups may not address or attempt to hide a physician's impairment in an effort to protect the interests of the group, says Callahan. "We have to ask, 'How forthcoming are these groups in disclosing issues or problems that aren't otherwise identified by the hospital?' "



**Medical Staff Briefing** (ISSN 1076-6022 [print]; 1937-7320 [online]) is published monthly by HCPro, Inc., 200 Hoods Lane, Marblehead, MA 01945. Subscription rate: $389/year or $700/two years; back issues are available at $25 each. • Postmaster: Send address changes to **MSB,** P.O. Box 1168, Marblehead, MA 01945. 

he says. In addition to not granting contract or employed physicians the right to a hearing, many hospitals deny these physicians access to a confidential treatment program should they suffer from a mental health or substance abuse problem. If a contract or employed physician is impaired, it would be difficult for a hospital to justify reporting the physician if the:

- Hospital never investigates the problem
- Physician never receives treatment
- Hospital never takes corrective or disciplinary action against the physician

Such a report could also trigger a defamation action or similar challenge if there is no clear documentation that any impairment existed, Callahan adds.

"Maybe he could have gone through a physician health program and received adequate treatment for his Demerol addiction, and the patient never would have been injured. Who knows?" says Cors, referring to the physician at the center of the Kadlec case.

## Closing the loopholes

The following are a few steps hospitals can take to prevent physicians from slipping through these loopholes and protect themselves from becoming the center of litigation associated with hospital-based physicians:

- **Make a hearing optional.** Callahan suggests that hospitals give themselves the option of having a hearing if the hospital believes the physician is a threat to patients based on quality-of-care concerns. If the physician agrees to a hearing, he or she will either be vindicated or reported to the NPDB and the state health board. If a reportable action is imposed, any hospitals he or she applies to in the future will see the red flag. "If the physician decides they don't want a hearing because they know what

> *continued on p. 4*

## Kadlec overview

The Kadlec case has hospitals across the country reviewing their credentialing practices, but they should also be reviewing their exclusive contracts and employment agreements to make sure impaired physicians are treated and, if necessary, reported.

**Jonathan Burroughs, MD, FACPE, FACEP, FAAFP,** senior consultant at The Greeley Company, a division of HCPro, Inc., in Marblehead, MA, provides the following summary of the case.

Three years ago, the Federal District Court for the Eastern District of Louisiana found Lakeview Regional Medical Center and Lakeview Anesthesia Associates guilty for misrepresenting and omitting key information regarding Robert Lee Berry's use of Demerol while on duty as an anesthesiologist. Lakeview Anesthesia Associates terminated Berry's employment in March 2001, and Lakeview Regional Medical Center allowed Berry's membership and privilege to expire six months later without taking formal corrective action.

When Kadlec Medical Center in Richland, WA, requested a credentialing reference through its appointment reference questionnaire, Lakeview Regional Medical Center refused to complete it. The medical center argued that it did not have the resources to fill out such a form due to the volume of requests. Instead, it sent a form letter stating the dates Berry was an active staff member and provided no further comment. Lakeview Anesthesia Associates further stated that there were no quality or health concerns and that Berry left the practice in "good standing."

In November 2002, a patient at Kadlec Medical Center, while undergoing a routine tubal ligation, suffered extensive brain damage due to Berry's impairment.

Kadlec settled with the family for $7.5 million. As a result, Kadlec and its insurance carrier, Western Professional Insurance Company, sued Lakeview Regional Medical Center and Lakeview Anesthesia Associates, resulting in the verdict above.

In May, the verdict was modified by the U.S. District Court for the Eastern Division of Louisiana by upholding the finding against Lakeview Anesthesia Associates but overturning the decision against Lakeview Regional Medical Center, stating that an "affirmative duty to disclose does not exist absent of a fiduciary and confidential relationship."

## Kadlec

< continued from p. 3

the likely outcome is and resigns, that is a resignation in lieu of corrective action, and that is reportable too," says Callahan.

➤ **Make the physician's relationship to the hospital clear to patients.** Callahan also suggests hospitals make it clear to patients that physicians who are under exclusive contract with a specialty group are not hospital employees. "In many jurisdictions, courts have held hospitals responsible for the negligence of these hospital-based groups because, in the patients' eyes, those physicians are hospital employees," he says, adding that courts in Illinois and other states have recommended hospitals make the distinction clear through appropriate signage, name tags, forms, and other means. "If hospitals fail to do that adequately, they may be held liable," he says.

➤ **Afford the same rights to all physicians on the medical staff.** Cors suggests hospitals give all physicians on the medical staff the same rights. "There needs to be clear policies and expectations in place to evaluate the ongoing performance of, and identify problems with, any physician on your medical staff, regardless of his or her employment or contract status. It should be the same for everyone," he says.

Cors adds that exclusive contracts and employment agreements are relatively new, and many hospitals may still be ironing out the wrinkles. "I think we have to take a serious look at how these contracts and employment agreements get written," he says. "You don't necessarily want to open the door to a fair hearing, but if there is a physician on your staff with a known problem, and you pass them on to the next hospital without doing anything about it, is that the right thing to do?" ■

### Inform the MSO of exclusive contracts

As more hospitals consider alternatives to the traditional medical staff model, they need to cover all their bases, or they risk causing more problems than they solve. According to *The Medical Staff Leaders' Practical Guide,* Sixth Edition, published by HCPro, Inc., in Marblehead, MA, it is often assumed that informing the medical staff office (MSO) about exclusive contracts is guaranteed, particularly because it ultimately affects who may apply for privileges in the areas the contracts cover. However, it is not unusual to hear that the MSO is unaware of these contracts. When developing privileging criteria and/or a privileging system, exclusive contract arrangements should always be part of the picture. All potential applicants should be told—preferably up front on the privileging form—that no other individual or group may apply for privileges in an area that is covered by an exclusive contract. This can prevent embarrassment for a practitioner who is told after applying for privileges that he or she is ineligible.

# Katten

**Katten Muchin Rosenman LLP**

www.kattenlaw.com

401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax