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HEALTH LAW NEWS

Lamb McErlane's Inaugural Health Law Newsletter

By: Vasilios J. Kalogredis, Esquire, Health Law Department Chairman

It has been almost a year since I joined Lamb McErlane PC. It has been a seamless transition. I have brought my forty plus years of experience dealing exclusively with physicians, dentists, veterinarians, podiatrists, chiropractors, and other health care professionals, as well as their related entities. Lamb McErlane provided me with the opportunity to formally establish and head the Health Law Department of the Firm. Lamb McErlane already had serviced many health care individuals and entities over the years. I have been able to continue to provide the services that I have for many years. This includes assisting health care providers with practice sales, mergers and joint ventures, "partnership" buy-ins and buyouts, employment agreements, independent contractor agreements, regulatory matters, and other health care law related services.

> ONE OF THE THINGS THAT ATTRACTED ME TO LAMB McERLANE WAS WITH OVER THIRTY VERY ACCOMPLISHED ATTORNEYS WE CAN PROVIDE MANY SERVICES WHICH MAY BE OF VALUE TO MY CLIENTS THAT WERE NOT AVAILABLE "IN-HOUSE" IN THE PAST.

One of the things that attracted me to Lamb McErlane was with over thirty very accomplished attorneys we are able to provide many services which may be of value to my clients that were not available "in-house" in the past. We have people with expertise in estate planning, family law, real estate, criminal, workers compensation, as well as various administrative law and litigation practices. For more details please visit www.lambmcerlane.com.

As most of you who are receiving this Newsletter know, over the years, I have been involved in providing a Health Law Newsletter to my clients and friends. I know many of you have asked about this and have been kind enough to state that you have enjoyed receiving this Newsletter over the past decades.

After having provided a Health Law Newsletter to clients and friends for decades, I am very excited about this inaugural Edition here at Lamb McErlane. I hope you find it informative and of interest.

Spring 2017

In this issue…

Is a Practice Merger or Sale in your Future?

By: Vasilios J. Kalogredis, Esquire

Depending upon the competitive environment, malpractice insurance climate, and reimbursement situation in a particular locale, many smaller practices are having a more difficult time than larger practices. Indeed, with the proper planning and forethought, larger practices are more capable of instituting efficiencies that will bring them economies of scale.

Back in the 1990s, many physicians – particularly those in primary care – sold their practices to hospitals, healthcare systems, practice management companies, and similar organizations. The sellers would then often become employees of the acquirer. After a few years, many of them reverted back to private practices.

A strong option considered by many practitioners today is to become part of a larger, independent medical group through a merger. In that circumstance, the medical practice is controlled and owned by physicians. The physicians, therefore, are not employed by a for-profit entity, large hospital or hospital system, or other non-physician-controlled institutional organization.

Is a Practice Merger or Sale in your Future? *(continued)*

Advantages of a Merger

When properly analyzed, organized, and executed, a merger may strengthen the physicians' negotiating position with hospitals, employers, third-party payers, suppliers and other vendors. If a practice is large enough and important enough in what it offers in a particular community, some payers might be willing to provide better reimbursement, obviously benefiting the practice and physicians from a bottom-line standpoint.

Sound planning, effective marketing, and new efficiencies can indeed make a larger group stronger and, therefore, able to at least maintain if not strengthen its market share. The whole may indeed become larger than the sum of its parts.

A larger practice should also be better equipped to provide a fuller spectrum of services and better continuity of care. For example, in a primary care setting, it is possible that a group might have some physicians working only in the office and others working solely in the hospital providing inpatient services. A merged practice might also be able to provide better service by having physician care available for more hours during the week.

By having more doctors involved, the opportunity is there for increased financial resources. That can translate into a variety of advantages: new purchases of major medical equipment; added ancillary services; more sophisticated information technology; recruitment of higher-level lay management staff, additional physicians, specialists (such as general dermatologists being able to add a dermatopathologist), ancillary personnel, and physician extenders such as physician assistants and nurse practitioners; group purchasing; increased marketing capabilities; and the ability to more readily add space, offices, or hospital locations.

Joining Office-Based MDs with Hospitalists

We have seen situations where primary care physicians merge with hospitalists. Such a move has allowed the primary care physicians to focus on their office practice while providing a broader base of patients for the hospitalists.

Merging Solo Practitioners

We've often seen a situation where two solo practitioners in a community are busier than they want to be by themselves, but not busy enough to each bring on a full-time second physician. This may result in a merger of the two, who then jointly hire a third physician for the newly formed entity. This makes good sense and has worked very well for quite a few practitioners.

For many solo or very small groups, one negative aspect is the lack of protection in the event of death, illness, disability, or retirement. By developing an appropriate group (through merger or otherwise), proper forethought and appropriate negotiated documentation can provide the shareholder physicians with built-in protections.

Obviously, a solo practitioner does not have that luxury. Unfortunately, we have seen too many physicians who are absent for extended periods due to disability and, in some cases, they pass away without a clear plan of practice transitioning in place. In many circumstances, their practices were decimated from greatly reduced volume and economic standpoints. What had been an asset becomes a liability for that physician or his heirs. This has caused some solo physicians to merge with others to provide the cash flow protection while they are absent and the manpower coverage to allow the practice to be "maintained" during any such absence. It also provides a ready-made buyer upon death or retirement.

We recently advised a general internist in her early sixties who had been in solo practice "forever." She was beginning to experience some health issues and was seriously beginning to think about retirement. She was also concerned because she did not have in place a buyer for her practice if something were to happen to her. We advised her of the problems of a "distress sale," which greatly reduces the chances for a reasonable buyout on a "short notice" sale. We talked to a couple of practices in the area regarding the possibility of merger and/or their buying out her practice right now. One option involved a younger solo internist who was looking to expand her patient base and viewed this as an excellent opportunity of doing so, while providing the more senior doctor with the protections and benefits she was seeking. The other option was a two-doctor internal medicine practice whose two principals were in their forties. They viewed this opportunity to bring the strong reputation and large patient base of my client into their practice as a truly positive thing for all three of their futures. These are good illustrations of what drives some of these merger considerations.

Many solo practitioners are hesitant to take any extended vacation time off. The concern is that no revenue will be generated but the bills will continue. This is obviously another benefit of having more than one doctor in a practice with proper planning, this can work out very nicely.

Other Benefits of a "Group"

A "true group" practice has increased opportunities for properly structuring things in light of the fraud and abuse, "Stark," and anti-trust restrictions that are out there. An example of this involved some independently practicing orthopedic surgeons who merged into a larger (approximately 40 physicians) group. The merger provided them with the critical mass with which to develop a physical therapy center, a surgery center, and a high quality MRI facility. Their size and quality allowed them to negotiate with third-party payers to get the services reimbursed as well. This is something they could not have done as independent practices.

With proper planning, having separate practices come together as one provides the potential for the avoidance of duplication of services. For example, personnel, lab services, legal and accounting services, and the like may be consolidated.

A Look at Overhead

It is not always true that the merged entity's overhead as a percentage of gross collections of the practice will be lower than it was in the aggregate among the prior independent practices. Often it takes a period of digestion for this to happen, since many of the practitioners do not want to have to give up – at least at the start – their own staff, facilities, and the like.

An illustration of this involved a group of internists who merged together a few years ago. They ultimately were able to consolidate facilities (and, hence, better utilize available square footage as well as to reduce the number of receptionists by 50%). Those personnel savings allowed the new group to hire an MBA-type administrator who has been further able to continually monitor the overhead of the practice and realize sound cost savings, as well as take a leadership role in the practice's planning and growth.

Issues to Consider

A major deterrent to merging or selling a practice is the physician's concern about having less control and autonomy. Being a part of a larger organization is not appealing to many physicians. This concern should not be discounted. What will make one doctor happy may not work for another doctor.

It is imperative that everyone involved in merger discussions and negotiations be open and upfront. This includes communicating why they are considering such a situation and what they hope to obtain. Mergers should not be rushed into. Indeed, it's much better not to merge at all than to merge quickly and then realize there are major incompatibility problems. This would be comparable to the couple that rushes to get engaged and married without openly and honestly addressing important issues (such as finances, children, and religion) that could cause the union to fall apart.

Included within the openness is a willingness to share the finances of the respective practices with others. It is important that before doing this, all parties involved sign Confidentiality Agreements as well as documents that clarify how the fees and other costs regarding the evaluation process are to be split among the participants. The Confidentiality Agreements help to protect against competitors going on a fishing expedition to obtain data on a practice without being serious about pursuing an amalgamation.

The various physicians involved may have very different reasons for considering such a step. They may be at different stages of their professional careers. They may have quite different goals regarding what they wish to accomplish in their professional lives going forward. These differences may cause serious disagreements when it comes to the type of patients they wish to see, how hard they want to work, how much money they are willing to invest into the practice, and how they believe the practice's net income pie should be divided.

It is indeed true that the larger an organization, the greater the potential for incompatibility and disagreements – if for no other reason than because more people are involved. At the same time, the input and influence of any one physician lessens. This is a barrier which some physicians have a tough time climbing over.

Committing to the Process

To increase the chances for success in a merger, it takes a substantial amount of time, energy, and money as well as a genuine commitment to the process and its end goals. Although getting larger through a merger is not the best solution for every medical practice, it is clearly a viable alternative for many to consider as they face the challenges of how the healthcare environment will impact their future professional lives.

Mr. Kalogredis has been advising physicians, dentists, and other health care professionals and their businesses for over 40 years. He is Chairman of Lamb McErlane PC's Health Law Department. He can be contacted by email at bkalogredis@lambmcerlane.com; by phone, 610-701-4402; or fax, 610-692-6210.

Pennsylvania Wage Payment and Collection Law

By: Mary-Ellen H. Allen, Esquire

Hiring and firing employees requires consideration of multiple legal issues. When an employee is hired or separates from employment, one statute both the employee and employer must consider is the Pennsylvania Wage Payment and Collection Law ("WPCL") *43 P.S. §260.1 et seq.* The WPCL is a state law that acts as a vehicle to recover unpaid wages and also provides for damages in the event an employer withholds compensation from an employee. The protections of the WPCL apply to all employees based in Pennsylvania.

Under the WPCL, the employer has a duty to notify its employees at the time of hiring of the time and place, as well as the rate of payment of wages, fringe benefits and wage supplements. Every employer is required to pay all wages due to an employee on regularly scheduled paydays. Regular paydays must be designated by the employer in advance and cannot be altered without adequate notice.

Salary payments are considered wages for purposes of the WPCL. Other compensation that the employer has promised through an employment agreement also is considered "wages" under the law. More specifically, earned commissions and earned bonus payments, accrued but unused PTO, health

benefits, and other fringe benefits promised within an employment agreement are considered wages. This would include malpractice insurance premiums, including tail coverage, assuming the agreement calls for it. Employers are not required to pay out unused vacation time, however, if the employer has clearly communicated a use it or lose it policy.

The WPCL provides employees with a process to recover wages which they have earned, but have not been paid. If an employer fails to pay wages and if an employee institutes a lawsuit in order to obtain the payments that are undisputedly due and owing, a successful employee will be entitled to the full amount due, plus an additional 25% in liquidated damages (when wages remain unpaid for more than 30 days past the regular payday) as well as attorney's fees. The award of attorney fees to a successful employee is mandatory. Employers, on the other hand, who successfully defend against a WPCL claim are not entitled to recover its attorney's fees.

Under the WPCL, the term "employer" includes "every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of the above-mentioned classes employing any person in this Commonwealth." The inclusion of "agent or officer" within the definition means that the decision-maker within the company who made the determination not to pay wages due may be held personally liable. There is a three year statute of limitations meaning any action must be brought within three years of the non-payment.

Upon separation of employment, wages earned prior to separation become due and payable on the next regular payday on which such wages would otherwise be due and payable. Severance payments agreed upon within a separation agreement also are considered wages under the statute.

This article is meant to educate the reader on the general parameters of the Wage Payment and Collection Law and is not intended to act as legal advice. Lamb McErlane PC can assist you in understanding how this law may apply to your specific circumstances and encourage you to seek legal advice on this topic.

Mary-Ellen is a partner and is co-chair of Lamb McErlane's Employment Law Department and a member of the litigation department. She concentrates her practice in employment law and commercial litigation. mallen@lambmcerlane.com. 610-701-4420.

"The Apology Rule"

By: Scot R. Withers, Esquire

The Benevolent Gesture Medical Professional Liability Act, also known as the apology rule, went into effect in Pennsylvania over three years ago, on December 24, 2013. It applies to communications made in any medical negligence action commenced after that date.

The law encourages health care providers to express empathy by offering condolences to a patient or bereaved family after an unexpected medical outcome, while at the same time providing confidence that such expressions may not be used against a medical provider in a medical malpractice action.

Specifically, the law allows doctors and health care providers to offer a "benevolent gesture" after an unexpected medical outcome. A "benevolent gesture" is defined in the law as "any action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration emanating from humane impulses." The law thus supports the standards of professional conduct by which healthcare providers are bound, since most medical ethics codes generally require a medical provider to disclose all facts which are necessary for a patient's full understanding of their condition and treatment.

The legislation does not, however, relieve any medical providers' liability or take away a patient's or family's right to sue. Medical providers must keep in mind that while statements such as "I'm sorry" will not be admissible in a court proceeding, acknowledgements of negligence or fault by medical providers would not be so insulated.

Scot is a partner in Lamb McErlane's Litigation Department and the Post-Trial and Appellate Advocacy Group. He concentrates his practice in the state and federal appellate courts of Pennsylvania. swithers@lambmcerlane.com. 610-430-8000.

Winding Down a Practice: Managing Outstanding Liabilities

By: Jake D. Becker, Esquire

When dissolving a professional corporation, doing so does not terminate outstanding potential liabilities. Under Pennsylvania law, dissolution of the corporate entity neither eliminates nor impairs any remedy available to or against the corporation or its directors, officers or shareholders for any right or claim existing, or liability incurred, prior to the dissolution if the claim is brought within two (2) years of dissolution and within the applicable statute of limitations for the type of claim. 15 Pa.C.S.A. § 1979(a).

As for potential liability for shareholders, if a claim is brought within the two-year period after dissolution, the shareholder's liability is limited to the lesser of the shareholder's pro rata share of the claim or the amount distributed at dissolution to the shareholder. 15 Pa.C.S.A. § 1979(c).

There are two main considerations regarding retention of business records and related documents when dissolving a corporation, potential lawsuits and the IRS. The IRS recommends that individuals and corporations retain documents for the seven (7) years to insure they have the necessary documents to defend themselves if an audit occurs. With non-tax related documents, the retention time is driven by the applicable statute of limitations.

The following documents fall in the tax category: payroll quarterly reports, W-2s and 1099s, tax returns, 401(k) and corporate retirement information (e.g. employee request for changes, distributions, enrollments), stock certificates and old corporate documents, QuickBook records (these are electronic). These documents should all be retained for seven (7) years as they could be helpful in defending an IRS audit.

Pursuant to 42 U.S.C. § 1320a-7a(c)(1), the statute of limitations or Medicare fraud claims is six (6) years. Thus, Explanation of Benefits (EOB) and meaningful use source documents should be retained for six years.

Although some documents from the preceding paragraphs may be useful in potential litigation, six or seven years is longer than any applicable statute of limitations. The following documents should be held for a minimum of four (4) years: back-up documentation for accounts payable, EOBs, loan payoff documentation, personnel files, physician contracts, merger agreements, old vendor contracts, back-up documentation for accounts payable, and loan payoff documentation.

Under Pennsylvania law, the statute of limitations for breach of contract is four (4) years. 42 Pa.C.S.A. § 5525. Any other type of claim the corporation might be liable for would have a shorter statute of limitations than that of breach of contract. Thus it is recommended that these documents be retained for four years.

Although these policies can be expensive, the cost can pay for itself if needed to defend a claim brought after dissolution.

Jake is an associate in the litigation department. He concentrates his practice in the areas of civil, commercial and municipal litigation, complex insurance coverage and bad faith litigation, as well as health law. jbecker@lambmcerlane.com, 610-701-3278.

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Lamb McErlane represents and counsels lawyers, law firms and judges on a broad range of ethics-related issues.

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Lamb McErlane advises educational institutions in every aspect of their mission, including start-up, financing, employment, personnel, student's rights and discipline, policy development, and construction and public bidding issues.

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Lamb McErlane has been counseling and defending local, county and state government for decades in a wide variety of lawsuits as well as non-litigation matters.

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