LAMB | McERLANE PC

ATTORNEYS AT LAW

Results Driven. Trusted Advisors.

HEALTH LAW NEWS

Doctors Today Facing Many Options

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

DOCTORS ARE FACING more challenges than ever. Costs are increasing. Reimbursement rates are stagnant and/or becoming less certain. This is causing many independent physician and dental practices to critically look at how they are now functioning and whether they should continue on as small, independent, entities or not.

In some situations, staying small and independent, perhaps with a concierge medicine or direct contracting approach, might work. For others, entering into joint relationships with other practices or other health care entities makes sense. Some of the opportunities relate to affiliation with larger regional and even national physician groups. Others may join hospitals of health systems. Others may be aggressively pursued by private equity investment groups.

Rising costs can be attributable to many things. Some of it relates to infrastructure improvements, including going from paper based medical records systems to electronic medical records. The ever increasing costs to pay staff to handle all of the administrative burdens now placed on medical practices is often a big factor as well.

Fall 2017

In this issue…

Reimbursements will not improve any time soon in the big picture. They might actually fall as many are trying to reduce the overall expenditures for healthcare. In addition, all of the new value-based pay initiatives and attempts to move away from fee-for-service, at a minimum, can be confusing for many practitioners as they try to map out their futures. How will things be measured? What infrastructure will be needed? But, being larger can allow for improved reimbursements.

For some, the doctors may decide that they want to continue to be the owners of their practices and not have other "bosses" but, they may feel they need managerial assistance to paddle their way through the rough waters of the healthcare world today. Continuing to practice independently and retain ownership of their particular practices is a good way to go if they are able to find and enter into a good management services agreement with an organization that knows what it is doing and can be a real benefit to the doctor owned entity. Among the things practitioners may be looking for would be efficiency and organizational structure in governance, operations, revenue management, population management, and doctor management.

For some, if they are fortunate enough to have the opportunity to be involved with such an organization, being a part of a large, physician-owned and managed, single specialty or multi-specialty practice is an excellent way to go. There are many who continue to want to have physicians be looked at as more than just "worker bees" and want to be involved in the planning, decision-making and equity ownership of a good practice situation. It is not easy to get that type of thing off the ground without the proper funding and management in place. However, it is being done and has been done.

In my practice, I have seen a marked increase in private equity groups looking into private practice consolidation situations. The ones I have seen the most to date have involved dermatology, urology, ophthalmology, orthopedics, and some of the hospital-based type practices such as radiology, anesthesia, and emergency medicine. Typically, in the private equity deals I see, they pay a really good price for really solid

Doctors Today Facing Many Options *(continued)*

practices. However, part of the transaction often involves the selling doctors being remunerated at a lower compensation level than they had been prior to the sale. This provides the "profits" that the private equity folks need to justify the purchase price. In some of these deals, equity in the private equity entity is also offered to the EBITDA-based selling doctors as part of the transaction. Obviously there is risk in any of these deals. However, since these private equity investors generally look at these purchases as a three to five year window, they usually try to flip things within that timeframe. Some doctors have done very well with that. Again, there are no guarantees and it is not something that is happening across the board in all practice situations. However, for some doctors looking to cash out now, it can work very nicely.

Dermatology is really hot right now. Although it is not right for everyone, some physicians have viewed the full or partial sale of their practices as a positive thing to allow them to spend one hundred percent of their professional time providing clinical patient care. Centralization and consolidation of administrative functions (billing, scheduling, marketing, personnel, purchasing, etc.) can be a real benefit as well if you are dealing with the right people who know what they are doing. In some cases, the sellers of these thriving practices have teamed up with investors to provide more equity to allow for the expansion of the practice footprint in a particular area, with those doctors getting an equity stake in the bigger organization.

Physicians also have and will continue to consider integrating their practices fully (often by sale and post-sale employment) or on another basis with hospital systems/academic medical centers.The Eastern Pennsylvania and South Jersey market has seen a lot of consolidation and change in the hospital marketplace. It is happening elsewhere also.

It was recently announced that Paladin Healthcare will be buying Hahnemann and St. Christopher's. Cooper University Health System recently announced it would be acquiring Lourdes Health System (Camden and Willingboro) and St. Francis Medical Center in Trenton. Jefferson Health has been very aggressive over the past two years and has joined together with Aria Health and Abington Memorial Hospital as well as Kennedy Health System in South Jersey. Penn Medicine is also expanding dramatically. A few years ago it took over Chester County Hospital. It is adding Princeton Health Care System and also had taken over Lancaster General Health. Reading Health System recently acquired five community hospitals in southeastern Pennsylvania from Community Health Systems. They included Brandywine Hospital, Chestnut Hill Hospital, Jennersville Hospital, Phoenixville Hospital, and Pottstown Memorial Medical Center. That is a major expansion for this West Reading-centered hospital system. Crozer-Keystone Health System has joined forces with Prospect Medical Holdings, Inc.

All of these changes in the hospital market in the area may provide opportunities for many physicians and medical groups as they ponder their next steps.

Lamb McErlane has been in the middle of advising many of our doctor clients as they evaluate what is best for their professional futures. The challenges and opportunities are many!

Vasilios "Bill" 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 Supreme Court Decision Results in Sweeping Change to Informed Consent Law

By: Maureen M. McBride, Esquire

THE PENNSYLVANIA SUPREME COURT issued a sweeping new decision that stands to dramatically change the way physicians obtain informed consent in Pennsylvania. In *Shinal v. Toms*, 31 MAP 2016 (June 20, 2017) (Wecht, J.) the Supreme Court held that physicians must *personally deliver* information to their patient and *personally obtain their patient's consent* in order to discharge their duties under Pennsylvania's informed consent law.

Shinal involved claims of lack of informed consent against Steven A. Toms, M.D., Director of the Department of Neurosurgery at Geisinger Medical Center. Plaintiffs, Megan L. Shinal, and her husband, asserted that Dr. Toms failed to obtain Mrs. Shinal's informed consent before performing brain surgery, even though all parties recognized that Megan Shinal signed a consent form before the surgery took place. The trial court instructed the jury that it could consider information provided to Mrs. Shinal by Dr. Toms' "qualified staff" in deciding whether consent was appropriately obtained.

Pennsylvania Supreme Court Decision Results in Sweeping Change to Informed Consent Law *(continued)*

The Supreme Court disagreed. In a 41-page opinion, the Court held that physicians may not rely upon subordinates to disclose information required to obtain informed consent. To allow physicians to delegate in this fashion, the Court held, "would undermine patient autonomy and bodily integrity by depriving the patient of the opportunity to engage in a dialogue with his or her chosen health care provider." Because it found that the informed consent instruction was erroneous, the Court concluded that the defense verdict in favor of Dr. Toms could not stand. The Court therefore remanded the matter for a new trial.

In a strongly-worded dissenting opinion, Justice Max Baer argued that the Majority's decision that physicians may not use their qualified staff members to assist in providing necessary information and obtaining patient informed consent finds no support in case law or in the MCARE Act, 40 P.S. 1303.504(b).

According to Justice Baer, "the [MCARE] act conspicuously does not mandate that only physicians themselves can provide information to patients to inform their consent …[t]he legislature could have, but did not, expressly require that only physicians can provide patients with information regarding informed consent." Justice Baer also expressed practical concerns about the decisions' far-reaching, negative effects, noting that, to avoid legal liability, physicians "now must be involved with every aspect of informing their patients' consent, thus delaying seriously ill patients access to physicians and the critical services they provide."

The practical concerns addressed by Justice Baer have been echoed by physicians and hospitals throughout the Commonwealth of Pennsylvania. The Pennsylvania Medical Society, which had filed an amicus brief in the matter, issued a statement on its website acknowledging that *Shinal* may trigger a dramatic shift in practice. The Medical Society noted that physicians can "seemingly no longer rely upon the aid of their qualified staff in the informed consent process" which may mean that staff can no longer assist with providing information or answers to follow-up questions patients may have.

Until a legislative or other solution to the issues raised by *Shinal* is reached, physicians should be mindful that the duty owed to a patient on whom the physician is to perform a procedure requires the physician, not the physician's intermediary, to obtain the patient's informed consent.

Maureen Murphy McBride is co-chair of Lamb McErlane's Appellate Department and is a member of Litigation Department and the Firm's Executive Committee. She concentrates her practice on appellate law and litigation in state and federal courts. mmcbride@lambmcerlane.com. 610-701-4410.

Oversight Requirements and Regulations for Supervising Physician Assistants

By: Katherine E. LaDow, Esquire

A **PHYSICIAN ASSISTANT (or "PA")** is a healthcare professional who practices medicine as a part of a healthcare team with supervising physicians and other providers. Each state has different rules as to what a PA may or may not be able to do. This article will focus on Pennsylvania and New Jersey. A PA is limited as to what he or she may do without being under the supervision of a licensed physician. Generally, a PA may perform those duties and responsibilities, including the ordering, prescribing, dispensing, and administration of drugs and medical devices, as well as the ordering, prescribing, and executing of diagnostic and therapeutic medical regimens, as directed by the supervising physician. Additionally, a PA may provide any medical service as directed by the supervising physician when the service is within the PA's skills, training and experience, forms a component of the physician's scope of practice, is included in the written agreement (referenced below) and is provided with the amount of supervision in keeping with the accepted standards of medical practice. 49 Pa. Code § 18.151. A PA can provide numerous benefits to a licensed physician and/or medical practice, including but not limited to: easing the physician's work load, increasing patient satisfaction through amplified face-to-face contact, providing cost effective staffing, and more.

It is important for doctors and practices to be familiar with the state laws applicable to the employment and supervision of a PA. In Pennsylvania, a licensed physician must file a registration form with the Board of Medicine along with a written agreement between the physician and the PA. 49 Pa. Code § 18.142. In addition, a detailed recitation of the physician's professional background and specialties, medical education, internship, residency, continuing education, membership in American Boards of medical specialty, hospital

Oversight Requirements and Regulations for Supervising Physician Assistants *(continued)*

or staff privileges are needed in order to obtain permission to supervise a PA. 49 Pa. Code § 18.143. In assuming the role of a supervising physician, the physician shall:

1) monitor the compliance of all parties to the written agreement,
2) advise any party to the written agreement of the failure to conform with the standards contained in the written agreement,
3) arrange for a substitute supervising physician in the event that the current supervising physician is not readily available,
4) review directly with the patient the progress of the patient's care as needed based upon the patient's medical condition and prognosis or as requested by the patient,
5) see each patient at least once while the patient is hospitalized,
6) provide access to the written agreement upon request and provide clarification of orders and prescriptions by the physician assistant relayed to other health care practitioners, and
7) accept full professional and legal responsibility for the performance of the PA and the care and treatment of the patients. 49 Pa. Code § 18.144. A physician may not supervise more than four PAs without obtaining specific Board of Medicine approval.

Additionally, a PA may not provide medical services at a satellite location unless the supervising physician has filed a registration with the Board. 49 Pa. Code § 18.155. The supervising physician must visit the satellite location in which the PA is providing services every ten (10) days.

New Jersey has very similar requirements for physician oversight of PAs. N.J.S.A. 45:9-27.17. A physician must have a written delegation or agreement with the PA that sets forth the PA's duties, practice location, relationship with the supervising physician, etc. However, New Jersey law does not require the supervising physician to be physically present at the hospital or health care facility in which the PA serves patients. New Jersey only requires supervising physicians to be readily accessible to PAs and have continuous communication through telephone, electronic, or other communication channels. N.J.S.A. 45:9-27.18. The supervising physician is required to review patient records/charts within seven (7) days of their inception and review all medication or prescription orders within forty-eight (48) hours. As in Pennsylvania, a physician may not supervise more than four PAs without obtaining specific Board approval.

The use of PAs is a cost effective way to improve a medical practice. It is important to ensure the supervising physician and PA are in compliance with the state requirements. Lamb McErlane PC can assist physicians and medical practices in understanding the laws and regulations that apply to PAs and how they relate to one's present situation.

Katherine ("Katie") E. LaDow is an associate in the litigation department at Lamb McErlane PC. She concentrates her practice in the areas of state civil litigation, family law and health law. kladow@lambmcerlane.com. 610-701-3261.

Five Key Things to Consider Before Executing a Commercial Lease for Medical and Dental Offices

By: Helen H. Mountain, Esquire

BEFORE ENTERING into a commercial lease for medical or dental offices, there are a number of issues to consider.

Five are set forth below:

1. **Personal Guaranties.** Medical or dental practitioners may have formed a business entity such as a limited liability company or professional corporation to shield themselves from personal liability. However, many commercial landlords commonly require personal guaranties from the individual owners of the business entity, which may expose practitioners and their personal assets to liability if the tenant defaults under the Lease. Also, if you do have such an entity, execute the Lease in its name and not as an individual.
2. **Renovations/Improvements.** The commercial lease should set forth whether the landlord will be designing and constructing the tenant improvements at its sole cost, the landlord will be giving the tenant an allowance for tenant improvements or the tenant will be responsible for designing and constructing the tenant improvements at its sole cost. The lease should also expressly state who is the owner of all tenant improvements, and whether that

Five Key Things to Consider Before Executing a Commercial Lease for Medical and Dental Offices *(continued)*

tenant may remove its improvements at the expiration or termination of the lease. If tenant is allowed to remove them, the lease should specify in what condition the space must be left.

3. **Equipment.** The lease should expressly state that all trade fixtures and equipment installed by tenant will remain tenant's property and that tenant may remove its trade fixtures and equipment upon expiration or termination of the lease. Clarity is needed, including defining what is in each category so that the potential arguments as to what may or may not be removed is reduced.
4. **Death or Disability Clause.** A closely-held medical or dental practice needs to consider whether it would be able to continue to operate if a critical owner or employee dies or becomes disabled and cannot work. It should try to negotiate including a provision allowing it to automatically terminate the lease if it so loses its critical person. This is particularly important in a sole owner practice situation. One does not want to burden one's family with the financial obligations of such a lease if it can be avoided.
5. **Assignment.** A medical or dental practice may want to include a provision allowing it to assign the lease to a buyer of the practice without the landlord's prior consent because a requirement that landlord approve the assignment may be a significant hurdle in selling the practice. Sometimes this is not attainable. If not, then seek language that, although such consent will need to be obtained, "it will not be unreasonably withheld." Also, some form leases require that the landlord be notified if/when the tenant's ownership structure changes. This can be burdensome.

A landlord's form lease will generally contain landlord-favorable provisions. Some are more onerous than others. Always read every term in the lease and engage a real estate attorney to explain the lease provisions to you and attempt to negotiate more favorable terms on your behalf.

Helen H. Mountain is a partner at Lamb McErlane PC. She concentrates her practice representing companies in corporate and business law counseling, as well as corporate and financing transactions. She also has extensive skills and experience in real estate and development matters and serves clients in a range of municipal finance projects including serving as bond counsel. hmountain@lambmcerlane.com. 610-701-3269.

Areas of Practice

APPELLATE
The Post-trial and Appellate Practice Group is a team of seasoned appellate lawyers with decades of experience. They are well known to Pennsylvania's Appellate Courts and throughout the United States.

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

BANKING AND FINANCE
Lamb McErlane's Banking and Finance practice group provides results-oriented counsel to clients engaged in various and diverse kinds of finance transactions.

BUSINESS
Whether the client is a closely-held business or a large national corporation Lamb McErlane provides clients with comprehensive, coordinated and efficient advice, specifically tailored to meet each client's specific objectives.

CRIMINAL
The Criminal Defense team at Lamb McErlane is well-prepared to deliver a wide range of services, from initial investigations through to trials and appeals.

EDUCATION
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.

ELECTION LAW
Lamb McErlane provides clients with assistance in all areas of Election Law.

EMPLOYMENT
Lamb McErlane encompasses a full range of services including human resource counseling, employment litigation and representation in labor relations matters.

ENVIRONMENTAL
The Environmental group offers reliable legal advice on all aspects of environmental law and enables clients to take proactive measures to adhere to current and anticipated regulatory issues.

ESTATES, WILLS, AND TRUSTS
Lamb McErlane plans and administers estates and trusts ranging from a simple will to estates worth hundreds of millions of dollars. The Firm counsels individuals, families, closely held businesses, and tax-exempt organizations.

FAMILY LAW / DIVORCE
Lamb McErlane provides clients with sensitive yet aggressive legal representation for a variety of family law proceedings pertaining to divorce, child custody, adoption, financial support, distribution of assets, as well as cases involving complex interstate support enforcement and custody issues.

GOVERNMENT LIABILITY & CIVIL RIGHTS DEFENSE
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.

HEALTH LAW
Lamb McErlane brings an extensive amount of experience representing physicians, dentists, group practices, other health care professionals and health care-related entities.

LITIGATION
Lamb McErlane is widely known for its dynamic, diverse and efficient litigation practice and is uniquely prepared to see a case from trial through appeal.

MUNICIPAL FINANCE
Exclusive among our local peers, Lamb McErlane is uniquely qualified to provide bond counsel services.

MUNICIPAL, LAND USE, & CONDEMNATION LAW
Lamb McErlane serves as solicitor to numerous municipal authorities, municipalities, zoning hearing boards and school districts, as well as serving as counsel to agencies within the executive branch of the Commonwealth of Pennsylvania.

PERSONAL INJURY
Lamb McErlane has a long and successful track record representing clients in diverse matters including wrongful death and survival actions, medical and dental malpractice, automobile accidents, product liability, liquor vendor liability and premises liability in both federal and state courts.

REAL ESTATE
Lamb McErlane represents clients in a broad range of sophisticated and complex commercial and residential real estate transactions and offer a full range of services for buyers, sellers, developers, landlords, tenants and capital markets clients.

WORKERS COMPENSATION
Lamb McErlane has an outstanding reputation working with insurance companies. The Firm makes certain that our clients are fully informed of the workers compensation system process and what benefits are available.

LAMB | McERLANE PC

ATTORNEYS AT LAW

WEST CHESTER
Vasilios J. Kalogredis
24 E. Market Street,
P.O. Box 565
West Chester, PA 19381
Phone 610.430.8000

First Class Presort
U.S. Postage
PAID
Permit #310
19464

Our Attorneys

MARY-ELLEN H. ALLEN
Employment / Litigation

ALEX J. BAUMLER
Municipal, Land Use, and Condemnation Law / Environmental / Litigation

JAKE D. BECKER
Litigation / Health Law / Employment

DANIEL R. BUSH
Criminal / Litigation

WILLIAM R. CHRISTMAN III
Election Law / Municipal, Land Use, and Condemnation Law

KEVIN J. CONRAD
Business / Real Estate / Litigation / Estates, Wills and Trusts

JOHN J. CUNNINGHAM IV
Appellate / Litigation

GUY A. DONATELLI
Employment / Education / Litigation / Municipal, Land Use, and Condemnation Law / Government Liability & Civil Rights Defense

VINCENT T. DONOHUE
Business / Real Estate / Banking and Finance

HELEN J. ESBENSHADE
Municipal, Land Use, and Condemnation Law / Municipal Finance / Employment

JOEL L. FRANK
Litigation / Attorney Discipline / Ethical Matters / Election Law / Personal Injury

STEPHANIE PAHIDES KALOGREDIS
Estates, Wills and Trusts

VASILIOS J. KALOGREDIS
Health Law

ROMAN J. KOROPEY
Business / Real Estate / Litigation / Estates, Wills and Trusts

KATHERINE E. LADOW
Litigation / Family Law / Health Law

WILLIAM H. LAMB
Appellate / Litigation / Attorney Discipline / Ethical Matters / Municipal, Land Use, and Condemnation Law

RACHEL E. LUSK
Litigation / Government Liability & Civil Rights Defense / Health Law / Election Law

CARLA MARINO
Family Law

MAUREEN M. MCBRIDE
Appellate/Litigation/Employment

STACEY WILLITS MCCONNELL
Estates, Wills and Trusts

JAMES E. MCERLANE
Business / Banking and Finance / Real Estate / Municipal Finance / Attorney Discipline / Ethical Matters

HELEN H. MOUNTAIN
Business / Real Estate / Banking and Finance / Municipal Finance

DAWSON RICH MUTH
Criminal / Litigation / Personal Injury

ALAN P. NOVAK
Business / Municipal, Land Use, and Condemnation Law / Real Estate

MAX O'KEEFE
Litigation / Municipal, Land Use, and Condemnation Law / Criminal

THOMAS J. O'NEILL
Municipal Finance / Banking and Finance

LAWRENCE J. PERSICK
Family Law / Litigation / Education

VINCENT M. POMPO
Municipal, Land Use, and Condemnation Law / Environmental

SENATOR JOHN C. RAFFERTY JR.
Business / Education

JAMES C. SARGENT
Appellate / Litigation / Employment / Municipal, Land Use, and Condemnation Law

JOHN J. STANZIONE
Personal Injury / Workers Compensation / Litigation / Employment

MARK P. THOMPSON
Municipal, Land Use, and Condemnation Law / Environmental

SCOT R. WITHERS
Appellate / Litigation / Attorney Discipline / Ethical Matters / Education / Election Law