

# The Legal Angle

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**An Electronic Newsletter from Davis & Davis, P.C. covering Legal Issues  
for Healthcare Providers.**

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## **Hospital Recruitment Practices May Attract More Than Physicians**

Rural hospitals are commonly faced with the task of bringing new physicians to the community. A common tool used to accomplish that task is a recruitment agreement with a new physician. An important legal issue raised by the use of physician recruitment agreements is compliance with the federal Anti-Kickback Law, which generally forbids anyone from giving or receiving remuneration, or kickbacks, in exchange for referrals for services covered by Medicare, Medicaid, or other federal health care programs. The U.S. Department of Health and Human Services (HHS) has enacted several anti-kickback “safe harbors” or exceptions, including a “practitioner recruitment” safe harbor, which can ensure anti-kickback compliance if the numerous and detailed requirements of the safe harbor are met. A few of the “practitioner recruitment” safe harbor requirements are as follows: the agreement be reduced to writing and signed by the parties; the benefits provided by the hospital to the physician be for a period not in excess of three years; the physician cannot be required to make referrals as a condition of receiving payment from the hospital and the amount of payment from the hospital may not be based on the amount or value of referrals from the physician.

Another important legal consideration in physician recruitment agreements is compliance with the Stark Law, which prohibits physicians from referring Medicare and Medicaid patients to an entity for treatment if the referring physician (or immediate family member) has a financial relationship, unless an exception applies. The law also prohibits an entity from billing for Medicare or Medicaid services provided in eleven designated categories as a result of a prohibited referral. The Stark Phase I final rules defined terms, explained major statutory exceptions, and created new exceptions. The Phase II rules, just released on March 26, 2004, will be effective on July 24, 2004 and address, among other things, statutory exceptions pertaining to physician ownership of rural providers and hospitals. The new regulations also interpret a number of statutory exceptions for compensation arrangements involving physicians, including exceptions for employment relationships, personal services arrangements, and physician recruitments.

Recruitment agreements that run afoul of the basic Stark prohibition and do not meet a Stark exception are strictly prohibited. Recruitment agreements that do not meet the safe harbor requirements under the Anti-Kickback Law, however, may still pass legal muster in certain instances, as illustrated by a recent opinion issued by the HHS Office of Inspector General (OIG).

Advisory Opinion 01-04 discussed a recruiting arrangement involving a tax-exempt hospital in a rural, medically underserved area recruiting a medical school resident who was training in otolaryngology, an underrepresented specialty in the hospital's service area. Incentives proposed in the recruitment contract included interest-bearing loans to pay the physician's medical school loans and other educational costs in exchange for a three-year commitment to establish a full-time private specialty practice nearby, maintain staff privileges, accept patients while on-call, and for up to 20 hours per month, assist in the hospital's educational, physician-recruitment and fundraising programs. The hospital proposed to forgive one-third of the debt for each year the physician fulfilled his obligations, with the outstanding balance coming due if the physician defaulted on his obligations. This relationship did not fit into a safe harbor because the hospital was not located in a health professional shortage area (HPSA) and the term of the relationship would exceed the three-year limit imposed in the safe harbor. Regardless, the OIG concluded that, although the proposed arrangement would potentially violate the anti-kickback statute, no sanctions would be imposed because the arrangement posed minimal risk of abuse. The OIG applied the following criteria in making this determination:

- Is there documented objective evidence of a need for the practitioner's services?
- Does the practitioner have an existing stream of referrals within the recruiting entity's service area?
- Are the recruitment benefits narrowly tailored so that the benefits do not exceed that which is reasonably necessary to recruit a practitioner.
- Does the remuneration directly or indirectly benefit other referral sources?

If your organization needs to recruit new doctors, the dilemma you may face is twofold: offer too little in the way of incentives and you may experience a shortage of doctors; offer too much and you can potentially run afoul of the Anti-Kickback or Stark Laws. To avoid attracting both your new recruit *and* an OIG investigation, pay careful attention to the Anti-Kickback Law and safe harbors, and seek legal counsel when needed.

[Alice M. Rutledge](#)

## **Does Your Hospital Have “Hidden” Contracts With Its Medical Staff?**

Hospitals often enter into written contracts with physicians for a variety of reasons, such as contracts to provide emergency room coverage, contracts to staff and run clinics, and contracts to recruit physicians. Hospitals are often under the impression that these express, written contracts are the only enforceable agreements they have with the physicians that are members of the medical staff. Under Texas law, however, a hospital's bylaws can, at times, form a legally binding contract between the hospital and its physicians.

Texas courts have held that the bylaws of a hospital's governing board can constitute a contract between the hospital and physicians on the medical staff. This issue generally arises when the hospital has in some way curtailed a physician's clinical privileges and the physician alleges that the hospital did not follow its bylaws regarding the required due process, or fair hearing, procedures. Importantly, courts have distinguished between the bylaws of the governing board of a hospital and the *medical staff bylaws* of a hospital. Texas courts have held that a hospital's medical staff bylaws do *not* form a contract between the hospital and

its physicians, except to the extent that the medical staff bylaws define or limit the powers of the Hospital governing board.

These legal principles raise two important points for hospitals to help avoid claims for breach of contract. First, language setting out the responsibilities of the medical staff regarding credentialing issues and adverse action taken on physicians' privileges should not be included in the bylaws of the hospital's governing board. Instead, these provisions should be spelled out in the medical staff bylaws. Similarly, the responsibilities of the governing board should be set out in the board's bylaws, not the medical staff bylaws. Second, and most important, when any type of adverse action or restriction is being taken, or might be taken, regarding a physician's privileges at the hospital, always refer to and carefully follow the applicable provisions in both the medical staff and the governing board bylaws.

#### **A. Craig Carter**

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## **The All-New, Tougher** **Texas State Board of Medical Examiners**

In fiscal year 2002, the Texas State Board of Medical Examiners held 172 "Informal Settlement Conferences." In fy2003, they held 477. There is absolutely nothing informal about them. In fy2002, TSBME conducted 8 contested trials at the State Office of Administrative Hearings. In fy2003, they conducted 57. Between 2001 and today, the Board has tripled the number of prosecutors on the agency's staff. No one expects to get into trouble with their licensing board. However, cases that would have been shrugged off before are now getting administrative penalties and reprimands. Situations that previously resulted in a slap on the wrist are now resulting in probated suspensions. Or worse.

#### **Areas of Concern**

Over 40% of complaints, and 60% of Board disciplinary actions, result from standard of care issues. A related topic concerns allegations of non-therapeutic prescribing. In today's litigation and regulatory environment, physicians must be constantly aware of the importance of charting their actions, including all the

“SOAP” criteria. In the case of pain treatment, physicians can protect themselves by fully documenting diagnostic tests and other referrals. In difficult cases, the practitioner will be in a better position if he can show referrals to a pain clinic and/or a “pain management contract” with the patient. Areas of repeated concern to the Board include billing practices, boundary issues between physicians and patients, and impaired practitioners. Many are unaware that it is a violation of the Board rules to include the phrase “board certified” in an advertisement unless the complete name of the ABMS/BOS certification board appears in the advertisement. In the area of medical records requests, among other items, the Board rules dictate: the deadline to respond, the amount that may be charged, and activities for which you may and may not charge. On medical records, if federal regulations (i.e.-HIPAA) are inconsistent with state regulations, whichever law is most “restrictive/stringent” applies.

### **TSBME Procedures**

The Board receives complaints regarding licensees from patients, hospitals, other agencies, and other health professionals. Additionally, the Board has authority to initiate allegations itself, as it does when a physician receives a certain number of malpractice judgments or settlements. The physician is often given the opportunity to supply a response during the preliminary stage of the investigation. The time for a physician to retain competent legal counsel is immediately upon receipt of an inquiry from the Board. Many cases will be forwarded to the enforcement division, which has nurse investigators, a panel of consultant experts, and a dozen attorneys at its disposal. If the case is referred for litigation, the physician will receive an invitation to come to Austin for what is called an Informal Settlement Conference (“ISC”). At the ISC, a panel consisting of one or more members of the Board judges the physician. The case against the physician will be made by a prosecuting attorney from the litigation division. The Board panel will also have its own attorney present to advise it during deliberations. The physician can be grilled on practically any topic by the Board panel and by both Board attorneys. The Board panel will then retire (with its own attorney!) to decide what sanction, if any, to impose on the physician. The physician will then have the choice to accept this offer or appeal to a public administrative trial. Some physicians decide to subject themselves to one of these “informal” conferences with a lawyer who has never practiced before the Board. Amazingly, some go without any legal representation whatsoever.

### **Ramifications**

Anyone who reads the Board newsletter is aware that it has dramatically stepped up both the number and severity of its disciplinary actions. A resulting

issue is federal law requiring state medical boards to report some actions to the National Practitioner Data Bank. Health insurance carriers monitor Board actions and are aggressively acting to remove physicians from their plans. A troubling trend is a carrier reporting to the Data Bank the removal of a physician from the plan for a Board action, such as a fine or an order requiring additional hours of continuing medical education, when those Board orders are not themselves reportable to the Data Bank.

Some who have observed for a long period believe that the intensity of enforcement by the Texas State Board of Medical Examiners can be viewed as a pendulum that shifts back and forth. There certainly is no doubt where that pendulum is currently. Let's all be careful out there.

[Scott Tatum](#)

## **Firm News**

The Firm is pleased to announce that Alice Rutledge has recently joined Davis & Davis as an associate attorney. Ms. Rutledge comes to the Firm with previous healthcare law experience, including defending nursing homes and other healthcare providers in Texas. Ms. Rutledge graduated from South Texas School of Law in 1998.

Brian G. Jackson recently spoke, for the third time in three years, at the Texas State Bar's prestigious Advanced Medical Malpractice Course. This year the Course was held in San Antonio and was attended by hundreds of healthcare lawyers from across the state. Mr. Jackson's speech centered on defending county hospitals and hospital districts in medical malpractice cases and other types of litigation. Mr. Jackson is a shareholder in the Firm and has been with Davis & Davis since 1991.

Craig Carter recently published a legal article in the St. Mary's Law Journal, which is one of the top ten most cited law journals in the country. The article discusses defenses to breach of contract claims brought against governmental entities, such as hospital districts, municipal hospitals, and county hospitals. Mr. Carter is an associate at the Firm and has been with Davis & Davis since 2002.

## **About Our Firm...**

**Davis & Davis, P.C.** is known for exacting standards, attentiveness to clients large and small, cost-efficient and aggressive representation, and a degree of legal sophistication more common in the nation's largest cities.

C. Dean Davis established the Firm in Austin Texas in 1961. The Firm continues to be A.V. rated and attributes its success to well-respected clients and the issues that concern them.

More Information on Davis & Davis can be found on the Internet at:

<http://www.ddpc.com/>

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If you have any questions or comments regarding this newsletter, including suggested topics to be covered, or if you no longer wish to receive this newsletter, please contact [Alex J. Fuller, Jr.](#)