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Physician Separation Issues

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Physician Separation Issues are best dealt with upfront in the documents the physician enters into with the practice, when the physician joins the practice as an employee and/or when the physician becomes an owner of the practice. Obtaining a **Separation Agreement** at the time a physician departs, while ideal, is often not possible, especially if the departure is not amicable; which is generally the case when the practice has terminated the physician's employment. The best way to avoid costly and time consuming litigation at the time of separation is to have carefully drafted documents prepared up front. Think of these documents as a prenuptial agreement of sorts designed to govern post practice relationship issues, rather than post marital relationship issues.

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For example, a well drafted **Employment Agreement** will specify the manner in which the physician's employment may be terminated whether for cause (i.e. a specific set of reasons the practice may terminate the physician's employment immediately); or for no cause (i.e. by the practice or by the physician voluntarily with a required period of notice). This Agreement also will specify the parties' rights and obligations to each other following termination. These rights and/or obligations can vary depending upon whether the physician terminated his employment, whether the practice terminated the physician's employment for cause, or whether the practice terminated the physician's employment without cause.

For example, the practice usually will pay for the physician's malpractice insurance during the physician's employment. However, the physician is usually responsible for the cost of "tail" coverage upon termination of employment, which can be very expensive. A common compromise, however, is for the physician to be responsible for the cost of "tail" coverage if the physician terminates his own employment (i.e. quits), or if the practice terminates the physician's employment for cause (i.e. because the physician committed one of the wrongful acts specified in the Employment Agreement); however, the practice may be obligated to purchase the "tail" coverage if the practice terminates the physician's employment without cause.

The well drafted Employment Agreement also will specify that all patients treated by the physician are the practice's patients, not the physician's patients; and upon termination, the patients' medical records remain the property of the practice. However, the Employment Agreement should grant the physician the right to make copies of such records for any legitimate (non-competitive) purpose including defense of a malpractice action or a third party audit at the physician's expense.

These Employment Agreements also will specify the parties' obligations to each other regarding the **non-disclosure of confidential information, the non-solicitation of the practice's patients and employees, and non-competition, both during employment and following termination.** The non-competition provisions will typically specify a certain geographic service area within (and a time period during which) the physician may not practice or establish an office. These provisions are of particular importance to both the physician and the practice; and if not properly drafted can be rendered unenforceable. A non-competition provision that turns out to be unenforceable will come as a pleasant surprise for the departing physician and as a bitter pill for the practice to swallow. This area of the law is currently in a state of flux, and legal expertise is critical to draft critical to draft contractual language that stands the best chance of meeting the parties' expectations during and following the parties' relationship with each other.

Carefully drafted buy in and entity governing documents also are necessary to deal with the issues pertaining to the practice's and the physician's relationship with each other during the period of ownership, and upon

termination of such ownership. The physician owner's Employment Agreement will not only deal with the issues described above, but also will deal with the payment of any earned, but unpaid compensation payable upon the physician's termination of employment. This earned, but unpaid compensation typically represents the physician's share of the practice's accounts receivables based on a formula set forth in the Employment Agreement. The amount payable can sometimes vary depending upon whether the practice terminated the physician's employment for cause or without cause; or whether the physician terminated his employment.

The **buy-in documents** (i.e. **shareholder buy-sell, operating and/or partnership agreements**) depending on the nature of the entity involved, also will deal with the amount of money, if any, the physician is entitled to be paid for the physician's ownership interest in the practice. These Agreements, if properly drafted, spell out how the value of such ownership interest will be determined, and the manner in which payment for such interest will be made (i.e. immediately, via insurance proceeds in the event of death, and/or via a promissory note over time). Once again, the purchase price and/or the manner of payment can vary depending upon the reason for the separation and/or on whether the physician's separation occurs close to (or coincidently with) another owner’s separation. Simultaneous withdrawal provisions are critical to prevent the practice from having to pay out multiple physicians at the same time, when those physicians leave together or within a relatively short period of time of each other. Otherwise, these “simultaneous” withdrawals can create a financial burden on the practice (or a "run on the bank") that the practice may not be able to satisfy; a disappointing result for both the practice and the departing physician.

Similar documents govern the parties' relationship with each other, during (and upon termination of) the parties' relationship with each other, in connection with other business entities connected with the practice. Typically, the practice owners also own interests in the building within which the practice is located; as well as other joint ventures or entities such as ambulatory surgical or imaging centers. Properly draft shareholder buy-sell, operating and/or partnership agreements governing these ancillary entities, also will define the parties' rights, duties and obligations to each other in the event the physician's relationship with the practice is terminated, and will dictate whether the departing physician also is to be bought out or otherwise removed from these entities.

In summary, not all physician departures are amicable; and in fact, many are not. Further, the practice might not even be dealing with the physician at the time of separation; which is the case in the event of a physician's death. Emotions typically run high at this juncture, and carefully drafted documents will give the parties' the security of knowing what will be expected of them at the time of separation. The time and expense spent up front also will be significantly less than the time and expense associated with the litigation that is almost certain to ensue in the absence of pre-existing definitive agreements that govern the separation.

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