KEAN MILLER
FROM MAIN STREET TO WALL STREET
KEAN MILLER HAWTHORNE D'ARMOND McCOWAN & JARMAN LLP

HEALTH LAW NOTES

What's Inside

PHYSICIAN MUST COMPLY WITH TERMS OF NONCOMPETITION AGREEMENT 1

PROFESSIONAL COURTESY EXCEPTION UNDER STARK III: SIGNIFICANT CHANGES 2

PHYSICIAN MUST COMPLY WITH TERMS OF NONCOMPETITION AGREEMENT

On September 26, 2007, the Louisiana Second Circuit Court of Appeal upheld the judgment of the First Judicial District Court in Caddo Parish in finding that the noncompetition and nonsolicitation clauses in a contract between a urology clinic and a professional medical corporation ("PMC") were enforceable as to the physician who had formed the PMC. *Regional Urology, L.L.C., et al v. David T. Price, M.D. and David T. Price, M.D., A Professional Medical Corporation*, 42-789 (La.App. 2nd Cir. 9/26/07), 966 So.2d 1087, *rehearing denied* 10/18/07.

The clauses at issue were part of an independent contractor agreement between David Price, M.D., A Professional Medical Corporation (PMC) and Regional Urology, L.L.C. (Regional Urology). Dr. Price was not a named party to the contract in his individual capacity. The contract prevented competition and solicitation by David Price, M.D., PMC for a period of 2 years in Caddo and Bossier Parishes. In addition, the contract provided that it would "apply to any physician who is a Member, any corporation which is Member or any physician's L.L.C. which is a Member of Regional Urology, L.L.C."

After Dr. Price left Regional Urology on June 1, 2007, Dr. Price created David Price, M.D., L.L.C. in Claiborne Parish on June 2, 2007. Regional Urology promptly filed suit in Caddo Parish, seeking an injunction preventing Dr. Price from performing urology services in Caddo or Bossier Parishes. The court granted the injunction and Dr. Price appealed.

The Second Circuit Court of Appeal reasoned that although noncompetition agreements are strongly disfavored in Louisiana, they are allowed when the agreement prohibits the person from competing or soliciting within a specified area for a period of up to 2 years. La. R.S. 23:921(C). The Court also disagreed with Dr. Price's position that he was not personally bound by the provisions, which prevented competition by both the physicians and their physician organizations. The Court recognized that a separate identity for physician organizations is appropriate for taxation, business management and liability protection, but saw no reason to maintain the technical distinction of a separate identity for noncompetition agreements. Thus, the Court found that the noncompetition and nonsolicitation clauses in the contract were enforceable as to Dr. Price, in both his individual and incorporated capacities.

While a majority of Judges ruled to enforce the noncompetition agreement, a dissenting Judge aptly pointed out that the majority decision did not take into account the importance of a person's right to choose his own physician. Access to medical care is an important public policy consideration that is threatened by noncompetition agreements involving physicians. The dissent compared the profession of medicine to that of law and identified both as involving consensual, fiduciary, and trusting relationships between the specialists and clients. According to the dissent, noncompetition agreements with physicians have a negative impact on physician-patient relationships, and, thus, should not be enforced.

Valerie A. Judice
Valerie.judice@keanmiller.com
225.382.3425

This newsletter is designed as a general report on legal developments. The published material does not constitute legal advice or rendering of professional services.

PROFESSIONAL COURTESY EXCEPTION UNDER STARK III: SIGNIFICANT CHANGES

On December 4, 2007, Phase III of the Stark Law's regulations became effective. They include some significant substantive changes, one of which is a change to the professional courtesy exception. This change is likely to have a significant effect on many designated health service ("DHS") providers, as those entities are defined by the Stark Law. DHS providers that have a professional courtesy policy would be well-served to review it and take appropriate action in light of the new regulations.

The Stark law is a strict liability, civil statute that prohibits the referral by a physician of Medicare patients for the furnishing of items or services by a DHS entity when the physician (or his immediate family member) has a financial relationship with the DHS entity, unless a Stark exception is met. A financial relationship may be an ownership interest or a compensation arrangement, and any form of remuneration, a term that is broadly defined, creates a financial relationship. The DHS entity may not bill for the items and services provided to the referred patient, and any reimbursement that occurred must be refunded. There are eleven (11) DHS categories under the Stark law. Some of them, by way of example, are physical and occupational therapy; clinical laboratory services; various radiology services; durable medical equipment; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services.

In Phase II of the regulations, a professional courtesy exception was created. It permitted a DHS entity to provide free or discounted health care items or services to physicians and their family members if all of the following conditions were met: (1) the courtesy was offered to all physicians on the entity's *bona fide* medical staff **or** in the entity's local community without regard to the volume or value of referrals or other business generated between the parties; (2) the items and services were of a type routinely provided by the entity; (3) the entity's professional courtesy policy was in writing and approved in advance by the entity's governing body; (4) the courtesy was not offered to any federal health program beneficiary unless there was a good faith showing of financial need; (5) if the courtesy included a full or partial waiver of any coinsurance obligation, the entity was to notify the insurer in writing; and (6) the arrangement did not violate the federal Anti-Kickback Statute. Some DHS entities have used this exception to provide professional courtesy to physicians and their family members in the entity's local community.

Unfortunately, textual changes to the professional courtesy exception and specific, express comments in the discussion of the Phase III regulations have significantly narrowed the exception. CMS has virtually eliminated all DHS entities, other than hospitals, from being able to use the professional courtesy exception. The textual change has limited the exception to **only** those DHS entities that have a *bona fide* medical staff. In other words, only those entities with a *bona fide* medical staff may extend professional courtesy to members of its *bona fide* medical staff **or** to physician members of the DHS entity's local community. The change expressly provides that DHS entities that do not have a *bona fide* medical staff may not rely on the professional courtesy exception. Per the Phase III commentary, CMS apparently considers only hospitals and physician practices/group practices as entities that have a *bona fide* medical staff. (CMS also has eliminated condition (6) listed above, although this change is not the focus of this article.)

This change to the professional courtesy exception is likely to have a material effect on DHS entities other than hospitals. Those entities that have relied on the professional courtesy exception to provide courtesy health care items and services to physicians in the DHS entity's local community may no longer rely on this exception. DHS entities are encouraged to obtain legal advice about what action they should take if they have a professional courtesy policy that provides free or discounted items and/or services to physicians and their immediate family members if the DHS entities receive Medicare patient referrals from the physicians.

Linda G. Rodrigue
linda.rodrigue@keanmiller.com
225.382.3439