IN THE CURRENT ENVIRONMENT

In the current environment in which there is an increasing demand for nephrologists, an increasing sophistication of the practice of medicine, and an increasing concern about reduced reimbursement and higher costs, particularly for professional liability insurance, the need to properly and carefully structure employment arrangements between physicians and their medical practices is essential. Conversely, the days of a handshake agreement or a one- to two-page letter articulating the employment relationship is a thing of the past.

While the best drafted document cannot create or maintain the professional relationship that is essential to a successful working relationship, structuring a well-organized employment agreement provides for a clear understanding among the parties of their responsibilities and expectations. It will also eliminate or significantly reduce any real or potential misunderstanding arising out of the more generalized conversations that the parties usually have leading up to the development of an agreement. It is also important to note that as the employment relationship continues, the parties’ recollections of what they intended usually fade, and so reliance upon a well-drafted, written agreement becomes essential for the parties to recall the original understanding.

While the employer and the employee typically will have differing views on certain provisions of the agreement, it is in the interest of all parties to adequately address the terms of the employment relationship. When addressing an employment relationship, the following key terms and conditions are essential:

- Duties and Responsibilities
- Term and Termination
- Compensation/Benefits
- Restrictive Covenants

DUTIES AND RESPONSIBILITIES

The employment agreement should clearly set forth the duties and responsibilities of an employed physician. First, the nature of the practice of the physician should be discussed. For example, is the practice of the size where the physician will be practicing exclusively in nephrology, or will there be an internal medicine component of the services rendered? The agreement should also describe the expectations of the parties with regard to the geographic scope of the services and the institutions in which the physician will be expected to provide services. In this way, the parties will be very clear as to the amount of travel involved and the services to be rendered. In addition, by addressing the institutions in which the physician will be required to practice, it will be clear as to how the responsibilities of providing professional services to the practice’s patients will be provided, not only by the physician whose contract is an issue, but also by others in the practice.

In many cases, the issue of on-call responsibility is raised in the context of a physician employment agreement. Addressing this issue with specificity is a difficult one for most medical practices given the need for flexibility, which may arise due to illness, vacations, professional meetings, and other activities of a typical practitioner. However, a general statement as to the ex-
pectations for on-call responsibilities tends to provide the parties with a general understanding of how on-call responsibilities will be divided among the physicians in the practice.

It is also very important from an employer’s perspective to ensure that the agreement is clear as to the expectations of the physician’s commitment to the practice. On this issue, the statement that the physician shall devote his full time and attention to the employer is generally provided.

**TERM AND TERMINATION**

Typically an employment agreement will address both the term of the arrangement and the basis for its termination. A typical term in a nephrologist’s contract will run from two to three years and possibly include a provision for automatic renewal on a year-to-year basis thereafter. It is important that the parties understand at the outset what each other’s expectations are with respect to the length of the agreement and the potential for a continuing relationship at the end of the term.

In any event, there is always potential for either party to be dissatisfied with the relationship, and therefore, it is equally important that a mechanism for termination be included. Typically an employment agreement’s termination clause would fall under three categories. The first category would be termination without cause. In these instances, there may be a provision for either party, upon adequate notice, ranging from 30 to 180 days, to end the relationship without the need to show that there was cause for the termination. A termination without cause provision provides flexibility to both parties, and, from the standpoint of the employer, reduces the risk of disruption.

The second category of termination is typically characterized as “for cause,” but occurs due to no fault of either party. This type of provision would be a termination upon the death of a physician or upon disability, and in the case of disability, generally would state time period (e.g., three months) that would pass during which the physician would be incapacitated and unable to perform his or her duties, before the right to terminate would arise.

The final area for termination for cause would be those provisions that typically would specify circumstances under which a party is at fault and a termination would occur. These types of provisions would include, at the least, the following:

- a failure to perform duties and responsibilities
- a revocation or suspension of medical staff privileges or license
- conduct that jeopardizes the health and safety of patients
- conduct that constitutes fraud, dishonesty, unprofessional conduct, or negatively impacts the practice
- a failure to abide by the terms of the agreement (a provision that would be applicable to both the employer and the employee)

Many agreements also include, within the context of the termination provision, what events would occur upon termination of the agreement. These provisions would include payment of remaining compensation, return of all patient-related and other confidential information, and, in some cases, the manner in which the termination of the physician-practice relationship would be communicated to the third parties, including patients.

**COMPENSATION/BENEFITS**

The compensation and benefits section is obviously a very critical component of an employment agreement. It is the method by which the employee physician can be rewarded fairly for the performance of services and as a means by which the employer can ensure that the employer’s expectations in terms of performance—the terms of the agreement—can be managed. A typical physician employment agreement will have two components: a fixed base salary and a bonus component.

The benefits to be provided are an important part of the compensation package. Most practices will offer some or all of the following:

- insurance (medical, dental, professional liability, etc.)
- participation in retirement benefit plans
- paid leave (vacation, illness, continuing medical education)
- business expense reimbursement (cell phone, car expenses)
- professional expenses (licensure, memberships, etc.)

These are all important issues to be discussed by the parties in the context of the agreement in order to ensure a clear understanding of the benefits to accrue under the agreement.

**RESTRICTIVE COVENANTS**

Major concerns for practices are protecting both sensitive information, including trade secrets, and patient relationships. To be of any value to a practice, information not only must be gathered and developed, it also must be shared with employees so they can use it. However, that in itself poses a threat to secrecy, particularly when an employer/employee relationship ends. In such cases, the former employee is often in a position to use secrets (e.g., patient lists) against the practice, especially if he or she was privy to essential business information and plans to open his or her own office or join a rival practice.

To protect themselves and sensitive information, employers have developed ways to restrain the former employee’s use of this information. These include restrictive covenants barring post-employment use or disclosure of selected company information—i.e., non-disclosure agreements, non-competition agreements, or both. Of these two types of restrictions, covenants not to compete are considered most effective in protecting information.

The issue of a non-compete or a restrictive covenant is one of the most volatile issues that physicians and medical practices must negotiate and resolve. As with many businesses (within and outside the health care industry), medical practices believe that their physician employees are an integral part to the success of the medical practice, and, as such, will become privy to certain confidential information about the practice, as well as being exposed to referral sources and patients to which they had no previous experience. Most practices also are of the opinion that a certain level of training and orientation of a new physician to its practice is required, and therefore, there is a benefit that is being conveyed upon the physician employee. Because of these benefits, medical practices frequently require (assuming state law allows) that the physician agree not to compete with the practice within an agreed upon area surrounding the practice, or those institutions (i.e., hospitals and dialysis facilities) to which the practice has introduced the physician and had him or her provide services. More importantly, the general point of contention is the requirement that following termination of the agreement, for a period of time (typically referred to as “tail”), the physician will not engage in activities which are competitive with that of the employer.

Restrictive covenants generally fall into three categories:

- non-solicitation of patients and/or employees
- non-disclosure of confidential information
- non-competition with employer, including post-termination
Courts generally hesitate to enforce restrictive covenants, because they are wary of restraints placed on an employee’s right to compete in the field with which he or she is most familiar. Nonetheless, where restrictive covenants meet the standards imposed by law, courts recognize that they should be enforced [The Instrumentalist Co. v. Band Inc. (1985)].

The basic test applied by courts is “whether the covenant is reasonably necessary to protect the employer from improper or unfair competition.” In determining whether a restrictive covenant is “reasonably necessary,” most states use the analysis from the Restatement (Second) of Contracts, which lists three factors:

- the employer’s need to protect a legitimate business interest
- the hardship or injury to the former employee
- the likely injury to the public

Additionally, the reasonableness of a restrictive covenant is generally assessed in terms of the geographic, temporal, and activity limitations it imposes. Given these considerations, it is apparent that determinations about the reasonableness of restrictive covenants necessarily depends on the facts and circumstances of each case. Not surprisingly, what one court finds reasonable another may not.

**Non-solicitation of patients and/or employees**

Most agreements will contain a provision preventing a terminated physician from soliciting patients and/or employees following their termination in order to continue to provide services. In most states, a restriction on the solicitation of patients/customers will be enforceable. See, for example, Abbott-Intervast Corp. v. Harkabus (1993) and Curry Eye Center Ltd. v. Butler (1999).

However, in some states, such as California, statutory provisions support a strong public policy favoring free competition and prohibit post-employment, non-competition covenants. Therefore, in Kolani v. Glaska (1998), a post-termination, non-solicitation of patients or customers’ covenant was not witheld.

**Non-disclosure of confidential information**

The desire to maintain the confidentiality of information of the medical practice is twofold: (1) to protect the practice’s patients and (2) to protect its business. A practice does have a right to maintain the confidentiality of this information and to ensure that it is not used inappropriately by a former employee. As a result, such a provision has been found to be enforceable by the courts. Thus, the practice’s confidentiality interests will be protected by such a non-solicitation agreement.

**Post-termination/Non-competition**

Typically, a post-termination, non-competition provision will prevent the physician employee from engaging in activities competitive with the practice, for a period of time. This would include specific professional services rendered by the practice, as well as ancillary services it provides, such as medical director services at area dialysis facilities. As noted above, it is important within the context of such a post-termination agreement that the covenant be reasonable as to the prohibited activity, geography, and time.

With respect to the covenant’s activity, it should specify the area of specialization of the practice and relate to the services that the physician employee has provided to the practice. Therefore, to prevent a nephrologist in a nephrology practice from engaging in the practice of medicine generally, may result in a court determining that the employer does not have a protectible interest in the general practice of medicine, and thus, the court may refuse to enforce a covenant.

More particularly, with regard to the reasonableness of the geographic scope and time of the covenant, many courts and state legislatures have addressed these issues.

**Geographic scope**

What constitutes a reasonable geographic limitation will depend on the facts of a case. For example, a geographic restriction of 30 miles around the Chicago area was found to be unreasonable [House of Vision Inc. v. Hiyane (1967)], while a geographic limitation of 250 miles around New York City was found to be reasonable in Wessel Co. Inc. v. Busa (1975). Generally, a larger geographic limitation will more likely be accepted if the time and/or activity limitations are narrower. The majority of cases state that the lack of a geographical restriction does not in itself render a restrictive covenant void, but its absence makes the other restrictions more important.

While generalizations are difficult, a territorial restriction will most likely be upheld if it does not extend beyond the area in which the employee worked for his or her employer. Such restrictions are most vulnerable when they extend beyond the area in which the employer conducts its business.

**Temporal scope**

What constitutes a reasonable temporal limitation should be assessed in light of other relevant facts. Generally, it must not extend beyond the time necessary to protect the employer’s legitimate business interest. For example, a two-year time restriction was found reasonable in McRand Inc. v. Beeken (1985), where evidence demonstrated that it took the company one to three years to establish a major account. While there may be a variation from state to state, typically a restrictive covenant’s reasonableness is measured by its hardship to the employee, its effect on the general public, and its reasonableness as to time and territory. Because each state law and the facts and circumstances will dictate the reasonableness, the employer should take care in assessing each new contract that it enters into in order to determine whether under current circumstances the geographic scope and temporary scope of the covenant are reasonable.

**CONCLUSION**

A vast body of law governs physician employee and employer relationships. As a result, extreme care should be taken in crafting an agreement that sets forth the practice’s and the employee physician’s expectations with regard to their relationship. Experience has shown that a carefully and clearly drafted employment agreement avoids disputes that can later result in disagreements and potential termination of a relationship.