

Legal Briefing for GPs - Autumn 2008

Would your practice benefit from a legal health check?

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SOLICITORS

CLEAR PRACTICAL ADVICE

These are interesting times for the healthcare sector and you will be well aware of the pressures on primary care. However, there are many commercial opportunities in this new environment and getting professional legal advice is essential to ensure those opportunities can be managed as effectively as possible. This briefing outlines some of the legal issues arising from the new opportunities and reminds you of some issues which have been around a while, but which we advise you to review in your practice from time to time.

Contracting and Partnerships

Many practices have recognised the benefits in providing new services commissioned by the Primary Care Trust (PCT).

In addition to the General Medical Services (GMS) or Personal Medical Services (PMS) contracts which permit the provision of core services via certain types of business structure (usually a partnership), the new Alternative Provider Medical Services (APMS) contracts were introduced in 2004. These give Primary Care Trusts the ability to contract for any services from any provider.

The terms of such APMS contracts are not set in stone, like a GMS contract, and they must be carefully considered and negotiated. It is essential to obtain our advice to safeguard your interests. Your contract must be enforceable and binding, particularly as your activity can be subject to changes in government or PCT policy.

In many cases, the size of the service being tendered may require that you team up with another practice to provide the service – perhaps one which you have got to know through a practice-based commissioning group. If so, you should make sure you get the right advice about how to structure such a joint venture. Some legal structures may not be appropriate for use as commercial vehicles as it can be very difficult to remove any value from them.

A number of large private providers are also seeking to get their “foot in the door” by partnering with GP practices and you may have been approached and considered your options. The opportunities provided by such commercial interests are often attractive, but the private providers will seek legally binding obligations from practices, often in the shape of substantial legal agreements. It is important that we vet these on your behalf to safeguard your interests.

If you are seeking to set up new services, you also need to give consideration to how things should be structured. Generally, goodwill may be created in any additional services you set up and this would have a value when you sell on to a commercial party, or to your successor(s) on retirement. However, you are not allowed to sell goodwill in a GMS/PMS practice because that belongs to the state. Making sure that the service is run through a separate company or other vehicle and doesn't get mixed up with partnership property is extremely important, as is getting proper advice on how to go about it.

Property Matters

If you are developing new services, it may be that you require new space to provide them in. Currently, we are seeing a wealth of new surgery developments. The two basic options are to manage the development

yourself which requires time and support or to engage a third party developer, which will require you to enter into significant legal relations with them. In either case you may also require legal support on how to dispose of your old premises.

Data Protection

Given the developments mentioned above, transfer of data between practices is becoming increasingly frequent, and it is essential that you consider your data protection obligations before undertaking new activities. The Information Commissioner, the data protection watchdog takes the doctor patient relationship particularly seriously and will have little sympathy for a practice which is found not to be dealing with its patients' data as strictly as the law requires it to. If you are not registered as data controllers and if you are not aware of your obligations to comply with the data protection principles then you ought to address this as soon as possible.

Partnership Deeds

Most practices will have updated their partnership deeds since the new contract came in, but it is as well to continue to keep it up to date as things change. Getting your agreement wrong or too far out of date can have serious implications. The British Medical Association have a partnership agreement checklist which is available free of charge. Use that to give your agreement its own “health check” – and if it is not up to scratch contact us for advice to get it into proper shape.

Employment

Many employment rights do not apply to partners' relationships with each other. For example, maternity or paternity leave is not obligatory in a partnership agreement and is a matter of choice for the partners. Of course, this is not the case with your practice staff including, importantly, any salaried partners who are employees. Everyone has the right not to be discriminated against on the basis of sex, race, sexual orientation, religion, disability, and now age. Note that discrimination rights do apply between the partners themselves.

Getting it wrong can be costly and time consuming and everyone at the practice should be made aware of their obligations. We can help you to make sure that policies and procedures are in place to reduce the risk of any claims and, should a problem arise, then we can help you handle this too.

Handling Adverse Patient Incidents

“A doctor in the ‘Baby P’ case is being investigated after claims that she failed to spot Baby P’s broken back and ribs during an examination.”

“The family of a documentary film-maker who died of heart failure at the age of 43 won six-figure damages from the three doctors who failed to diagnose and treat his worsening condition.”

These are just two recent news stories that highlight the potential consequences of medical errors. Whatever the circumstances, it is important to take legal advice as early as possible.

Your Will

As a busy practitioner, do not forget to safeguard your own personal affairs and ensure that you have a valid will. It is wise to review your will from time to time, especially if your circumstances change – such as moving house, change of marital status, having children or grandchildren.