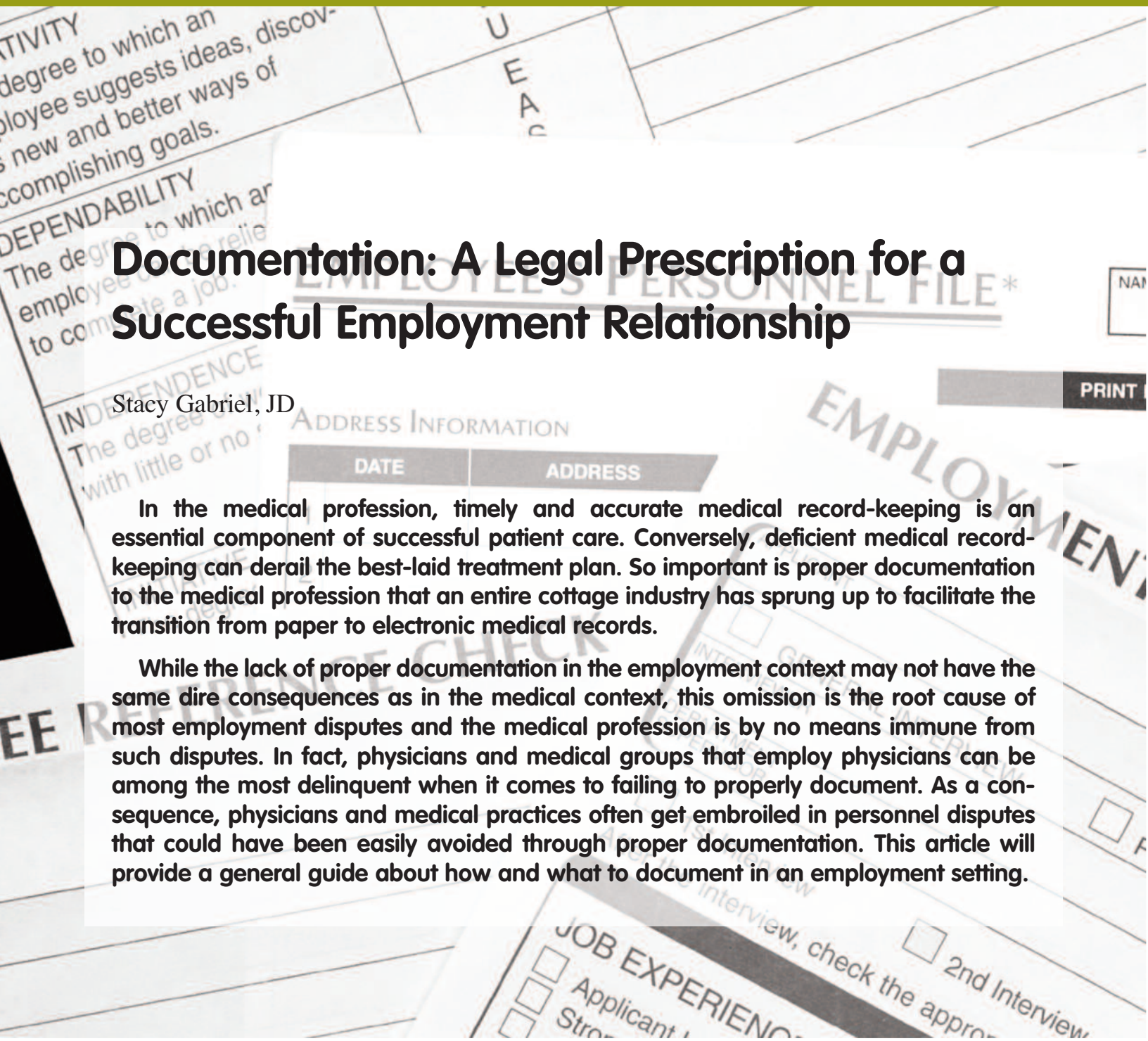

Documentation: A Legal Prescription for a Successful Employment Relationship

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In the medical profession, timely and accurate medical record-keeping is an essential component of successful patient care. Conversely, deficient medical record-keeping can derail the best-laid treatment plan. So important is proper documentation to the medical profession that an entire cottage industry has sprung up to facilitate the transition from paper to electronic medical records.

While the lack of proper documentation in the employment context may not have the same dire consequences as in the medical context, this omission is the root cause of most employment disputes and the medical profession is by no means immune from such disputes. In fact, physicians and medical groups that employ physicians can be among the most delinquent when it comes to failing to properly document. As a consequence, physicians and medical practices often get embroiled in personnel disputes that could have been easily avoided through proper documentation. This article will provide a general guide about how and what to document in an employment setting.

How to Document

This may seem like a simplistic point to cover. After all, physicians are highly educated professionals who are trained on the mechanics of meticulous record keeping. While that may be true as to medical records, many in the medical field are not as conscientious when it comes to documenting personnel matters. Instead, I often hear my physician clients say they verbally addressed a point that is now the subject of a dispute, but didn't feel the need to put it in writing. When faced with this all-too-common scenario, my standard response is, "If it's not documented, it didn't happen!"

When it comes to personnel matters, documentation means, at a minimum:

- Drafting a document that describes the subject or issue being communicated. The document can take the form of a memo, letter, email or any other form of written communication;
- The document should be dated and the author should be identified;
- The document should be written so it makes sense to a third party audience. Avoid excessive acronyms, first names only, or vague references to events without context. Specify the date(s) when the event being described occurred;
- If there is backup documentation to support or provide context to the issues raised in the document (e.g. sales data, financial statements, attendance records), consider attaching the backup support to the document;
- The document should be delivered to the employee in question contemporaneous to the event. Sticking the document in a drawer or a supervisor's file, but not sharing the document with the employee, is tantamount to not documenting at all;
- In a potentially adversarial situation (such as a discipline or termination), it is advisable to have a witness to the delivery of the document; preferably someone who will be viewed as non-threatening and objective to the employee in question;
- In most cases, the employee who is issued the document should acknowledge that he/she received the document by signing it and should be given a copy of the signed document. If the employee refuses to sign, a notation should be made on the document specifying the date it was delivered and that the employee refused to sign;
- If the document is of a critical nature, a space should be provided for the employee to write a rebuttal;
- The document should be filed in a personnel file or some other central location easily accessible to the Human Resources (HR) representative, or management responsible for HR matters;
- The document should be maintained for the duration of the employment relationship, and several years thereafter; and
- The document should not be circulated beyond the employee in question, your counsel, HR or key members of management who have a need to be apprised of the situation.

What should be documented?

There are certain critical aspects of the employment relationship that should be documented. Those include:

The Formation of the Employment Relationship

Perhaps no other aspect of the employment relationship is neglected as much as the terms of hire; perhaps because the parties are in the "honeymoon" period and everyone's guard is down. However, a miscommunication over the terms of employment routinely becomes the subject of later conflict. It is essential that parties to an employment relationship delineate in writing: the job/role the employee is expected to perform; the duration of the employment term (if it is for a fixed period of time); that the relationship is at-will (meaning it can be terminated by either party for any reason and at any time); the wages the employee will earn; work schedule and location; whether the employee is exempt (salaried) or non-exempt (hourly) after that determination is made in compliance with federal wage and hour laws; whether the employee is eligible for bonuses or incentive compensation (see the following section for further discussion on compensation plans); any benefits to which the employee is eligible; and any other unique aspects of the employment relationship (e.g., sign-on bonus or payment of relocation, malpractice, CME and other professional-related expenses). In most instances, these terms can be memorialized in an offer letter that should be signed by the employee. However, when it comes to key hires, the prospective employee may insist the terms be memorialized in an employment agreement that entitles the employee to severance if he or she is terminated without cause. Such agreements require careful scrutiny and should be vetted by an experienced employment law attorney.

Compensation Plans

Whether contained in the offer letter, employment agreement, or a separate document, it is essential that an

employee's compensation terms be clearly specified. Ambiguity regarding how a bonus/incentive payment is earned, when it is to be paid, whether it is subject to any offsets or deductions, and whether it is owed if the employee leaves before the payment is scheduled to be made can become the subject of hotly debated and expensive legal disputes. Care in drafting proper language up front will greatly reduce the risk of problems arising down the road.

Restrictive Covenant Obligations

In Arizona, non-compete agreements as applied to physicians are strongly disfavored. However, even in the physician context, non-competes are not, *per se*, unenforceable. Also, courts are more receptive to enforcing other forms of restrictive covenants, such as non-disclosure/confidentiality obligations and patient or employee non-solicitation/non-interference provisions. If an employer wants to restrict an employee's ability to engage in certain competitive activities post-employment, those restrictions must be documented either in the offer letter, employment agreement or a separate document. Careful consideration needs to be given to the duration and geographic scope of the restrictions, and whether to provide monetary consideration for binding an employee to a covenant beyond an initial job offer or continued employment. Consulting with legal counsel at the drafting phase, or to review and potentially update existing agreements to bring them into line with developments in the law, is highly advisable.

Personnel Policies and Procedures

A prudent employer will communicate its workplace rules and expectations in writing to its staff upon hire, oftentimes in an employee handbook. This gives employees the opportunity to conform their behavior to the employer's expectations and provides the foundation to dispense disciplinary action upon non-compliance. While not every workplace scenario must be reduced to a policy, there are a handful of essential personnel policies that every employer should implement. Those include: anti-harassment and discrimination; FMLA (if the employer has over 50 employees within 75-mile radius); substance abuse testing and prevention; proper use of internal communication systems; attendance; paid time off; dress code; and conflict of interest.

Performance Feedback

Employees should be advised in writing when they are doing a good or bad job. Silence will be interpreted as sign of satisfactory performance. Performance reviews are a vehicle to give an employee an honest assessment of whether they are meeting an employer's expectations. While delivering a negative review can be uncomfortable, it is never a good idea to "sugar coat" a review. That favorable review will become exhibit number one in a later wrongful termination or discrimination claim made by a disgruntled employee. If an employee violates a workplace rule or is not performing up to an employer's expectations, written corrective action should be issued following the "How to Document" rules discussed above.

Separation Agreements

If the employment relationship ends, it may be appropriate to memorialize the terms of departure in a separation agreement. Most frequently, a separation agreement is used when the employer has decided to pay the departing employee severance or provide some other benefit in exchange for releasing any known or unknown claims against the employer. A separation agreement can also be used to reinforce an existing, or introduce a new, restrictive covenant obligation on the departing employee. The separation terms will vary widely based on the unique facts and circumstances of each departure. Counsel should be consulted.

While not every employer-employee interaction needs to be documented (and indeed over- documentation can stifle a healthy working relationship), there are certain personnel events, such as the ones described in this article, that should be reduced to writing to set expectations and avoid conflict. It bears repeating: "If it's not documented, it didn't happen!" RU

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