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TERMINATION OF HOSPITAL MEDICAL STAFF PRIVILEGES FOR ECONOMIC REASONS: AN APPEAL FOR CONSISTENCY

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I. INTRODUCTION

The relationship between physicians and hospitals is undergoing significant change. Historically, a physician maintained a private practice in the community and looked to the local hospital for ancillary support when his or her patients were too ill to remain at home. This community-based physician gained access to the hospital by obtaining medical staff privileges. These privileges allowed the physician to admit patients to the hospital, treat patients while they were there, and use the hospital's staff and equipment. The physician generally enjoyed the use of the privileges throughout his or her active career, losing them only if found incompetent. Today, not all physicians maintain a community-based practice. Instead, many are employed by hospitals to staff various departments. Others enter into exclusive contracts, either individually or as part of a practice group, to provide certain services for hospitals.

Although these "hospital-based" physicians have a different economic relationship with the hospital than traditional community-based physicians, they usually have similar medical staff privileges. Unlike community-based physicians, however, they may not enjoy the use of their privileges throughout their active careers. Instead, these physicians face the actual or constructive termination¹ of their privileges whenever their contractual relationship with the hospital changes.

Physicians who lose or cannot use their privileges for this reason are suing hospitals with increasing frequency. The case law, however, has failed for the most part to articulate the legal principles that govern these controversies.

This Article analyzes those cases arising from the loss of medical staff privileges in private hospitals due to changes in the contractual relationship between the hospital and the physician. It does not in-

* Director, Skelton, Taintor & Abbott; B.A. Univ. of Southern Maine (1982); J.D. Univ. of Maine School of Law (1986).

** Director, Skelton, Taintor & Abbott; B.S. Rensselaer Polytechnic Institute (1973); J.D. Univ. of Maine School of Law (1982).

1. Constructive termination of privileges occurs when the physician is denied access to the hospital's equipment or facilities without having his privileges revoked. See *infra* Part III.

clude cases arising from the loss of privileges for incompetence or other disciplinary reasons or cases decided on antitrust grounds.²

The Article identifies four kinds of economic relationships between hospitals and physicians.³ Using these classifications, the Article compares a recent case from Maine, *Bartley v. Eastern Maine Medical Center*,⁴ and its precedents, with recent conflicting authority from Tennessee, *Lewisburg Community Hospital v. Alfredson*.⁵

The Article posits that the courts have reached opposite results on similar facts for two reasons. One, the parties have neglected to set forth clearly their agreement with respect to privileges. Consequently, courts have been presented with contracts and bylaws that are ambiguous, silent, or contradictory on the issue of privileges. For instance, the contract between the parties may not address the issue of privileges⁶ or may conflict with the hospital bylaws,⁷ which usually have not been updated to reflect the contract between the parties. Two, when faced with ambiguous or conflicting evidence, the courts have overlooked a significant and often controlling fact: the economic relationship between the physician and the hospital. This Article suggests that courts should rely on the economic relationship between the parties as the best extrinsic evidence of the parties' intent with respect to privileges, including the physician's right of access to the hospital's equipment and personnel. The Article concludes with a discussion of how hospitals can modify their contracts and bylaws to minimize the risk of unfavorable decisions in these cases.

2. For a discussion of antitrust issues, see generally Robert J. Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges*, 17 *LOX. U. CHI. L.J.* 331 (1986).

3. See *infra* Part II.

4. 617 A.2d 1020 (Me. 1992).

5. 805 S.W.2d 756 (Tenn. 1991).

6. See, e.g., *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1020.

7. An example of the contract being inconsistent with the bylaws is *Hospital Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559 (Fla. Dist. Ct. App. 1987). In this case, a pathologist's exclusive contract provided for termination of his privileges upon termination of the contract. Subsequent to entering into this contract, the hospital amended its bylaws to provide that termination of a physician's contract would not affect his or her medical staff privileges. *Id.* at 560. Apparently, this provision was added to the bylaws in response to the Joint Commission on Accreditation of Healthcare Organizations (hereinafter JCAHO) Standards which provide that physicians with contractual relationships with the hospital will have their privileges defined through the medical staff bylaws. Standard MS.2.16.6, *Joint Commission on Accreditation of Healthcare Organizations 1994 ACCREDITATION MANUAL FOR HOSPITALS*, at 70 (hereinafter 1994 JCAHO ACCREDITATION MANUAL). The court ruled that the subsequent amendment of the bylaws modified the exclusive contract but only because it expanded rather than restricted the physician's rights. *Hospital Corp. of Lake Worth v. Romaguera*, 511 So. 2d at 560.

II. RELATIONSHIPS BETWEEN PHYSICIANS AND HOSPITALS: PRIVILEGES AND ECONOMICS

Hospitals may be organized as private for-profit corporations, private not-for-profit corporations, or public not-for-profit corporations. Regardless of the nature of corporate organization, a physician generally has no automatic right to practice in either a public hospital or a private hospital.⁸

Medical staff privileges are the method by which physicians gain access to the hospital, and the hospital controls the quality and number of physicians who are permitted to practice within its facility.⁹ The procedure for granting and revoking privileges as well as the applicable standards of conduct for physicians are embodied in the medical staff bylaws.¹⁰

Medical staff privileges, however, are only part of the modern relationship between hospitals and physicians. There is also an economic relationship between the hospital and the physician. This economic relationship may be viewed as a continuum of dependency. At one end is the community-based physician. At the other is the physician-employee of the hospital. In between are non-employee hospital-based physicians.

The most economically independent is the community-based physician. The primary basis of a community-based physician's practice is his or her office. It is there the physician sees and evaluates patients and decides what treatment is necessary. The physician's office practice is separate from the hospital and constitutes his or her own private professional practice. The physician is free to reap the benefits of this practice, including income, but is also responsible for the burdens of the practice, including office management, overhead, and fluctuations in cash flow.

The community-based physician's relationship with the hospital revolves around patient care, particularly the quality of care provided by the physician. "Economic" decisions by the hospital, such as the organization of the hospital, the services it offers, or the equipment it provides, influence the decisions of a physician to which hospital he or she will admit patients but otherwise have only a marginal effect on the community-based physician's practice, unless the physician is located in a one-hospital area.¹¹

8. *E.g.*, *Hayman v. City of Galveston*, 273 U.S. 414, 416-17 (1927); see generally Barbara Cray, *Due Process Considerations in Hospital Staff Privilege Cases*, 7 *HASTINGS CONST. L.Q.* 217 (1979).

9. Sheree Lynn McCall, *A Hospital's Liability for Denying, Suspending and Granting Staff Privileges*, 32 *BAYLOR L. REV.* 175 (1980) (hereinafter McCall).

10. Standards MS.2-MS.3, 1994 *JCAHO ACCREDITATION MANUAL*, *supra* note 7, at 66-72.

11. The primary concern of the community-based physician faced with a suspension, reduction, or revocation of his or her privileges is a full and fair opportunity to explore the charges presented. The peer review and hearing requirements of medical

In contrast to the community-based physician, the hospital-based physician is not truly an independent private practitioner. This physician has exchanged the freedom to reap all the economic advantages of practice for certain benefits provided by the hospital such as office management and stable cash flow.

There are three types of hospital-based physicians: (1) the physician-employee; (2) the "dependent" physician, whose services are billed by the hospital; and (3) the "quasi-independent" physician, who bills his or her services directly but who must have access to hospital equipment and staff in order to render such services.

The physician-employee and the dependent physician have a similar economic relationship with the hospital. In both cases, the hospital has a direct economic interest in the cost/price structure of the physician's practice. The more the hospital has to pay the physician, the less revenue will be available for the hospital. If the hospital decides to change the method of providing services or to terminate a service, these physicians may see their positions diminished or even eliminated.

Quasi-independent physicians, such as radiologists and anesthesiologists, have a less direct economic impact on the hospital's bottom line. They are, however, highly dependent on the hospital for access to equipment and staff and rarely maintain an office practice separate from the hospital. For these physicians, an inability to use the hospital's equipment renders their medical staff privileges meaningless.

Clearly, a hospital's relationship with a physician is much broader than the relationship created by medical staff privileges alone. The distinction between the parties' economic relationship and the relationship created by the granting of privileges is crucial to understanding the physician's right to exercise his privileges by having access to the hospital's equipment and staff.

The hospital must control access by all physicians on the basis of quality of care.¹² The hospital exercises this control through the credentialing and privilege revocation procedures in its medical staff bylaws, which must include a peer review process and notice and

staff bylaws are a result of this concern. Peer review is also required by the Medicare-Medicaid program, 42 C.F.R. §§ 482.1-482.66, and may be required by state statute and regulations, *see, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2503 (West 1990); 6 Code of Maine Regulations, ch. 112, VI, XIX, and is a condition of accreditation by the Joint Commission on Accreditation of Healthcare Organizations, Standards ES.1, GB.1, 1994 JCAHO ACCREDITATION MANUAL, *supra* note 7, at 105-06, 113-16. In addition, medical staff committee members of a professional review body are provided with immunity from antitrust actions if the procedures comply with the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (1988).

12. Standards MS.2-MS.3, 1994 JCAHO ACCREDITATION MANUAL, *supra* note 7, at 66-72.

opportunity for a hearing.¹³ The hospital may also control access to its equipment and staff on the basis of its own economic interests. The hospital exercises this control not through the credentialing process but through its contracts with physicians for certain services.¹⁴

III. CONFLICTING APPROACHES BY COURTS

As the following analysis of the case law demonstrates, hospitals have often neglected to articulate in contracts with physicians or in their bylaws the scope of their discretion to control access for economic reasons. A hospital has a strong economic interest in controlling the access of its employee and dependent physicians and a far weaker economic interest in controlling the access of quasi-independent and independent physicians. The distinction between these economic interests has gone virtually unnoticed by some courts. As a result, some courts have failed to appreciate the difference between the hospital's control of access on the basis of quality of care and the hospital's control of access on the basis of its own economic interests.

Courts have historically taken one of three approaches to cases involving termination of medical staff privileges. If the hospital is a private hospital, the courts usually employ an express contract analysis based on the hospital bylaws.¹⁵ In some jurisdictions, the courts view hospitals as quasi-public entities and employ an approach similar to a review of an administrative proceeding.¹⁶ If the hospital is a public hospital, the courts also analyze the physician's property and, or alternatively, liberty interests in the privileges granted and the

13. Standard MS.2.12, 1994 JCAHO ACCREDITATION MANUAL, *supra* note 7, at 68.

14. See, e.g., John D. Blum, *Evaluation of Medical Staff Using Fiscal Factors: Economic Credentialing*, 26 J. HEALTH & HOSP. L. 65 (Mar. 1993); Kevin E. Grady, *Current Topics in Medical Staff Development and Credentialing*, 26 J. HEALTH & HOSP. L. 193 (July, 1993).

15. Medical staff bylaws constitute an enforceable contract between a hospital and its staff physicians. See, e.g., *Bhatnagar v. Mid-Maine Medical Ctr.*, 510 A.2d 233, 234 (Me. 1986); see also *Pariser v. Christian Health Care Sys., Inc.*, 816 F.2d 1248, 1251 (8th Cir. 1987); *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102, 1106 (E.D. Pa. 1986); *Robinson v. Magovern*, 521 F. Supp. 842, 925 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir. 1982), *cert. denied*, 459 U.S. 971 (1982); *Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n*, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986); *Berberian v. Lancaster Osteopathic Hosp. Ass'n*, 149 A.2d 456, 458 (Pa. 1959); *St. John's Hosp. Medical Staff v. St. John Regional Medical Ctr., Inc.*, 245 N.W.2d 472, 474 (S.D. 1976). See generally Barbara Cray, *Due Process Considerations in Hospital Staff Privileges Cases*, 7 HASTINGS CONST. L.Q. 217, 251-54 (1979) (hereinafter Cray); *McCall*, *supra* note 9, at 183-86.

16. *McCall*, *supra* note 9, at 186-88; Cray, *supra* note 8, at 238-46. California takes this approach. It is similar to the approach taken in the New Jersey case of *Greisman v. Newcomb Hosp.*, 192 A.2d 817 (N.J. 1963), which created a common law right to due process in medical staff decisions. *Contra Hottentot v. Mid-Maine Medical Ctr.*, 549 A.2d 365 (Me. 1988).

corresponding constitutional due process requirements.¹⁷

Most hospital-physician litigation today arises from the termination or expiration of an exclusive contract arrangement,¹⁸ or the termination of an employment relationship.¹⁹ For example, the hospital may enter into a contract or employment relationship with a physician or group of physicians, giving the physician or group the exclusive right to provide certain services at the hospital. The hospital also grants the physician or physicians privileges. The hospital later decides, for economic or other reasons, to terminate the contract or employment, oftentimes giving the exclusive rights to a different entity. The hospital may or may not attempt to terminate the physician's privileges. Once another entity obtains the exclusive right to provide services, the hospital denies the physician access to the hospital's facilities and staff. The physician finds himself both without the contract and without the ability to exercise privileges at the hospital.

Turning to the courts for assistance, the physician seeks to reassert or reinstate his or her medical staff privileges as the method of continuing to use the hospital's facilities and staff and thus preserve the economic value of his relationship with the hospital. Sometimes the physician can point to express provisions of the bylaws providing that her privileges are not contingent on employment contracts. If, however, the contract does not address the issue of privileges or if the bylaws have not been updated to reflect the effect of the additional contractual relationship, hospitals find themselves in the anomalous position of appearing to have violated the bylaws each time they terminate a contractual relationship. In addition, if the hospital allows the physician continued access to its equipment and staff, the hospital may violate the exclusive contract it has now

17. See Carolyn Quinn, Comment, *Procedural Due Process Rights of Physicians Applying for Hospital Staff Privileges*, 17 *LOY. U. CHI. L.J.* 453, 453-65 (1986). Only in cases regarding public hospitals is the term "due process" used in its constitutional sense. In all other cases where government action is not implicated, the use of the term "due process" denotes notice and opportunity to be heard.

18. *E.g.*, *Bilek v. Tallahassee Memorial Regional Medical Ctr.*, No. 91-973 (Cir. Ct. Leon Cty, Fla., Apr. 29, 1991); *Palm Beach-Martin County Medical Ctr. v. Panaro*, 431 So. 2d 559 (Fla. Dist. Ct. App. 1983); *Szczerbaniuk v. Memorial Hosp. for McHenry County*, 536 N.E.2d 138 (Ill. App. 2d 1989); *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d 1020 (Me. 1992); *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d 483 (Md. 1981); *Lewisburg Community Hosp., Inc. v. Alfredson*, 805 S.W.2d 756 (Tenn. 1991). Cases may potentially arise, however, from a variety of economic decisions made by hospitals. For instance, a hospital may decide to close a particular unit, may decide not to replace or update certain equipment, or may decide to discontinue certain procedures.

19. *E.g.*, *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir. 1988); *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d 262 (8th Cir. 1983); *Williams v. Hobbs*, 460 N.E.2d 287 (Ohio App. 1983); *Adler v. Montefiore Hosp. Ass'n of W. Pa.*, 311 A.2d 634 (Pa. 1973).

given to someone else.

The physician who loses the right to use his or her privileges at a private hospital for economic reasons may therefore present two different contracts for interpretation and enforcement: (1) the employment or exclusive contract between the hospital and the physician; and (2) the contract created by the medical staff bylaws.²⁰ Often one or both of these contracts do not reflect accurately the understanding between the physician and the hospital with respect to the exercise of privileges. If the bylaws or any separate contract clearly delineate the scope of the privileges granted, the courts need look no further than these documents and may apply contract principles to the facts. If the contract and bylaws are silent, ambiguous, or contradict each other, the rationale for the courts' decisions has been less understandable. Courts appear to be rewriting rather than enforcing the bargain struck by the parties. The result is a body of law that undermines the contractual bargain of the parties and offers little legal guidance to practitioners in drafting agreements and advising clients.

A. *The Law Court Fails to Recognize the Economic Relationship Between the Physician and the Hospital in Bartley v. Eastern Maine Medical Center*

1. *The Case*

Representative of courts' confusion in this area is a recent decision of the Maine Supreme Judicial Court, sitting as the Law Court, *Bartley v. Eastern Maine Medical Center*.²¹ The plaintiffs in *Bartley* were four emergency physicians employed by a group practice that had an exclusive contract with Eastern Maine Medical Center to provide physician services in the emergency department. When the group practice lost its exclusive contract, the hospital denied the physicians access to its emergency department. The physicians sued, relying on the rights granted them in the medical staff bylaws.²² The case reached the Law Court on the physicians' appeal of a grant of summary judgment to the hospital.

The issue before the court in *Bartley* was whether the hospital

20. One way to sidestep physicians' claims under hospital bylaws is to declare that such bylaws do not create an enforceable contract. That approach was recently taken in *St. Mary's Hosp. v. Radiology Prof. Corp.*, 421 S.E.2d 731, 736 (Ga. App. 1992).

21. 617 A.2d 1020 (Me. 1992). For a criticism of the *Bartley* case, see Chenen, *Bartley v. Eastern Maine Medical Center: Cost Containment Prevails Over Physician's Rights*, 7 MEDICAL STAFF COUNSELOR 67 (1993).

22. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1021. The Law Court began its analysis on a tentative note, indicating that the medical staff bylaws "may constitute an enforceable contract between the medical center and its staff physicians." *Id.* (emphasis added). The court did not, however, pursue this line of reasoning. See *supra* note 20.

had breached the contract created by the medical staff bylaws by denying the physicians access to the hospital's equipment and staff without providing notice and hearing as required by those bylaws. The physicians relied on two separate provisions of the bylaws. The first was an express provision that privileges were not contingent on employment contracts.²³ The second was that privileges could not be reduced without notice and hearing.²⁴ The court found that these two provisions did not prevent the hospital from denying the physicians access to the hospital's equipment and staff and held that the hospital did not breach the contract created by its bylaws.²⁵

The court gave essentially two grounds for its decision. First, it found that the medical staff bylaws were "subject to the authority of the hospital board of trustees,"²⁶ which, being vested with the general management of the affairs of the hospital, had the power to enter into new contracts for the staffing of the emergency department and otherwise manage the hospital's departments.²⁷

Second, the Law Court found that the physicians were not entitled to the notice and hearing provisions of the bylaws because these provisions were applicable only to "major corrective action."²⁸ As defined by the bylaws, corrective action occurs when there is a recommendation that a physician's privileges be reduced.²⁹ The court reasoned, however, that the physicians' privileges were not reduced because a grant of privileges did not include the right to use the privileges.³⁰ Since the physicians' privileges were still intact, the court found the notice and hearing provisions inapposite.³¹

23. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1022 (citing Art. III, § C(5) of the bylaws which provides: "Physicians who are employed or are under contract to the Medical Center shall be appointed through the same procedure used for all members of the medical staff. Continuation of membership shall not be made contingent on continuance of such employment or contract.").

24. Brief for Appellants at 9, *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d 1020 (Me. 1992) (No. PEN-92-211) (citing Art. III, § E(1)(a) of the bylaws). The exclusive contract was apparently silent on the issue of privileges as no mention was made of its terms.

25. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1023.

26. *Id.* at 1022.

27. *Id.*

28. *Id.* at 1023.

29. *Id.* The bylaws provided that "privileges may be reduced or terminated *only* when it is found, after a substantial notice and hearing process, that 'the activity or professional conduct of any medical staff member . . . is . . . lower than the standards or aims of the Medical Center.'" (emphasis in original). Brief for Appellants at 9 (citing Art. III § E(1)(a) of the bylaws).

30. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1023 (citing *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d 262, 268 (8th Cir. 1983); *Holt v. Good Samaritan Hosp. & Health Ctr.*, 590 N.E.2d 1318, 1323 (Ohio App. 1990)).

31. *Id.* at 1023.

2. Analysis

Bartley contains no mention of the terms of the exclusive contract between the physicians and the hospital. This omission leaves the reader to assume that the contract addressed neither termination of privileges nor access to facilities and staff once the contract was terminated. Further, the reader is not given a complete understanding of the terms of the bylaws. This prevents the reader from determining the economic relationship between the parties, although the hospital's brief pointed out that the physicians were hospital-based physicians whose services were billed by the hospital.³² In the end, the reader is left with the impression that the court redefined, without attention to the bylaws or the contract, the concept of medical staff privileges and used this new definition, in combination with its expansive reading of the discretion granted the hospital's board of trustees, to undermine the notice and hearing rights granted under the bylaws.

a. *The Bartley Court's Treatment of the Grant of Privileges v. The Right to Exercise Privileges*

The *Bartley* court defined hospital medical staff privileges to mean only that the physicians were qualified to practice at the hospital not that the physicians had the right to exercise the privileges.³³ The court then said that in order to use the privileges, something else was necessary for hospital-based physicians but not for community-based physicians.³⁴ The court, however, did not identify any language in the bylaws that differentiated between the grant of privileges and the exercise of privileges or between privileges granted to hospital-based physicians as distinguished from other physicians.³⁵ Nor did the court identify anything in the exclusive contract that supported these distinctions.

If the court had explained the distinction between hospital-based

32. Generally, hospitals include in their billings the fee generated by their emergency physicians, which would make these physicians "dependent" physicians as that term is used in this Article. This classification may be inferred from the court's noting that the new contract contained a "compensation arrangement more favorable to the hospital." *Id.* at 1021. The hospital's brief on appeal pointed out that the hospital controlled the physicians' pricing and billing practices under which the physicians received 80.8% of the professional charges billed through the emergency department. Brief for Appellee at 4, 7, *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d 1020 (Me. 1992) (No. PEN-92-211). In addition, the hospital eventually adopted an employment relationship with its emergency room physicians, thus increasing the hospital's economic control.

33. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d at 1023.

34. *Id.* The court referred to these physicians as "general practitioners."

35. See *infra* text accompanying notes 40, 54 & 65 for a discussion of cases in which the courts analyzed the specific provisions of the bylaws to support their decision regarding the meaning of privileges.

physicians and general practitioners in terms of their different economic relationships with the hospital, the court's basis for the distinction between the grant of privileges and the right to use privileges would be more understandable. In addition, these differences could have been used to analyze properly the cases relied on by the court.

i. The Basis for the Distinction Between the Grant and the Exercise of Privileges

Two seminal cases, cited by the *Bartley* court, have recognized the distinction between the grant and the exercise of hospital privileges. The first case is *Engelstad v. Virginia Municipal Hospital*,³⁶ decided by the United States Court of Appeals for the Eighth Circuit in 1983. Dr. Engelstad was an employee-at-will of the hospital.³⁷ When he lost his job as the director of the pathology department, Dr. Engelstad sued for damages alleging that the hospital had failed to provide him appropriate notice and hearing.³⁸ The court held that Dr. Engelstad was not entitled to a hearing under the bylaws.³⁹ The court noted that the bylaws granted physicians the right to treat patients. This right, however, did not apply to Dr. Engelstad who, as a pathologist, did not treat patients. In the case of pathologists, the bylaws provided that their privileges were defined by the medical staff executive committee.⁴⁰ The court also found that Dr. Engelstad's staff privileges had not been reduced since he had been offered an arrangement with the hospital to continue as a staff pathologist.⁴¹

In other words, the physician in *Engelstad* was an employee whose privileges under the bylaws were expressly distinguished from the privileges granted to independent physicians. The contract created by the bylaws accurately reflected the parties' economic relationship. Moreover, the physician had declined other employment that would have allowed him to exercise his privileges. The court's decision was consistent with the parties' contract and their economic relationship. These facts show that *Engelstad* is clearly distinguishable from *Bartley*.

The other case relied on by the *Bartley* court was *Holt v. Good*

36. 718 F.2d 262 (8th Cir. 1983).

37. *Id.* at 266.

38. Because the hospital was a public hospital, Dr. Engelstad relied on both 42 U.S.C. § 1983 and the hospital bylaws for his right to a hearing. *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d at 263. On the civil rights claim, the court found that because Dr. Engelstad did not have a property interest in his employment with the hospital, he had no protected interest sufficient to require a due process hearing. *Id.* at 266.

39. *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d at 269.

40. *Id.* at 264.

41. *Id.* at 269.

Samaritan Hospital and Health Center.⁴² Dr. Holt held an exclusive contract with the hospital that entitled him to provide emergency room services. Dr. Holt lost the exclusive contract and subsequently refused to work for the physicians who were awarded the new contract.⁴³ And, like the physician in *Engelstad*, Dr. Holt had the opportunity to exercise his privileges but chose not to.⁴⁴

Dr. Holt was, in all likelihood, a dependent hospital-based physician whose services were billed by the hospital.⁴⁵ *Holt* does not appear to be factually distinguishable from *Bartley*.

Both *Engelstad* and *Holt* conclude that having privileges at a hospital does not confer the unimpeded right to exercise those privileges.⁴⁶ Lost in the analysis is the distinguishing fact that the right to exercise privileges is related to the economic relationship between the parties and in these cases was limited to dependent hospital-based physicians. This distinction was controlling in the seminal case to address this issue, *Adler v. Montefiore Hospital Association of Western Pennsylvania*.⁴⁷

ii. Origin of the Distinction Between the Grant and the Exercise of Privileges

The genesis for the distinction between the grant of privileges and the ability to exercise privileges is found in *Adler v. Montefiore Hospital Association of Western Pennsylvania*. Dr. Adler was a cardiologist who lost his part-time employment as the Director of the Cardiology Lab at Montefiore Hospital. In addition to this part-time

42. 590 N.E.2d 1318 (Ohio Ct. App. 1990).

43. *Id.* at 1319.

44. *Id.* The court in *Holt* relied primarily on four cases, rather than an analysis of the economic relationship between the parties, to support its holding. These cases are all distinguishable. First, the court relied on *Lewin v. St. Joseph Hosp.*, 146 Cal. Rptr. 892 (Ct. App. 1978), a case that employed the administrative law analysis to hospital privileging issues. See *supra* note 16 and accompanying text. Second, the court relied on *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d 483 (Md. Ct. Spec. App. 1981). In that case, however, the physician was granted privileges for a limited period of time only; the physician's privileges and contract expressly terminated at the same time. See *infra* note 69. The court also relied on *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir. 1988). *Collins*, however, is an antitrust case. The contractual issues are dismissed in one paragraph at the end of a lengthy decision. See *infra* text accompanying notes 55-60. *Collins* is factually similar to *Holt*, though, in that both physicians were dependent, hospital-based physicians whose services were billed by the hospital. Finally, the *Holt* court relied on *Williams v. Hobbs*, 460 N.E.2d 287 (Ohio Ct. App. 1983). *Williams* is similar to *Holt* in that the issue turned on the employment status of the physician. *Williams*, unlike *Holt*, involved a quasi-independent physician.

45. Unlike the court in *Engelstad*, the court in *Holt* did not address the economic relationship between the parties.

46. *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d at 262, 267-69; *Holt v. Good Samaritan Hosp. and Health Ctr.*, 590 N.E.2d at 1319-21.

47. 311 A.2d 634 (Pa. 1973), *cert. denied*, 414 U.S. 1131 (1974).

employment, Dr. Adler maintained a private practice with two offices, and had privileges at three other hospitals.⁴⁸ As the part-time Director of the Cardiology Lab, Dr. Adler was the only physician authorized to perform certain procedures using hospital equipment.⁴⁹

The *Adler* court found that Dr. Adler's right to perform these procedures using the hospital's equipment arose solely from his employment as Director of the Laboratory and not from any grant of staff privileges.⁵⁰ Since Dr. Adler continued to enjoy the right and authority to admit and treat patients at the hospital, and since his rights to perform certain procedures using hospital equipment did not arise from his privileges, the court held that Dr. Adler had no right to a hearing under the hospital bylaws.⁵¹ In other words, the contractual basis for Dr. Adler's access to equipment was not the contract formed by the bylaws but the contract formed through his employment. Since the hospital had not breached his employment contract, he had no right to relief for the loss of access to the hospital's equipment.

In short, Dr. Adler was a dual-status physician. He gained the right to use certain equipment because he was employed by the hospital. The loss of access to such equipment, however, did not have a major effect on Dr. Adler's practice because in all other respects he was an independent community-based physician who maintained a private practice and continued to admit and treat patients at the hospital.

iii. *Distortion of the Distinction Between the Grant and the Exercise of Privileges*

Over time the reasoning of *Adler* has become divorced from its unique underlying facts. One reason arises from a failure to understand or articulate the underlying economic relationship between the hospital and the physician. An example of this failure is *Williams v. Hobbs*.⁵²

In *Williams*, the complaining physician was fired from the group practice that held the exclusive contract to provide radiology services to the hospital. The court found that the physician's privileges were indeed terminated. The court found that no breach of the hospital's medical staff bylaws arose from the termination.⁵³ Instead, the court held that employment by the exclusive contractor was one of the qualifications for hospital staff privileges in the department of

48. *Id.* at 636.

49. *Id.* at 637.

50. *Id.* at 644-45.

51. *Id.* at 638.

52. 460 N.E.2d 287 (Ohio Ct. App. 1983).

53. *Id.* at 292.

radiology. Once the physician lost this employment relationship, he was no longer qualified to hold privileges. Although the court quoted liberally from the bylaws, it identified no bylaw provision that imposed employment as a condition of privileges.⁵⁴

The court in *Williams* did not discuss the economic relationship between the radiologist and the hospital. Radiologists are quasi-independent physicians who bill for their own services. Unlike Dr. Adler who gained access to the hospital's equipment through his employment relationship with the hospital, radiologists maintain a certain independence from the hospital. The hospital's economic interest in restricting a radiologist's access to its equipment and staff is no greater than its economic interest in restricting a surgeon's access to its operating room. Also, unlike Dr. Adler, without access to a hospital's equipment and staff, radiologists are not able to exercise any of their privileges. The court in *Williams* erred by adopting an analysis based on the employment relationship between the physician and the hospital. Since the radiologist in *Williams* was economically independent from the hospital, the analysis found in *Adler* is inapposite.

The analysis in *Adler* is appropriate when the physician is not independent from the hospital, and his economic relationship with the hospital does determine the nature of his privileges. For instance, in *Collins v. Associated Pathologists, Ltd.*,⁵⁵ a dependent hospital-based pathologist, whose services were billed by the hospital, lost his employment with the holder of the exclusive provider of pathology services to the hospital.⁵⁶ Like the court in *Williams*, the *Collins* court held that the physician's ability to exercise his privileges was dependent on his employment relationship with the exclusive contract holder.⁵⁷ The court in *Collins* stated that it could not compel the hospital to enter into a contractual relationship with Dr. Collins in derogation of its exclusive contract with another provider.⁵⁸

One must look to the trial court opinion in *Collins*, however, to understand the basis for this conclusion. When Dr. Collins lost his job with the exclusive provider, he asked the hospital to employ him. The hospital refused.⁵⁹ The trial court found that the grant of privileges did not entitle a physician to an employment contract with the hospital.⁶⁰ In other words, in order to exercise pathology

54. *Id.* at 291-92.

55. 844 F.2d 473 (7th Cir. 1988).

56. *Id.* at 475.

57. *Id.* at 481.

58. *Id.*

59. *Collins v. Associated Pathologists, Ltd.*, 676 F. Supp. 1388, 1392-93 (C.D. Ill. 1987).

60. *Id.* at 1410.

privileges it was necessary to have a second contract or financial arrangement with the hospital. This was necessary because the hospital, not the physician, billed the patient for pathology services. Without the second contract, there was no way for the pathologist to be paid. Therefore, the reasoning of *Collins* should be applied only to employee and dependent hospital-based physicians.

The courts in *Collins* and *Williams* struggle to articulate the relationship between the grant of privileges and the exercise of privileges but fail to recognize that the relationship is governed by the economic relationship between the physician and the hospital. In the ideal case, the relationship between the exercise of privileges and any contract between the parties is defined in both the hospital's bylaws and the physician's separate contract with the hospital. Sometimes the court can infer this relationship from the facts presented. In most cases, however, this relationship is ignored. Unless the economic relationship between the parties is recognized as the distinguishing fact in these cases, any physician whose practice relies heavily on continued access to the hospital's equipment and personnel may be without legal recourse when his or her privileges are constructively terminated by a denial of that access.

b. Recognition of the Economic Relationship Between the Physician and the Hospital

The economic relationship between the hospital and the physician and its effect on the physician's privileges was recognized in *Lewisburg Community Hospital v. Alfredson*.⁶¹ Dr. Alfredson was the sole provider of radiological services to the hospital under two consecutive contracts. In his second contract with the hospital, he negotiated the deletion of a clause providing that his clinical privileges would terminate if the contract was canceled without cause.⁶² Eventually, Alfredson's contract was canceled. Technically, he retained his privileges, but the hospital denied him access to its equipment and staff.⁶³ Alfredson then sued the hospital.⁶⁴

The hospital made the same arguments raised in *Bartley*. The Tennessee court, however, found them unpersuasive for three reasons. First, the court painstakingly reviewed the medical staff bylaws but found no support in their language for differentiating between the grant of privileges and the ability to exercise them.⁶⁵ The court concluded that the grant of privileges must embody the ability

61. 805 S.W.2d 756 (Tenn. 1991).

62. *Id.* at 757.

63. *Id.* at 757-58.

64. *Id.* at 758. Alfredson sued on multiple grounds, all of which were disposed of by summary judgment. The only issue addressed on appeal was the breach of contract issue.

65. *Id.* at 760.

to exercise those privileges, based on the absence in the bylaws of any provisions to the contrary.

Second, the court implicitly recognized the economic relationship between the hospital and the physician when it explained that, "[w]ith hospital-based specialties such as radiology, the inability to use the hospital facilities and staff would have rendered the clinical privileges meaningless."⁶⁶ As a radiologist, Alfredson was most likely a quasi-independent physician who billed separately for his own services. In order to do so, however, he required access to the hospital's equipment and staff.

Finally, the court concluded, based on the unique facts of the case, that the hospital had made an economic decision when it agreed to delete the automatic termination of privileges provision from the physician's contract.⁶⁷ The hospital was bound by that decision just as it was bound by its decision to enter into a different exclusive contract. The court's finding—that the hospital had reduced the physician's privileges by denying him access to equipment and staff⁶⁸—is an implicit recognition of the underlying economic relationship.

The court in *Alfredson* used the economic relationship between the physician and the hospital to bolster its conclusion regarding the effect of changes in the physician's contractual relationship with the hospital. This evidence is not needed, however, to construe exclusive contracts that either expressly address the issue of privileges⁶⁹ or are

66. *Id.* at 761. Of course, this reasoning should be applied only to quasi-independent physicians. The hospital privileges of dependent physicians are similarly meaningless without access to the hospital's equipment and staff. These latter physicians cannot, however, gain access without some additional contract with the hospital.

67. *Id.* at 759.

68. *Id.* at 762.

69. For instance, in *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d 483 (Md. Ct. Spec. App. 1981), a professional association of radiologists, headed by Dr. David A. O'Brien, enjoyed an exclusive contract entitling them to provide radiology coverage to the hospital. *Id.* at 485. The contract and the radiologists' medical staff privileges expired on the same date. *Id.* When the contract was not renewed, but instead was awarded to another radiology group, O'Brien's group sued the hospital on a variety of theories, including breach of contract, equitable estoppel, interference with business relationship, violation of federal and state antitrust laws, fraud, and violation of due process. *Id.* at 484. The trial court ordered the hospital to provide the O'Brien group a "due process" hearing under the hospital's bylaws. The appellate court reversed, finding that the O'Brien group's rights under both their contract and the medical staff bylaws expired by agreement. *Id.* at 490. It is unclear from the *O'Brien* decision whether the bylaws permitted termination of privileges for economic reasons such as the expiration of an exclusive contract. At least one court has found that privileges cannot be terminated for economic reasons if the bylaws do not expressly authorize the termination. *Bilek v. Tallahassee Memorial Regional Medical Ctr.*, (No. 91-973), slip op. at 4 (Cir. Ct. Leon Cty, Fla., Apr. 29, 1991).

The *O'Brien* court also did not discuss whether the contract itself indicated that privileges would be terminated upon its expiration. The absence of this discussion

consistent with the scope of privileges granted under the bylaws.⁷⁰

The confusion seen in these cases arises from a failure to explore the economic relationship between the parties as the most reliable extrinsic evidence of the parties' intent regarding privileges if the documents themselves are unclear. If the limitations on privileges are clear from the plain language of the contract, this extrinsic evidence is not needed and should not be used to override the actual bargain of the parties.⁷¹ If the contractual language is ambiguous or

arises from the peculiar facts of the case. Usually, medical staff privileges are granted for a specific term such as one or two years. For the O'Brien group, however, the hospital departed from its usual practice by limiting the appointments to approximately five months. *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d at 486. The hospital notified each radiologist in the O'Brien group of the expiration date of his or her appointment, and each radiologist signed an acceptance letter. As the court noted, "none objected to or appealed from the appointment of limited duration." *Id.* Thus, the court went no further than holding the parties to the terms of their bargain. Although the physicians were presumably quasi-independent physicians, they had failed to protect the value of their economic relationship with the hospital by agreeing to a limitation on their ability to exercise their privileges.

70. *E.g.*, *Szczerbaniuk v. Memorial Hosp. for McHenry County*, 536 N.E.2d 138 (Ill. App. Ct. 1989). As in *O'Brien*, the hospital in *Szczerbaniuk* contracted with a radiologist to provide exclusive services to the hospital. The contract provided that it could be canceled by either party for cause by giving 180 days' written notice. The contract also expressly provided that membership on the medical staff was terminated if the contract was terminated. *Id.* at 139.

The physician alleged that termination of his privileges was a breach of the medical staff bylaws because the medical staff bylaws formed part of his contract with the hospital. *Id.* at 140. The trial court dismissed this part of the complaint, and the appellate court affirmed the dismissal. *Id.* at 140, 143. The appellate court found the exclusive contract between the parties controlling for four reasons. First, the exclusive contract expressly addressed the issue of medical staff privileges. Second, the exclusive contract did not expressly incorporate the medical staff bylaws. Third, the contract recited that it was the entire agreement of the parties. Finally, the contract contained procedures for resolving problems that were inconsistent with the bylaws. *Id.* at 143. In other words, the exclusive contract both defined and governed the economic relationship between the parties and overrode inconsistent provisions in the bylaws. Again, the quasi-independent physician had failed to protect the economic value of his contract with the hospital.

71. An example of the misuse of such extrinsic evidence is *Palm Beach-Martin County Medical Ctr. v. Panaro*, 431 So. 2d 1023 (Fla. Dist. Ct. App. 1983), which involved an exclusive contract for anesthesiology services. There the medical staff bylaws provided that loss of a contractual relationship with the hospital was cause for termination of privileges. The bylaws also required a recommendation of "cause" from the medical staff in order to revoke privileges. Dr. Panaro's privileges were revoked when his contract was terminated; however, no recommendation was made by the medical staff. *Id.* at 1024.

The court correctly found that the hospital had not complied with the procedural requirements of the bylaws in revoking Dr. Panaro's privileges. The court, however, also found a substantive breach of the bylaws by holding that the bylaws were internally inconsistent. *Id.*

The court compared the above-referenced portion of the bylaws that required cause for termination with the provision of the bylaws that required the grounds for termination not be arbitrary, unreasonable, or capricious. Although the bylaws defined loss

contradictory, this evidence gives the courts a reasoned basis upon which to determine the scope of a physician's right of access to a hospital's equipment and staff.

c. The Hospital's Discretion to Make Economic Decisions

The second aspect of the *Bartley* opinion that deserves clarification is the breadth of the hospital's power to impose ad hoc restrictions on privileges. The *Bartley* court found the hospital had broad discretion to enter into contracts and otherwise manage the hospital. This recognition of the hospital's broad discretion is in accord with the conclusion reached by most courts in evaluating a hospital's ability to enter into exclusive contracts.⁷²

The *Bartley* decision is unclear with respect to how the hospital's discretion to manage its business relates to the specific rights and obligations granted under the medical staff bylaws. The confusion may be due in part to an inadequate discussion of the significance of the bylaw provision that provided, "continuation of staff membership shall not be made contingent on the continuance of an employment contract."⁷³ The *Bartley* decision can be read to mean that the hospital's general managerial discretion to enter into contracts provides the unilaterally legal entitlement to overrule express provisions of the medical staff bylaws.

The discretion to enter into a contract, however, is not synony-

of a contract as "cause" for termination of privileges, the court found that the termination was not "arbitrary, unreasonable, or capricious" and therefore no cause existed for the termination. *Id.*

Anesthesiologists are generally quasi-independent physicians who bill separately for their services. The court apparently recognized this economic relationship between the parties. It noted that the loss of privileges would prevent Dr. Panaro from practicing anesthesiology and that he would have no means of support. *Id.*

Despite the parties' economic relationship, the bylaws permitted termination of privileges on the grounds asserted. Consequently, the court had no need to look beyond the documents in order to decide the case. What should have been a simple case of breach by the hospital caused by procedural error was complicated needlessly by an analysis that disregards the basic terms of the parties' contract. Had the bylaws not defined cause as including the loss of a contract, the court's exploration of this issue may have been justified. But the parties had provided for this eventuality in their contract; it was not for the court to disregard it.

72. See, e.g., *Tomlinson v. Humana, Inc.*, 495 So. 2d 630 (Ala. 1986); *Dattilo v. Tucson Gen. Hosp.*, 533 P.2d 700 (Ariz. Ct. App. 1975); *Redding v. St. Francis Medical Ctr.*, 255 Cal. Rptr. 806 (Cal. Ct. App. 1989); *Radiology Professional Corp. v. Trinidad Area Health Ass'n*, 577 P.2d 748 (Colo. 1978); *Rush v. City of St. Petersburg*, 205 So. 2d 11 (Fla. Dist. Ct. App. 1967); *Brandon v. Combs*, 666 S.W.2d 755 (Ky. Ct. App. 1983); *Hottentot v. Mid-Maine Medical Ctr.*, 549 A.2d 365 (Me. 1988); *Benell v. City of Virginia*, 104 N.W.2d 633 (Minn. 1960); *Holt v. Good Samaritan Hosp. and Health Ctr.*, 590 N.E.2d 1318 (Ohio Ct. App. 1990); *Williams v. Hobbs*, 460 N.E.2d 287 (Ohio Ct. App. 1983); *Adler v. Montefiore Hosp. Ass'n of W. Pa.*, 311 A.2d 634 (Pa. 1973).

73. *Bartley v. Eastern Maine Medical Ctr.*, 617 A.2d 1020, 1022 (citing *Medical Staff Bylaws Art. III, § C(5)*).

mous with the unilateral right to terminate a contract. The hospital has the same discretion to terminate a contract according to its terms as it has to decide to breach a contract. It is the terms of the contract that dictate the conditions under which it may be terminated without a breach occurring. Thus, a hospital cannot ignore or override the express requirements of a contract without breaching it.

Although the Law Court correctly analyzed the breadth of a hospital's discretion in making economic decisions, it failed to apply this analysis to the facts presented. An explanation of the economic relationship between the hospital and the physicians was needed. Otherwise, there is no reasoned basis why the hospital, in the exercise of its discretion, could not restrict or reduce for economic reasons any physician's access to the hospital without providing notice or opportunity to be heard as required by the bylaws. For quasi-independent and independent physicians, restriction or reduction of the physician's access to the hospital is a constructive reduction of the physician's privileges.

If the physicians in *Bartley* were indeed dependent hospital-based physicians, then it was the hospital's economic interest in the profitability of the services it rendered that would provide the limiting principle for the exercise of this discretion. Absent a showing of a similar economic interest in the profitability to the hospital of services rendered by other physicians, the hospital's discretion may not provide unfettered power to deny other physicians access to the hospital's equipment and staff for economic rather than competency reasons.

The *Bartley* decision also fails to analyze the significance of the provision in the medical staff bylaws that prohibits making the continuation of privileges contingent on continued employment with the hospital.⁷⁴ Although the physicians relied on this provision to support their right to relief, the court does not explain why it is inapplicable to the facts presented.

The court could have explained that the physicians in *Bartley* were not employed by or under contract with the hospital, but by an entity that had contracted with the hospital. Apparently their employment with this entity continued. Consequently their employment status had no relevance to their privileges, nor did they have a direct contractual relationship with the hospital.⁷⁵ Therefore, even without the distinction drawn by the court between the grant of

74. See *id.* at 1022.

75. Compare with *supra* text accompanying notes 36-46. In both *Engelstad* and *Holt*, the physicians refused to continue their employment relationship, *Engelstad* with the hospital and *Holt* with the exclusive contract holder. Similarly, in *Collins* (see *supra* text accompanying notes 55-60), the physician had been fired from his employment with the exclusive contract holder. None of these cases, however, cites a bylaws provision similar to the provision in *Bartley*.

privileges and the exercise of privileges, the cited provision of the medical staff bylaws can be construed to offer no protection to the physicians in *Bartley*. Consequently, the board of trustees did not override this express provision of the medical staff in refusing the physicians' access to its equipment and staff. Conversely, with the distinction drawn by the court between the grant and the exercise of privileges, this portion of the holding seems unnecessary.

Bartley should not be read for the proposition that hospitals have unfettered discretion to override the express provisions of medical staff bylaws without risking an action for breach of contract. A careful review of the factual underpinning of the court's holding shows that this discretion is not unlimited. Like any other business entity, a hospital may choose to breach any of its contractual obligations. But if it does, it may be liable for damages for breach of contract.

IV. A CALL FOR CLARITY

The confusion surrounding these disputes and the resulting litigation could be reduced, if not eliminated, by amending hospital and medical staff bylaws and by ensuring that all hospital-based physicians have written contracts with clearly defined termination clauses. Hospitals should take the lead in redesigning their bylaws to eliminate many of the problems outlined above. The mutual understandings and expectations of the hospital and the physicians should be set forth in plain language. The issue is one of reasonable notice to the physician of the scope and limitations of his or her rights to use the hospital's facilities, equipment, and staff.

Medical staff bylaws should define the rights of the physician who has been granted privileges. For instance, they should state to what extent the privileges include the right to use hospital equipment, facilities, and staff necessary to provide services. If these rights vary, the bylaws should distinguish between physicians who are community-based and physicians who are hospital employees or who are otherwise hospital-based.

In addition, the hospital and medical staff bylaws should expressly reserve to the hospital governing board the right to terminate any health service or change any method of delivering such services, including exclusive contracting and directly employing physicians. The bylaws should make clear that this authority supercedes the grant of privileges to a physician.

Next, bylaws should distinguish between termination of privileges for competence or disciplinary reasons and termination of privileges for business or economic reasons, by providing notice, an opportunity to be heard, and peer review for the former, but only a reasona-

ble period of advance notice for the latter.⁷⁶

The bylaws should also provide that employment and other contracts with physicians that provide for the withdrawal of privileges will supersede applicable bylaw provisions regarding privileges. Hospitals should bargain for contracts that provide for automatic withdrawal of privileges when the contract expires or is terminated. Where the contract is with a physician group or corporation, the contractor should be required to maintain employment agreements with its physician employees that provide for automatic resignation from the hospital upon termination of employment.

Finally, substantive changes in the bylaws should coincide or become effective with the physicians' biannual renewal of privileges.⁷⁷ Since privileges are granted for a specific term, arguably they are not subject to unilateral modification during that term. Making such changes effective upon renewal gives physicians fair notice and is consistent with contract law principles.

The case law in this area need not be confusing. What is needed is clear draftsmanship, updated bylaws, and litigants who provide the courts with an understanding of the economic relationships between the hospitals and physicians.

76. This is analogous to the distinction between an employer discharging an employee for cause and an employer eliminating a position through layoff or reduction in force. Generally even where employment contracts or collective bargaining agreements provide "due process" protection, it does not apply to a layoff.

77. Medical staff privileges are typically granted for two-year periods. In fact, JCAHO standards require that privileges be granted for not more than two years. MS.2.13, JCAHO, 1994 JCAHO ACCREDITATION MANUAL, *supra* note 7, at 68.