

# Joint Operating Agreement between University Medical Center Inc., (UMC) and KentuckyOne Health Inc. (KentuckyOne). November 13, 2012

## **Draft Note:**

The following 10 pages represent transcribed comments as I read through this joint operating agreement for the first time. I spoke into a voice recognition program. You will forgive me if this document is not highly polished or contains typographical errors. I prepared it to assist me in understanding the structure of the new partnership, and to allow me to compare this iteration with the merger documents prepared in 2011. I reserve the right to add to it and otherwise polish it up. For each section of the document I reference, I offer commentary either in brackets, or in the following "Comment." I hope that will allow you to follow my thinking or identify my concern.

I present this document on the KHPI website in the event it may help others to navigate some of these confusing issues, and in the hopes that someone else will help me understand them better. Please also read my companion analysis of the Academic Affiliation Agreement and the Lease that are part of the contract package. Let me know what you think too.

Peter Hasselbacher

## **Overall Impression:**

I must admit I was disappointed. Critical information that is part of this Affiliation Agreement was not provided. Indeed, it was that information that I think the parties knew would be most controversial. For example, I think the issues related to Catholic prohibitions of some standard elements of healthcare were buried as deeply as possible. Despite that, it is obvious that the structure of this entire partnership revolves around the Ethical and Religious Directives Of the Catholic Church.

As a lifelong academic physician who might even be characterized as a dinosaur, I was dismayed at the degree of academic, clinical, and financial independence the University was willing to trade away for money for its commercial research enterprise. In fact it looks like the University gave it all away! I am personally embarrassed for it. I was especially disappointed to see the University cede traditional academic prerogatives such as staff privileges to a non-academic entity. I fear what I will find in the Academic Affiliation Agreement. It was not for church state issues alone that I opposed the earlier iteration of this agreement.

I was concerned to see that some of the promised transfers of money to the University and the medical center were only potential amounts that depended on the financial health of the controlling organizations. Is also apparent that the University of Louisville will continue to be able to transfer additional clinical dollars away from its hospital activities to support nonclinical activities.

The stage is set to allow former University Hospital to remain a second class and segregated facility for those who have no other choice. There was nary a word about how the quality of medical care will be improved, nor how it will be made more affordable, but I foresee hospital wars the likes of which Louisville has never seen.

Peter Hasselbacher

### **Line by Line Analysis:**

It should be noted that the file containing this document is labeled "short joint operating agreement". It appears to be lacking all associated documents and exhibits. It is therefore incomplete and does not allow a meaningful understanding of the agreement.

This agreement is between the two parties. UMC is contracting with KentuckyOne Health to manage and operate University Hospital, the Cancer Center, and "all other ancillary businesses and operations" which are unnamed. [What are these other ancillary businesses?]

The term "Integrated Operations" is given to the combination of the former University of Louisville Hospital and KentuckyOne Health with the exception of unspecified services that KentuckyOne Health is prohibited from doing. These unspecified services are here euphemistically called "Maintained Procedures" but were previously termed the "Prohibited Services." These include procedures and services bared by the Ethical and Religious Guidelines of the Catholic Church.

A concurrent agreement exists between the two parties and the Commonwealth of Kentucky known as the Academic Affiliation Agreement.

Page 1, Item 1.1

UMC agrees to accept KentuckyOne as its sole and exclusive agent to manage its business with the exception of certain specified and unspecified services such as:

- neonatal intensive care unit
- obstetrical services
- male or female reproductive services (including contraceptive services)
- other services that cannot not be performed by KentuckyOne
- the above are termed, "Maintained Procedures"

UMC will continue to operate and retain full control over these Maintained Procedures within distinct units of the Business including surgical operating suites and such other equipment and facilities necessary to provide the Maintained Procedures. [Exhibit A which defines these Maintained Procedures is not included.] Profit or loss from these activities is not incorporated into profit or loss of the Integrated Operation. Annually, the

parties will determine if additional distinct units will be operated by UMC and exhibit A will be amended as necessary.

Comment. This is one of the most sensitive parts of the agreement and yet no details are given. This is how the agreement seeks to avoid giving the appearance that the Catholic Organization, KentuckyOne, is performing or doing substantial business with a partner that does procedures such as sterilization, contraception, therapeutic abortion, or withdrawal of fluids and nutrition at the end of life. Such medical procedures are part of the current standard of medical care, but forbidden by Catholic religious dogma. This list is not fixed. It is assumed that additional prohibited procedures or items will be added yearly implying close supervision by KentuckyOne. I would think the Church would have some concerns about this structure. Clearly they are doing business with an entity that can bring them into scandal for intervals up to one year. One may fairly ask what criteria KentuckyOne would use to determine that a service be added to the list of Maintained Procedures. The obvious answer is: the Ethical and Religious Directives of the Catholic Church, and the opinions of the Conference of Bishops. The Maintained Procedure list is a moving target. It is quite clear that this whole Operating Agreement is organized to comply with the Ethical and Religious Directives of the Catholic Church, even though the ERDs are not mentioned specifically.

Page 2, Item 1.4

The degree of control given to KentuckyOne to operate the “Integrated Operation” (the combination of University Hospital and KentuckyOne Health without the segregated Maintained Procedures ) is absolute. KentuckyOne Health is "authorized to take any action of any kind and to do anything and everything it deems necessary in connection with the operation of the Integrated Operation" with the exception of a few expressly designated limitations. Revenues from the former University Hospital will be used to cover shared costs of other KentuckyOne facilities. [Many subsequent Items in the operating agreement confirm that KentuckyOne's degree of control over the Integrated Operation is absolute and total.]

KentuckyOne Health will solely determine both capital and operations budgets, capital expenditures, and the incurrence of debt.

Comment: It's not the University's nor the city's hospital anymore. The hospital will once again have a new out-of-town boss. University of Louisville Hospital will now serve KentuckyOne's interests.

Page 3, Item D.

KentuckyOne Health will decide what services are provided or not at any particular KentuckyOne facility.

Comment: the University of Louisville has given away its clinical destiny.

Page 3, Item E.

KentuckyOne Health will decide which of any and all contracts, including managed care contracts, the Operation will participate in.

Comment: University Hospital will become a pawn or a player in the internecine hospital and insurance company wars that are now inevitable. A major impetus for this Agreement is to reach a size that can't be ignored and thus have clout with medical payers. University Hospital and faculty practices are not part of those wars.

Page 3, Item F.

KentuckyOne will manage all personnel matters of employees in the Integrated Operation.

Comment. This guarantees that the former University Hospital employees will be shifted to a program that follows religious directives.

Page 3, Item G.

KentuckyOne will determine credentialing criteria and grant hospital staff privileges at the Integrated Operations for services other than the Maintained Procedures.

Comment. I can't believe I'm reading this. The University of Louisville is giving up control of credentialing for its faculty hospital staff privileges! I consider this a major abandonment of its academic responsibility. I trust that the Parties have consulted the appropriate accrediting agencies for which academic control of faculty is still important.

Page 3, Item J.

KentuckyOne may reallocate income among any of its statewide hospitals!

Comment. In other words, KentuckyOne can rob any Peter to pay any Paul at the total discretion of KentuckyOne. This is what happens when you give up control of your own destiny.

Page 3, Item K.

KentuckyOne will determine and provide all ancillary services including pharmacy. [This is relevant to the issue of how contraceptive and reproductive health services will be administered in the hospital and its clinics. Will there be a separate pharmacy for forbidden items?]

Pages 3 and 4, Item 1.5.

The UMC board structure will remain in place and have autonomy over selection of its own members. Its powers are considerably limited to the following:

- A. May approve changes to the charity care policy that have already been approved and recommended by KentuckyOne.
- B. Approve changes in the clinical or operational policies and procedures for the Maintained Procedures (formerly the prohibited procedures.)
- C. May approve taking on its own long-term debt if the Moody rating is poor.

D. May approve changes to the hospital lease, state licenses, but only after approval and recommendation by KentuckyOne. ["Powers" like these make UMC little more than a puppet.]

E. UMC may approve the change of name selected by KentuckyOne.

G. UMC's principal responsibility is to govern all aspects of the former prohibited procedures (now called Maintained Procedures) including changes to medical staff bylaws that impact these procedures.

Comment. Except for providing a religious firewall for the church, UMC is now little more than a puppet necessary only to interact with certain state leases and licenses that are specific to the hospital itself. As it happens, not all business activities of UMS could be transferred to Kentucky One. These include Passport, Certificates of Need, etc. These activities generate substantial amounts of cash flow but require UMC to remain active. These income streams remain available for UMC to transfer money to the University of Louisville for its chosen uses.

That UMC can change its medical staff bylaws related to prohibited procedures implies that there will be dual medical staffs within the former University Hospital.

Page 4, Item 1.6. Charity care.

The operation will continue to serve the indigent and medically needy adult population of the operations service area regardless of their ability to pay including, without limitation, UMC's obligation under the current QCCT agreement; providing that KentuckyOne agrees to any future amendments to the QCCT.

Comment. This is a big promise. However, the "service area" must be defined. No promises are made that the indigent and medically needy will receive the same quality of care in the same beds or offices of the Operation. This promise is a good one only so long as it does not perpetuate our current system of second-class segregated medicine from the last century. Unfortunately, nothing in this Operating Agreement [or the Academic Affiliation Agreement] suggests to me that the former University Hospital will not continue to be a separate and unequal facility.

Page 4, Item 1.7.

UMC promises to provide KentuckyOne all necessary information to prepare cost reports to the federal Medicare program, and presumably the required reports of other accrediting and quality rating organizations.

Comment. This means that the University must provide its cost and clinical information about its prohibited procedures to be co-mingled with that from KentuckyOne before being submitted to Medicare. Even a Catholic hospital must dance to the federal government's tune, and in this instance, it seems to me that KentuckyOne is reporting its direct involvement in prohibited procedures. How is KentuckyOne handling this so as not to place the church in a condition of scandal?

Page 5, Item 1.12. Employee matters.

On the date of integration (March 2012), KentuckyOne will offer employment on an at-will basis according to its own new employee screening policies, except those individuals employed in the department providing the Maintained Procedures who will not be hired. The base salary is said to be substantially the same and will be subject to KentuckyOne's employment decisions. Hired employees that are terminated within the first year will be offered a severance package. No employee associated with the Maintained Procedures can participate in any KentuckyOne benefit plan.

Comment. Current University Hospital employees will move to a very different system about which I know little. There is no guarantee that all current employees will be rehired, because they will be subject to new screening policies. It is anticipated that some employees may be terminated within the first year. I have no idea about how current University Hospital employees feel about this. If nothing else, their health insurance options will be limited.

Page 6, Item 1.13. Medical staff and other Medical matters.

University of Louisville has given control of its teaching hospital and Cancer Center medical staff to KentuckyOne. KentuckyOne shall be the governing body that approves the Operation's medical staff bylaws, rules and regulations. Credentialed KentuckyOne physicians will be granted hospital staff privileges for all services other than the Maintained Procedures (prohibited procedures).

Comment. I am once again struck with how much of its academic independence the University of Louisville is willing to render to a nonacademic organization, especially one whose ideas about standards of medical care remain in the past century. In the previous iteration of this partnership, medical staff and residents had to attest in writing that they had been educated about and would follow Catholic medical policy. It remains possible that they will have to do so again. The University has not released all the relevant documents this time either.

Page 7 Item 1.1 3B.

The medical staff at the former U of L hospital will be organized into clinical departments for which the chiefs of service will be the applicable chairs of the University of Louisville School of Medicine or their designee.

Comment. It appears that there are limits to the degree of integration possible between University of Louisville Hospital and Jewish Hospital. I am aware that the existing medical staff at Jewish Hospital revolted at the possibility that the clinical services at Jewish Hospital would have University chiefs of service. It is not clear to me how this clause will interact with agreement clauses that appear to open up the medical staff of the former University facilities to other KentuckyOne physicians. This divided medical staff is an area that is likely to trouble the Integrated Operation for some time to come. The division of the hospitals is also likely to perpetuate the character of the Former University Hospital as a second-class, poor-peoples hospital. That would be a shame.

Page 7, Item 1.14. Medical records.

Curiously, UMC retains ownership of medical records and other related patient information. [I don't understand this. I vaguely recall some old law that the state was the custodian of old medical records. It was an issue for the University archivist once. This may also be related to the University's efforts to mine patient information for its commercial research enterprise.]

Page 7 Item 1.15. Transfer of neonatal intensive care beds.

The agreement requires UMC to give KentuckyOne first offer on the sale of any of its licensed neonatal intensive care unit beds.

Comment. The Certificate of Need for these beds may not transferable for this Agreement. These beds provide a big income stream to those who own them and University may have wished to retain them. Certainly such NICU beds will be good ammunition for KentuckyOne in what is certain to be stupendous hospital wars between KentuckyOne and Norton Hospital with its Kosair Children's Hospital. [Addendum. The Academic Affiliation Agreement makes it clear that KentuckyOne is contemplating starting a new children's service or hospital.]

Page 7, Item 1.16. Insurance.

UMC is responsible for maintaining all insurance required with respect to its Maintained Procedures. Notwithstanding this, KentuckyOne at its discretion may provide such insurance.

Comment. I suspect that it might be very expensive for UMC to ensure only the baby business of its current hospital risk pool. (Obstetric care and sick babies are high-risk entities.) However, KentuckyOne's willingness to share the risk and insure the prohibited procedures places it squarely in the prohibited procedures business. Good for them! Bad for their souls.

Page 8, Item 1.17. Assets related to maintain procedures.

UMC may not transfer any profits from its Maintained Procedures to the University or any other party if it causes a required Reserve Fund to drop below \$17 million. Curiously, included in this \$17 million minimum on reserves is UMC income related to the UMC reserve fund, capital fund, passport health plan, Louisville medical Center, Premier, Inc., and related entities.

Comment. This section implies that the University expects to continue to redirect hospital profits to other University affairs. This of course is what brought University Hospital to its knees in the first place. It appears this another reason for allowing UMC to continue to exist as a separate organization to allow it to channel income from these other entities into the University of Louisville's Foundations or other accounts. If I am correct, it was apparently not possible for KentuckyOne to assume UMC's roles in these organizations.

Section 2. Three pages of financial arrangements.

It is here that at least some of the financial transfers are described. Because several Exhibits are not provided, the document is of little value.

Page 8 Item 2.2. Payments to UofL Health Sciences Center.

During the term of the agreement KentuckyOne will make, "or shall cause UMC to make" annual payments of \$12,500,000 to the HSC subject to a number of conditions. These include that UofL will be in material compliance with the academic affiliation agreement. The Hospital and Cancer Center must retain their status as "state university teaching hospitals" as defined in state legislation. [This lets KentuckyOne tap into state money for indigent care and Medicaid graduate medical education payments and others. This was a bonus that made the partnership attractive to CHI.] The annual amount can be adjusted up or down depending on the financial health of KentuckyOne to be as low as \$7.5 M.

Item 2.3 a.

I do not understand this clause. UMC is assumed to have substantial income apart from its Maintained Procedures. Where is this income coming from? Where does it go? How much is it? These are the same questions I have been asking about University hospital finances for the past year.

Item 2.3 C.

UMC may retain 100% of the economic benefits and risk associated with its Maintained Procedures.

Comment. The bulk of these financial transfer agreements are not understandable because Exhibits B and C are not provided. I have no opinion whether the former University Hospital and its patients will receive more or less than they currently do. It is not possible for me to confirm that the financial benefits highlighted in the press conference are promised or merely possible.

Page 10 Item 2.5.

UMC agrees to retain working capital and the amount of \$17 million in a Reserve Fund to support provision of Maintained Procedures. Exhibit C, which provides any detail, is not provided. Additionally, UMC will retain \$15 million for capital improvements to operate the Maintained Procedures. There is no information about where this \$32 million will come from. I thought University Hospital was broke.

Curiously, the proceeds from any future sale of neonatal intensive care unit beds will be deposited in the UMC reserve fund where it can then be transferred to UofL. [Sounds to me like the sale of those beds is being contemplated!]

Page 10 Item 2.6. KentuckyOne Board of Directors.

The current KentuckyOne Board of 15 members will be expanded to 18 members of which three will be appointed by the University of Louisville, 10 appointed by Catholic health initiatives, and 5 by Jewish Hospital Healthcare Services Inc. [It is clear that the

University of Louisville is a very junior partner in this enterprise. So much has been given away!]

Pages 11 and 12. Various representations and warranties.

UMC declares that it has the free and clear ability and authority to enter this agreement. UMC also declares it will not be required to give any notice or obtain any consent or authorization from any person or entity in connection with the execution and delivery of this agreement. [After all, UMC is a private organization, is it not?] KentuckyOne makes the same warranties.

Page 13, Section 5. Credit and Financing.

Item 5.1.

UMC will become a member of the CHI credit group which will be the exclusive source of long-term financing for the Integrated Operation. UMC will refinance its existing debt through the CHI credit group.

Exhibit D, which would explain the details of this section, is not provided. Therefore it is not understandable. Apparently substantial payments by UMC to KentuckyOne will be made and the agreement requires that UMC will refinance its existing debt through KentuckyOne.

Comment. This section is impenetrable to me but important. In the last iteration of this deal, University Hospital became liable for part of the colossal debt of Jewish Hospital which complicated any unwinding activity. UMC does have some existing debt resulting from the failed previous partnerships but it was small compared to the debt incurred by Jewish Hospital. I trust that someone in the Governor's office or Attorney General's office was able to decipher this better than I. Participation in the Catholic Health Initiatives credit group may well be golden handcuffs that limit University's or the Commonwealth's options because it would be so expensive to withdraw.

Page 14. Section 6. Term and Termination.

The term of the agreement is expected to begin on March 1, 2013, the Integration Date. It continues for 20 years and then shall automatically renew for subsequent five year terms thereafter. Either party may elect not to renew after providing one year notice. Until integration day, UMC retains full control over its business.

UMC can terminate if KentuckyOne becomes insolvent or otherwise fails or changes hands; if KentuckyOne doesn't make its required payments; if the Academic Affiliation Agreement is terminated; if the UMC Reserve Fund falls below \$2 million; or if because of actions or omissions by KentuckyOne, UMC loses its accreditation for Medicare or Medicaid.

Similarly, KentuckyOne can terminate if UMC attempts to discontinue operations or divest assets exceeding \$3 million without the consent of KentuckyOne; if UMC no

longer qualifies as a state university teaching hospital for purposes of Medicaid disproportionate share payments or any similar future payment; if UMC loses its designation as an urban trauma center hospital [big bucks from that], if UMC no longer qualifies as a “unit of government” for intergovernmental transfers [a way to scam Medicare for extra match money]; if the operation of the Maintain Procedures by UMC threatens the participation of KentuckyOne in Medicare or Medicaid; if there are changes to clinical policy as a result changes to state law regarding abortion of in vitro fertilization; or loss of accreditation of the School of Medicine.

Comment: How can a private corporation be a “unit of government?”

Then follows extensive language related to of curing any breach.

Upon termination, each party shall remain liable for any obligations or liabilities arising from activities carried on. [I must assume this includes some share of the debt pool.]

Page 18, section 7. Audits and Transparency.

KentuckyOne agrees to make records pertinent to the operation of the Integrated Operation available to any governmental agency who request the records for audit, investigation, program review, or any other formal inquiry. [Making records available to a governmental agency is not the same as making them available under an open records provision.]

Page 18, Section 8. Miscellaneous.

If Medicare reimbursement regulations change, either party may give notice to renegotiate this agreement. [I suspect the parties are still counting on income flow from various disproportionate share, graduate medical education payments, and other bonuses. Both hospitals are currently considered teaching hospitals by Medicare and receive substantial bonuses for that designation.]

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