**Analysis of the Impact of the Ethical and Religious Directives of the Catholic Church on the Proposed Acquisition of University of Louisville Hospital by Catholic Health Initiatives (CHI).**

Draft 12/24/11

**Summary**.

Perhaps the most publically discussed justification for the blocking of the proposed acquisition has been the effect of Catholic health care restrictions on the practice of medicine by University Faculty and trainees, and access to the same level of care citizens of Louisville have come to expect from their public hospital. The parties of the acquisition, including the University of Louisville did not help their cause by refusing to release relevant documents. Some of those documents are now available. A detailed review of the Sponsorship Agreement and its supporting documents shows that contrary to prior statements, the University and its Hospital are willing to contractually agree to virtually all of the specific medical procedures and services forbidden by the Ethical and Religious Directives of the Catholic Church (ERDs). Direct references to the ERDs and supporting religious doctrine themselves are contained in the Agreement. Extensive restrictive covenants interfere with the rights of faculty physicians and trainees and constrain alternative locations where forbidden services can be provided. It is clear that The University of Louisville, its faculty and trainees, its Hospital, and its public will be affected by the agreement, giving up fundamental personal, medical, and academic freedoms. Both the list of contractually prohibited services and ERDs are acknowledged to be incomplete and subject to additions at the sole discretion of CHI. It is difficult to understand how this state University and hospital can be allowed to continue as a party to this acquisition on these grounds alone, let alone the host of others that have been raised.

**Introduction**

There are a number of reasons why many individuals and organizations have opposed or had serious concerns about the proposed acquisition of University of Louisville Hospital by Catholic Health Initiatives. The transfer of a state and public asset to a private one, the separation of church and state, the alignment of the entire medical training and clinical operations of a public medical school with a religious organization, transferring a substantial portion of Kentucky’s healthcare system to an out-of-state caretaker, or agreeing to onerous anticompetitive restrictions with other Kentucky health care providers and educational institutions are among of them. I will discuss these elsewhere. Any one of these issues provides sufficient grounds for rejecting the proposed business arrangement.

Perhaps the most emotionally controversial of these problems is the agreement by the University of Louisville to accept some of the religious teachings of the Roman Catholic Church as the basis for the provision of medical care in its teaching and clinical facilities. The University of Louisville has put its operations at ground zero of the abortion controversy that has torn asunder the civil fabric of our community. Because it is defined even in the Sponsorship Agreement as an instrumentality of the Commonwealth of Kentucky, the University of Louisville has put Governor Beshear, Attorney General Conway, State Auditor Luallen, Mayor Fischer, and other governmental offices and officials into the most difficult position possible. I do not know what these officials have been told in their private briefings by the business partners, but I heard the hospital system representatives say publically that medical treatment of women would hardly be affected at all; with the exception of certain procedures the University has contractually agreed not to do. To my and many ears, their protestations and promises changed from day to day and place to place. Requests for the specific contractual language and other relevant agreements were refused in an off-hand manner. To hear the advocates speak, the implications of their business decision on our community and on women’s health care, and the magnitude of the compromise of our institutional academic and medical ethics and independence were a “small thing.”

At the last possible minute, under court order, and indeed on the very day the proponents hoped their business papers would be signed, the University and its partners released a number of documents. These are heavy going for me as a non-lawyer, but now I can see why they wished to keep them secret. I invite any of you to help me. On the philosophy that we need first to deal with the elephant in the room, I analyze here the issue to what extent the University of Louisville has agreed to abide by Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition, of the United States Conference of Catholic Bishops (the ERDs). I have only had time to analyze the Sponsorship Agreement and its supporting exhibits. I do not yet know what lies in the other recently released documents.

**What are the ERDs?**

These are the rules that all Catholic health care institutions and providers must follow in any setting. There are 6 sections of the document, with a total of 72 specific directives. The majority of these are fairly general and would be relatively non-controversial. Indeed, they could be written just as easily in generic secular terms. However, they are written in religious language, understood in the light of revelation, and they use the definitions of the Catholic Church. They are not suggestions! Violation of the rules places the Church in a state of scandal and has led to institutions losing their status as Catholic. Individuals are excommunicated from the church, and presumably suffer in an afterlife. A large body of commentary expands on what is permissible or not. Local bishops have final authority in any given jurisdiction but are subject to review by higher authorities. Moreover, the ERDs and commentary are explicitly regarded as incomplete and subject to additions, directives, and further interpretation by the United States Conference of Bishops. Here are a few examples of the very specific language of the Directives.

Directive 4 requires that research in a Catholic teaching hospital must adhere to Catholic moral principles. Directive 5 requires that Catholic health care services must adopt these Directives as policy and make them a condition for medical privileges and employment. Directive 9 requires that “Employees of a Catholic Health care institutions must adhere to these directives.”

Obviously requiring the University of Louisville Hospital or any of its other units to comply with such directives would have been a non-starter. I cannot conceive that that agreement to follow the ERDs was ever even a matter for discussion– at least I hope it was not. At some point in the negotiations, perhaps late, the partners came up with language that the University would not be an official Catholic Hospital and therefore not bound by the Directives, but would contractually obey some of them. A list of forbidden procedures is reprinted and discussed below, but a reading of the Sponsorship document (which appears to be a top-level master agreement) makes it clear that the ERDs are having an impact directly and indirectly in several ways. The list of contractually forbidden procedures includes all of the Church’s prohibitions and limitations related to procreation, treatment of infertility, abortion, prenatal screening, treatment of rape victims, ectopic pregnancies, contraception, and end-of-life care. In fact, there is no specific medical treatment discussed in the ERDs that is not included in the University’s list. There is no meaningful difference to my eye between following the ERDs and contractually agreeing to obey all of the specific medical proscriptions of the Catholic Church. In its overriding quest for research money, the University of Louisville totally caved!

**Contractual Agreement to Limit Services Available to the Public**

Exhibit G, presented below, contains the list of procedures and policies that the University of Louisville is willing to agree by contract not to perform in any of the new joined hospitals. All the items in the prohibited list are shown in italics, with some commentary by me in brackets. The corresponding Directives can be viewed in an Appendix to this analysis.

***Exhibit G:***

*Except as otherwise permitted below, none of the following procedures may be performed at any Network Entity Facility:* [Network Entity is the name given to the collection of hospitals combined in the acquisition. It includes University Hospital and Jewish.]

***•Elective (direct) abortions.***

[Direct Abortion is not defined in the Sponsorship agreement. In the ERDs, a direct abortion is anything, medical or surgical that intentionally interrupts a pregnancy as defined from conception to birth. The definitions of viability, fetus, embryo, unborn child, abortion, and the like are as used by the Church, not necessarily by the medical profession.]

*• Abortion is the directly intended termination of pregnancy before viability or the*

*directly intended destruction of a viable fetus. Every procedure whose sole*

*immediate effect is the termination of pregnancy before viability is an abortion,*

*including the interval between conception and implantation of the embryo*.

[Directive #45. This is the hardline position of the Catholic Church. No exceptions are made for the health or life of the mother, rape, incest, severe fetal abnormality, genetic defect, or complications of treatment of infertility. An “Octomom” would be forced to carry all of her embryos. More importantly, a minor impregnated as a result of sexual abuse would be forced to deliver her child. A woman who became aware that her child would be born without a brain would be forced to carry to term. Everyone knows the list of situations for which many people believe termination of a pregnancy is a moral position. Some of us may agree that the Church’s position is correct. Some of us believe the Church’s position is cruel.

The remainder of Directive #45 which is not included in Exhibit G reads: “Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.” I believe this portion of the directive was omitted deliberately because of tacit acknowledgement by the church that they were associating with an entity that would provide abortions and other prohibited procedures ainn a variety of obvious work-a-rounds. The other directives relating to abortion are incorporated essentially verbatim.]

*• In the case of extra-uterine pregnancy, no direct abortion will be performed*.

[This is a difficult condition for the church to deal with and still maintain its moral inerrancy. It is foolish, if not barbaric, to require a woman who has an ectopic pregnancy (i.e. the conceptus is not implanted in the uterus) to carry her pregnancy one minute more than necessary. “Ruptured ectopic” as a cause of maternal death is part of our universal language and virtually 100% preventable. The Church had to find a work-around for its prohibition or risk exposing its physicians and staff to malpractice actions if not ridicule. The solution in the past seemed to revolve around whether or not there is a heartbeat. More recently, using incomprehensible [to me] twists of religious and medical logic, the Church permits a specific surgical remedy of removing an entire Fallopian tube, but this more invasive than the current standard of medical and surgical care. God forbid (… or does he/she?) that non-surgical treatment with the abortifactantmethotrexate be used! Respected Louisville Obstetrician/Gynecologists have declared that the Church’s approach to ectopic pregnancy turns best medical practice on its head. So much for the proposed partners’ goal of improving the standard of care in Kentucky.]

• *The foregoing notwithstanding, operations, treatments, and medications that have*

*as their direct purpose the cure of a proportionately serious pathological condition*

*of a pregnant woman are permitted when in the treating physician's judgment*

*they cannot be safely postponed until the unborn child is viable, even if they will*

*result in the death of the unborn child.*

[When I first read this, I thought it provided a loophole for abortion to save the life of the mother. Perhaps it was intended to give that impression. It does not. What this Directive (# 47) says is that if the mother has a severe medical illness, such as leukemia, that is is permissible for her to receive treatment for the leukemia even though the chemotherapy would cause harm or death to the developing fetus. Of course, any other finding would expose the Church to severe criticism and ridicule. If the treatments of choice for a malignancy might include the drug methotrexate, would the church approve that as well? I will leave that for the Bishop to answer.]

*• For a proportionate reason, labor may be induced after the fetus is viable.*

[This is Directive #49. What this directive allows is for labor to be induced artificially if there is some substantial risk to the fetus or mother. Perhaps for example, if there is an infection in the uterus, or there is bleeding that is life threating. Left unsaid is what happens if the fetus is too premature to survive outside the uterus? That would be an abortion and is forbidden. What is ambiguous here and subject to interpretation by the local religious authorities is the definition of terms like “proportionate,” or “viable” or “fetus.” Is a viable pregnancy anything after fertilization as seems to be the case for abortion? I would not know how to obey this contractual item (or its corresponding ERD) based on its language alone. What is clear to me is that the language of Exhibit G does not stand alone, but must perforce reference the external ERDs and supporting body of religious commentary. It cannot be said by the acquisition partners that they have not agreed. in effect, to follow the ERDs.]

***• Contraceptives, Sterilization and Fertility Treatment***

[The Catholic Church finds these family planning methods as repugnant as abortion. The irony is that most Catholic parishioners ignore the Church’s teaching on contraceptives and treatment for fertility yet the University of Louisville is willing to go along.]

*• Elective sterilizations male or female including tubal ligations, vasectomies and*

*Essure procedure.*

[This is directive #53. The ERDs permit procedures that cause incidental sterility when performed for the treatment of serious disease and no simpler treatment is available, for example cancer of the uterus.]

*• Contraceptives will not be dispensed for the purpose of contraception only.*

*• Insertion of IUDs/ Diaphragms except for medical purposes e.g. menorrhagia.*

[The previous two items from Exhibit G contain exceptions not mentioned in the ERDs. If some medical reason can be devised, then contraceptive techniques can be used. This is a loophole I have seen exploited to privide insurance coverage to employees of Catholic institutions. Unfortunately, it requires that both a treating physician and a reviewing professional from an insurance company collude in a lie. To save face, the Church offloads its ethical responsibility and guilt onto other professionals. This is a theme that runs through this entire proposed acquisition.]

*• The foregoing notwithstanding, emergency contraception, in the treating*

*physician's judgment, will be administered to victims of sexual assault after*

*confirmation that the victim is not currently pregnant.*

[This is from ERD # 36 related to sexual assault. It requires that the victim undergo pregnancy testing that would not be required of other women. It limits the range of therapeutic agents available to the victim and her doctor by specifically prohibiting any drug or procedure that might be considered by church authorities to be an abortion or to prevent the implantation of a fertilized egg to the uterine lining. Given that both egg and sperm remain alive for some time after a rape, such a restriction can be justified only by religious dogma, and is not designed to be in the best interest of the victim. After all, preventing such implantation is the main goal following rape management. This is another face-saving contortion of logic taken by the Church.]

*• Artificial insemination and in-vitro-fertilization (IVF).*

[Several ERDs address anything other than the natural method of causing a pregnancy. Virtually anything related to treatment of fertility is forbidden.]

***• Euthanasia-*** *Participation in euthanasia or assisted suicide in any way*.

[This language comes from the first part of Directive #60. On its face, this prohibition a reasonable thing in a state where assisted suicide is not yet legal. However, in the context of the other Directives and church opinions related to end-of-life issues, it is incomplete and perhaps even deceptive. For example, dying patients who reject the Church-defined “natural” therapies of nutrition and fluids can be interpreted by church agents as seeking to shorten their lives– i.e. commit suicide. Because the Directives make a point of rejecting advance directives or decisions by health care surrogates if they are not consistent with Catholic teachings, the conspicuous absence in Exhibit G of a statement that any otherwise legal advance directives will be honored should be an alarm bell.]

*• In addition, Network Entity will not be a party to any contracts or arrangements that result in the payment for or performance of surrogate motherhood or any of the procedures outlined above.*

[The last 6 Directives, (# 67-72 in the Appendix) deal with partnerships with other health care providers, particularly non-Catholic providers. This last clause of Exhibit G summarizes the prohibitions of these 6 Directives. “Any partnership that will affect the mission or religious and ethical identity of Catholic health care institutional services must respect church teaching and discipline.” The Network Entity will not be a party to any arrangements that result in the performance of any of the procedures above that might place the Church in a position of scandal. (Footnote to Directive #45: See Catechism of the Catholic Church: “Scandal is an attitude or behavior which leads another to do evil” (no. 2284); “Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged” (no. 2287).)

If I were writing this clause, I would have separated out “surrogate motherhood “ as a separate item to eliminate any confusion over my real intent to create a more global prohibition. This and other clauses in the Sponsorship Document make it very clear how important this is to the CHI. One wonders how the transfer arrangement with Baptist Hospital survives this prohibition, or indeed how Church authorities can pretend not to see the many the machinations being devised to get around their religious directives?]

**End of Exhibit G.**

**Other References to the Ethical and Religious Directives Contained in the Sponsorship Agreement.**

Exhibit G is not the only reference to the Ethical and Religious Directives in the Sponsorship Agreement. On page 5, it is agreed that none of the profits of the partnership that flow to the University of Louisville can be “used by the recipient to provide procedures that are described on Exhibit G.” The University agrees to restrict the uses of its own money! I find this amazing and can only wonder how this concession will be managed. If the money goes into general funds, then there is no way to keep it separate, which would mean that no University money could be used for the forbidden purposes. This would complicate the University’s promises to continue to provide all services in other places and other ways. Of course if all the money was going to be put in research accounts in the first place, then none of the profits could be used for clinical or indigent care purposes. If I were the Governor or other public officer, I would like to hear how the University plans to side-step this agreement. This agreement belies that assertion of the partners that the merger is only between the hospitals, and that the University is not affected. The ERDs are clearly intended to have an impact beyond University of Louisville Hospital.

In Section 5.2.E, on page 13 the contractual language agreeing not to perform any of the procedures described in Exhibit G at University of Louisville Hospital or Brown Cancer Center is inserted.

Additionally in 5.2.F the University agrees that the new Network Entity shall not take any action to cause CHI or the Catholic Facilities to fall out of compliance with the ERDs. … and that if operations of the Teaching Hospital Facilities [University and Jewish hospitals] result or reasonably will result in CHI or the Catholic Facilities falling our of compliance with the ERDs” then cause would be given to eject the University of Louisville from the partnership. Section VII.2.B.3 gives CHI sole responsibility for obtaining interpretation of Exhibit G and its attendant ERDs.. Because dissolution of the partnership would be extremely expensive for the University, this clause is a sword held over the University’s head. It also belies the frequently stated claim that the University has not agreed to follow the ERDs. Can anyone read any other conclusion into this language?

As if to hammer the point home, in 5.2.G, the Network Entity shall not permit or cause any action to be taken, and each Sponsor agrees not to take any action that would cause any of the Facilities to provide procedures that are described on Exhibit G at the Network Entity Facilities.”

Some of the additional clauses in this section attempting to minimize the appearance of interference with academic activities by the ERDs but are contradicted by other parts of the Sponsorship Agreement. For example, 5.2.H gives lip service to commitment to academic freedom on the content or curriculum of classes taught at the Academic Medical Center, but 5.2.L specifies that all physicians and trainees will be properly trained before being allowed to practice or learn in the hospital facilities. The only way to ensure this will happen is to take attendance at such a mandatory events. Hopefully the faculty and trainees will not have to sign any agreement that they will obey those teachings. What would happen, for example, if a faculty member or trainee refused to submit to this religious training (as I might)? Would they lose their job or be required to train or work elsewhere? Something worse? What would happen if, God forbid, they ever acted in the best interests of their patient and administered a forbidden treatment in the wrong place? CHI alone would be the judge of that.

Continuing the theme of respecting the Catholic heritage of CHI, 5.2.H gives further lip service to free exchange of information between doctors and their patients– just not freedom of action. My Catholic parents taught me that when you want to do a good deed, you do not tie any strings to it. I think that would be good advice to CHI and the University of Louisville.

Section 5.2.J states that the University of Louisville has no obligation to comply with Catholic heritage. Section 5.2.K allows faculty and trainees to perform forbidden procedures at facilities not owned or operated by the Network Entity (or otherwise not restricted by the onerous non-compete clauses of the Agreement). But how does CHI resolve this permissive statement with their own ERDs relating to partnerships? For example, Directive #70 and its explanatory footnote states:

*Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.*

ERD Footnote #44 expands on this: *“While there are many acts of varying moral gravity that can be identified as intrinsically evil, in the context of contemporary health care the most pressing concerns are currently abortion, euthanasia, assisted suicide, and direct sterilization. See Pope John Paul II’s Ad Limina Address to the bishops of Texas, Oklahoma, and Arkansas (Region X), in Origins 28 (1998): 283. See also “Reply of the Sacred Congregation for the Doctrine of the Faith on Sterilization in Catholic Hospitals” (Quaecumqu Sterilizatio), March 13, 1975, Origins 6 (1976): 33-35: “Any cooperation institutionally approved or tolerated in actions which are in themselves, that is, by their nature and condition, directed to a contraceptive end . . . is absolutely forbidden. For the official approbation of direct sterilization and, a fortiori, its management and execution in accord with hospital regulations, is a matter which, in the objective order, is by its very nature (or intrinsically) evil.” This directive supersedes the “Commentary on the Reply of the Sacred Congregation for the Doctrine of the Faith on Sterilization in Catholic Hospitals” published by the National Conference of Catholic Bishops on September 15, 1977, in Origins 7 (1977): 399-400.”*

Is not CHI directly “cooperating,” “approving,” and “tolerating” the “intrinsically evil“ actions by the University of Louisville? How long will this partnership be allowed when Catholic higher-ups learn of this agreement? Have they signed off on it already? I would be interested in any language that is used to authorize it. Given that ejection from the proposed partnership would be a calamitously expensive proposition for the University and Commonwealth, shouldn’t we have a right to hear from the Catholic Church authorities how they will interpret their own prohibitions now and in the future?

**Restrictive Covenants.**

Although University physicians appear to be allowed to perform forbidden procedures at other institutions, the very lengthy and detailed Restrictive Covenants of Article VI seem to limit the options available to those affiliated with or controlled by CHI. Furthermore, in Exhibit E, the University of Louisville promises it will use its best efforts to control the clinical practices of its faculty from competing with the Network Entity for hospital services enumerated in the Restrictive Covenants. These Covenants are written in heavy legalese and I do not claim to understand them fully. However, what facilities remain for faculty to practice in? So much for the not-really-true claims that the faculty of UofL will not be affected by the proposed acquisition. What I would like to see is a definitive list, agreed to in a legally binding way by CHI, of just where University Faculty and Trainees are allowed to practice independent medicine. Indeed, I would like to hear a better explanation about why faculty physicians and trainees are not being allowed to practice the best standard of medical care at their own home institution!

Catholic hospitals already make up some 22% of Kentucky hospitals and almost 30% of rural hospitals. This proposed acquisition would place an even higher percentage of hospital beds and clinics under the restrictive medical practices of the Church. Surely this is not what the proponents consider improving access to basic health care for Kentuckians?

**Inability to Rely on Exhibit G.**

Finally, and as if it were not difficult enough to predict how this Sponsorship Document would be implemented, Section 7.3 Amendments to Exhibit G is very specific that “*At any time, and from time to time, if CHI reasonably determines that it needs to amend Exhibit G so that CHI does not fall out of compliance with the ERDs … CHI has have the option to provide JHHS and University with a notice of an Affiliation Terminating Event.* Note that CHI has the sole right to make the determination, and that the standards used are the Ethical and Religious Directives, not the contractually agreed upon Exhibit G. Termination would be an expensive event for the University and Commonwealth, especially since University is assuming its portion of Jewish Hospital’s $400 long-term debt and the cost of any new investments in the downtown medical center. At least CHI is being honest that Exhibit G cannot be relied upon. Would that the University be as forthright. Why would it enter such an open-ended, uncontrollable, and potentially expensive agreement?

**Conclusion**

I believe the Commonwealth and its Courts cannot permit this acquisition to proceed. Current services expected by the community will be reduced; non-Catholic patients and physicians will be forced to abide by Catholic religious doctrine; a state institution and its faculty will be impermissibly restricted from interacting with other health care providers or academic institutions; the University gives up future control of its medical practices, and more. The University of Louisville is a full partner in this enterprise and cannot use as an excuse that it is not merging and therefore will not be affected. In my opinion, its credibility has already been diminished.

Peter Hasselbacher, MD

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