



The Ethical & Religious Directives: What the 2018 Update Means for Catholic Hospital Mergers

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Introduction

The Ethical and Religious Directives for Catholic Health Care Services (ERDs) are directives promulgated by the United States Conference of Catholic Bishops to govern Catholic health facilities. The ERDs present “a theological basis for the Catholic health care ministry” and govern the way health care is delivered in Catholic health facilities and systems, including hospitals, clinics, and managed care organizations.¹

How are the ERDs incorporated into Catholic health systems?

The ERDs govern what care can be provided by Catholic health facilities and how that care is delivered. They are also often incorporated into lease agreements for medical offices owned by Catholic entities, thereby restricting the services private providers can offer in their offices. Physicians must agree to abide by the ERDs to obtain admitting privileges at Catholic hospitals, and other hospital workers are contractually bound by them as a condition of employment.

What do the ERDs prohibit?

The ERDs prohibit a wide range of common reproductive health services, including all birth control methods, sterilization, abortion, some miscarriage management techniques, the least invasive treatments for ectopic pregnancies, and infertility treatments such as *in vitro* fertilization (IVF). The ERDs also limit the treatment options to prevent pregnancy as a result of sexual assault, such as oral emergency contraception pills.

¹ *Ethical and Religious Directives for Catholic Health Care Services*, U.S. CONF. CATH. BISHOPS (6th ed. 2018), <http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf> [hereinafter “ERDs”].

How do Catholic hospitals apply the ERDs?

There is considerable variation in how hospitals apply the ERDs. Some are quite literal in their interpretation, while others are less restrictive in their enforcement. A variety of factors drive these variations: the decisions of local Bishops with authority over the hospitals, disagreement among theologians about the proper interpretation of the ERDs, market forces, and sometimes simply by the quiet provision of some prohibited services on a case-by-case basis.

In some Catholic hospitals, physicians may perform sterilizations if they document a medical necessity in the patient's medical record. At St. Louise Medical Center in Gilroy, California, a very small number of sterilizations are allowed, but only if the physician applies for approval directly to the Archdiocese.² In some instances there has also been explicit discrimination in how this prohibition has been applied, particularly with respect to transgender patients. For example, a Dignity Health hospital in California that otherwise permitted sterilizations, cancelled a scheduled sterilization surgery for a patient upon learning he was transgender.³

What is the impact of the ERDs on patient care?

The ERDs substitute religious doctrine for the standard of care. They make no exceptions for the health or life of the patient, medical necessity, or the informed decision of the patient. Under the ERDs, treatment options are not subject to patient control or provider recommendation. For example, the prohibition on abortion applies to the termination of any pregnancy, even where the pregnancy is putting the patient's health or life at risk.

Catholic health systems control 16.6 percent (one in six) of the hospital beds in the U.S., and 20 percent or more of hospital beds in 20 states. Three out of the ten largest hospital systems in the U.S. are Catholic-owned.⁴ "The number of U.S. hospitals with a Catholic affiliation has increased by 22 percent since 2001."⁵ Most of the patients served in these facilities are not themselves of the Catholic faith or do not adhere to the doctrine as enforced by the Catholic bishops.

² St. Louise Medical Center form to request sterilization (On file at the National Health Law Program, Los Angeles, CA).

³ *Minton v. Dignity Health*, No. 17-558259 (Apr. 19, 2017).

⁴ *Miscarriage of Medicine*, AM. CIVIL LIBERTIES UNION 5 (updated 2016), http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=H%2Bg7sawTMhFgu%2BEKbKrbYidGfOs%3D. The number of Catholic health systems in the top ten recently went from four to three due to the merger between Dignity Health and CHI.

⁵ *Id.*

The ERDs have tangible, and in some cases life or death, consequences for patients. Patients have been turned away from treatment while actively miscarrying.⁶ Others have been denied tubal ligation surgeries, and transgender patients have been denied gender-affirming surgeries.⁷ Across the country, Catholic hospitals receiving billions in taxpayer dollars are turning away patients seeking emergency care, failing to provide critical reproductive health services, and placing their religious beliefs ahead of patients' health and lives.

What was the recent update in the ERDs?

At their June 2018 Plenary Assembly, the Committee on Doctrine of the U.S. Conference of Catholic Bishops developed and approved the Sixth Edition of the ERDs. The prior version was adopted in 2009.

The updated ERDs left in place prohibitions on material cooperation in actions that are "intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization."⁸ Both versions address the importance of preventing "scandal," defined as "an attitude or behavior which leads another to do evil."⁹ This includes anything the Catholic Church thinks might allow people to think that it is acceptable to disobey its moral and religious teachings, leading them to "sin." If, for example, a sterilization is performed at a facility that is associated with the Catholic Church, the Church may decide this is "scandal" because it could lead people to think sterilization is acceptable due to the association between the Catholic Church and the facility where the sterilization was performed. The updated ERDs do not alter this framing on "scandal."

The most prominent change in the Sixth Edition pertains to Part Six, which addresses "Collaborative Arrangements with Other Health Care Organizations and Providers." This section, which previously had been called "Forming New Partnerships with Health Care Organizations and Providers," underwent a substantial rewrite.

⁶ Judy Stone, *Healthcare Denied at 550 Hospitals Because of Catholic Doctrine*, FORBES, May 7, 2016, <https://www.forbes.com/sites/judystone/2016/05/07/health-care-denied-at-550-hospitals-because-of-catholic-doctrine/#60d7a9725ad9>.

⁷ Michael Hiltziz, *Here's another case of a Catholic hospital interfering with patient care*, L.A. TIMES, Jan. 11, 2016, <http://www.latimes.com/business/hiltzik/la-fi-mh-catholic-hospital-interfering-with-medical-care-20160108-column.html>; Claudia Buck & Sammy Caiola, *Transgender patient sues Dignity Health for discrimination over hysterectomy denial*, THE SACRAMENTO BEE, Apr. 20, 2017, <http://www.sacbee.com/news/local/health-and-medicine/article145477264.html>.

⁸ ERDs at 25 (Directive 70).

⁹ *Id.* at 24.

What did the 2018 ERD update say about Catholic hospital mergers?¹⁰

The bottom line in the revised Directives is that all mergers involving Catholic health facilities “must be operated in full accord with the moral teaching of the Catholic Church, including these Directives.”¹¹

In the future, non-Catholic health facilities that are affiliated with Catholic health facilities may be forced to adhere fully to the ERDs, or they may be separated from Catholic hospital systems or be subjected to some other response from their Catholic health institution counterparts. Under the revised ERDs, the provision of contraceptives, sterilizations, and other reproductive health services in entities that are affiliated with Catholic health facilities may be at risk. The ERDs give bishops the “ultimate responsibility” to determine whether health care mergers involve “scandal” or “wrongful cooperation” in medical care that violates Catholic principles.¹²

Some Catholic hospitals have evolved to provide some services such as birth control and sterilization. In some past mergers and affiliations, a secular partner has been allowed to continue providing reproductive health services. There have even been some instances where health systems have created “hospitals within hospitals” as a way to wall off a secular space within a hospital, where otherwise prohibited services can be provided. Under these arrangements, the broader hospital is typically subject to the ERDs post-merger, while the separately walled off “hospital within a hospital” is allowed to continue to provide some reproductive health services that are now prohibited in the larger hospital entity.

For example, in Troy, New York, a secular hospital—Samaritan Hospital—was merging with the St. Peter’s Health System and becoming Catholic. However, the hospital systems reached an arrangement whereby a section of the second floor of the hospital would become the Burdett Care Center, a separately incorporated hospital with its own finances, staff, and board. All maternity services from Samaritan and another nearby Catholic hospital in the system were moved to this center, where post-partum sterilizations and other services were permitted.¹³ It is unclear whether these types of arrangements would be possible under the revised ERDs, which could threaten the survival of these institutions and put in jeopardy the provision of necessary health services to the communities they serve.

¹⁰ The term “mergers” is used in this fact sheet to include any transaction encompassed by “collaborations” in the ERDs. The ERDs use “collaborations” broadly to include all business and other ventures between Catholic and non-Catholic entities. Some examples would include mergers and acquisitions, joint ventures, lease agreements, or any business deals involving existing or future Catholic management, governance, or control of a health facility.

¹¹ ERDs at 26.

¹² *Id.* at 25.

¹³ *Merger Creates St. Peter’s Health Partners; Region’s Most Comprehensive Health Care Provider*, ST. PETER’S HEALTH PARTNERS (Oct. 3, 2011), <http://news.sphp.com/news/merger-creates-st-peters-health-partners-regions-most-comprehensive-health-care-provider>.

The mergers section of the updated ERDs also include a number of new provisions and directives:

Merger (“Collaboration”) Defined

The updated ERDs include a directive defining “collaboration.” This definition is expansive and includes “any kind of collaboration, whatever comes under the control of the Catholic institution—whether by acquisition, governance, or management...” All such mergers “must be operated in full accord with the moral teaching of the Catholic Church, including these Directives.”¹⁴

Multiple Diocesan Jurisdictions

The updated ERDs include new provisions that respond to recent mega-mergers that span many states and multiple diocesan jurisdictions. In these situations, the diocesan bishops of each affected diocese must prospectively approve a merger. The diocesan bishop for the area where the system’s headquarters is located is responsible for coordinating with the other impacted diocesan bishops. These bishops are supposed to “make every effort to reach consensus.”¹⁵

Undermining Church’s Witness

In the prior version, mergers could be prohibited because of the “scandal that might be caused.” The new version includes this language but also adds “...or because the Church’s witness might be undermined.”¹⁶ It is not clear from the directives what this addition is intended to mean, but it is clearly more expansive than scandal alone.¹⁷ It seems to broadly include anything that might undermine the Church’s (and individuals’) adherence to Catholicism and Catholic teachings, including the Church’s ability to evangelize.¹⁸

If, for example, a Catholic health system is considering merging with a health facility that provides gender-affirming treatment for transgender patients that would not otherwise violate provisions of the ERDs—such as providing hormone therapy—the Church could now try to argue that this violates the ERDs. With the broadened language, it is not unconceivable that the Church could say providing gender-affirming care of any kind undermines the Church’s witness, if the powers that be think that providing such care could impact the Church’s ability to evangelize. This would be the case even though there is nothing in the ERDs or other doctrine prohibiting hormone therapy.

¹⁴ *Id.* (Directive 74).

¹⁵ *Id.* (Directive 69).

¹⁶ *Id.* at 26 (Directive 71).

¹⁷ *Id.* at 24.

¹⁸ *Disciples Called to Witness: Part IV*, U.S. CONF. CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/disciples-called-to-witness/culture-of-witness.cfm>.

Ongoing Assessments of Agreements

The updated ERDs expand on the directive requiring the Catholic entity to periodically assess whether the “binding agreement is being observed and implemented in a way that is consistent with the natural moral law, Catholic teaching, and canon law.”¹⁹ In the prior version, this directive only included “Catholic teaching.” It is not clear in either version what steps would or should be taken if this is found not to be the case. The new version does, however, provide that upon discovery that a Catholic health institution “might be wrongly cooperating with immoral procedures, the local diocesan bishop should be informed immediately and the leaders of the institution should resolve the situation as soon as reasonably possible.”²⁰

Administrator/Employee Conduct Prohibited

The updated ERDs include a new directive explicitly requiring that before mergers are approved, Catholic institutions must ensure that none of their administrators or employees will “manage, carry out, assist in carrying out, make its facilities available for, make referrals for, or benefit from the revenue generated by immoral procedures.”²¹ There is nothing on this point in the prior ERD mergers section. It is important to note that this directive specifically calls out referrals and the source of revenue as prohibited, if they are associated with what it considers to be immoral activities. The updated directives also require that representatives of Catholic health institutions who serve on governing boards of non-Catholic institutions or organizations that do not follow the Catholic Church’s ethical principles should—in their roles at non-Catholic entities—“make their opposition to immoral procedures known and not give their consent to any decisions proximately connected with such procedures.”²²

Establishing Other Entities

The updated directives prohibit Catholic entities from establishing another entity to “oversee, manage, or perform immoral procedures.”²³ This directive defines establishing such an entity to include “actions such as drawing up the civil bylaws, policies, or procedures of the entity, establishing the finances of the entity, or legally incorporating the entity.”²⁴

¹⁹ ERDs at 26 (Directive 72).

²⁰ *Id.* (Directive 77).

²¹ *Id.* (Directive 73).

²² *Id.* (Directive 76).

²³ *Id.* (Directive 75).

²⁴ *Id.*

Conclusion

It is clear that the 2018 updates to the ERDs are intended to help better manage the growing incidence of Catholic hospital mergers and to extend the reach of Catholic doctrine as far as possible. This expansion puts patients at risk by imposing Catholic religious and moral teachings in place of medical expertise and standards of care. It also makes it increasingly difficult for patients to identify when their health care is being dictated by religious beliefs rather than medical decision-making. It is crucial that advocates keep these new provisions in mind when reviewing mergers and transactions involving Catholic health care facilities, and ensure that adequate protections are in place to protect continued access to all necessary health care services including a full range of reproductive and sexual health care.