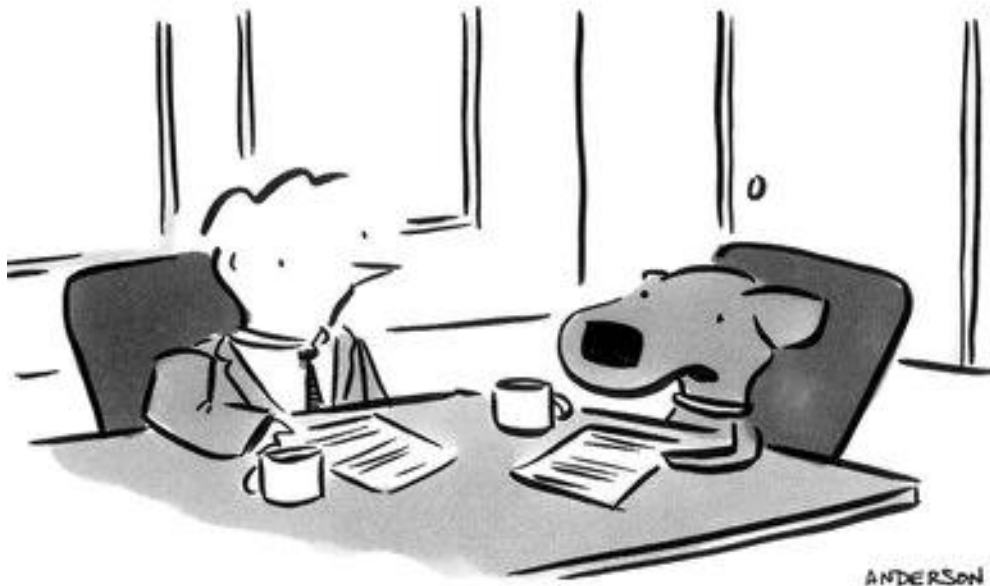


Contracting 101

2023 NHA Annual Meeting

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"Tell you what, rub my tummy and it's a deal."

Roadmap

- Legal requirements for contracts
- Common types of contracts
- Health care laws that affect contracts
 - Stark Law
 - Anti-Kickback Statute
 - HIPAA
- Pitfalls when reviewing contracts
- Contract negotiation and management tips

LEGAL REQUIREMENTS FOR CONTRACTS

Basic legal principles of contracting

Elements of a Contract

- Offer
 - Offer is invitation to make contract
 - Offers can go back and forth (but don't have to) until . . .
- Acceptance
 - Point at which one party agrees to other party's offer
- Consideration ("value")
 - Generally courts will only enforce contract if both sides are receiving something of value

COMMON TYPES OF CONTRACTS

Contracts commonly seen in health care settings

Are These Contracts?

- Memorandum of Understanding
- Non-Disclosure Agreement
- Engagement Letter
- Letter of Agreement
- Standard Terms and Conditions
- License Agreement
- Click-wrap Agreement
- Lease
- Purchase agreement
- Employment contract
- Medical director agreement
- Services agreement

Key Contract Provisions – Information About Parties

- Who are parties to contract?
 - Legal name v. d/b/a name
- Type of entity
 - Non-profit, LLC, PC
- Address for notice
- **Tip:** Business entity search on Secretary of State website

Key Contract Provisions – Term & Effective Date

- Term
 - Evaluate what length of term best meets your goals
- Auto-renew or expire?
 - Pros and cons to each
- Effective date
 - Can insert specific date
 - Can leave blank and fill in later
 - But don't forget to fill this in!
 - Can begin on event (i.e., when last party signs)

Key Contract Provisions – Recitals

- Contracts should tell a story
- Recitals give you the “plot”
 - What brought the parties to this arrangement?
 - Sets the stage for rest of agreement

Key Contract Provisions – Important Deal Terms

- What are we buying/selling/providing/receiving?
- Are the services accurately described?
- How are fees calculated?
 - Annual or monthly? Or only if invoiced?
 - If invoices are being used, can we/they dispute them if believe error occurred?
- What if payment is late or not received?
- What if fail to provide what was promised?

Key Contract Provisions – Representations and Warranties

- Standard reps and warranties:
 - Entity qualified to do business and in good standing
 - Signers have authority to sign
 - Clinician/health care provider licensed
 - Organization is in compliance with law
 - Which laws are listed?

Key Contract Provisions – Termination

- Termination
 - For cause
 - Without cause
 - Automatic
- What constitutes cause?
- Is there cure period?

Key Contract Provisions – Effect of Termination

- Effect of Termination – what happens when deal is over?
 - Outstanding payments/obligations
 - Assistance with transition
 - Survival of certain provisions beyond end of contract
 - Confidentiality

Key Contract Provisions – Confidential Information/PHI

- Will strategic/business information or PHI be obtained, accessed, or used?
- How is it being protected?
- What happens if impermissible disclosure or breach?

Key Contract Provisions – Indemnification

- So what is indemnification?
 - The obligation to pay or compensate other party for its own legal liabilities or losses (usually to third party)

Key Contract Provisions – Indemnification

- Unilateral or mutual
- Scope
 - Events beyond your control?
 - Other exceptions?
- Definition of damages/losses
 - What is included?
 - What is excluded?
- Procedure for invoking
 - Notification and timing

Key Contract Provisions – Limitation of Liability

- Think about a situation where your organization incurs a liability . . .
 - But was really other party's fault/responsibility
- Limitations
 - Tied to fees paid? (for example, 12 months)
 - Capped?
 - Other carve-outs?

Key Contract Provisions – Exhibits and Addenda

- Are all exhibits and addenda mentioned in contract included **and** filled in?
 - Often specific services and fees will be placed in exhibit/addendum in order to easily change or add additional services by changing exhibits

HEALTH CARE LAWS

Issue-spotting for specific health care compliance issues with contracts

Health Care Laws

- According to the HHS-OIG's website, "[t]he five most important Federal fraud and abuse laws" are:
 - Ethics in Patient Referrals Act ("Stark Law") (42 USC § 1395nn)
 - Anti-Kickback Statute (42 USC § 1320a-7b(b))
 - False Claims Act (31 USC §§ 3729-3733)
 - Civil Monetary Penalties Law (42 USC § 1320a-7a)
 - Exclusion Statutes (includes both mandatory and permissive exclusion) (42 USC § 1320a-7)
 - (And don't forget state laws)

Stark Law

If a physician (or family member) has a financial relationship with an entity that does not fit an exception, the physician may not refer and the entity may not bill for designated health services payable under Medicare

- Contracts with physicians or physician groups
- Technical/complex law
- Bad intent not required

Examples of Financial Relationships

- Employment
- Medical director services
- Professional services
- Call coverage agreements
- Independent contractor
- Equipment lease
- Recruitment agreement
- Ownership interests
- Providing services to physicians

Stark Exceptions

If a physician (or family member) has a financial relationship with an entity that does not fit an exception, the physician may not refer and the entity may not bill for designated health services payable under Medicare

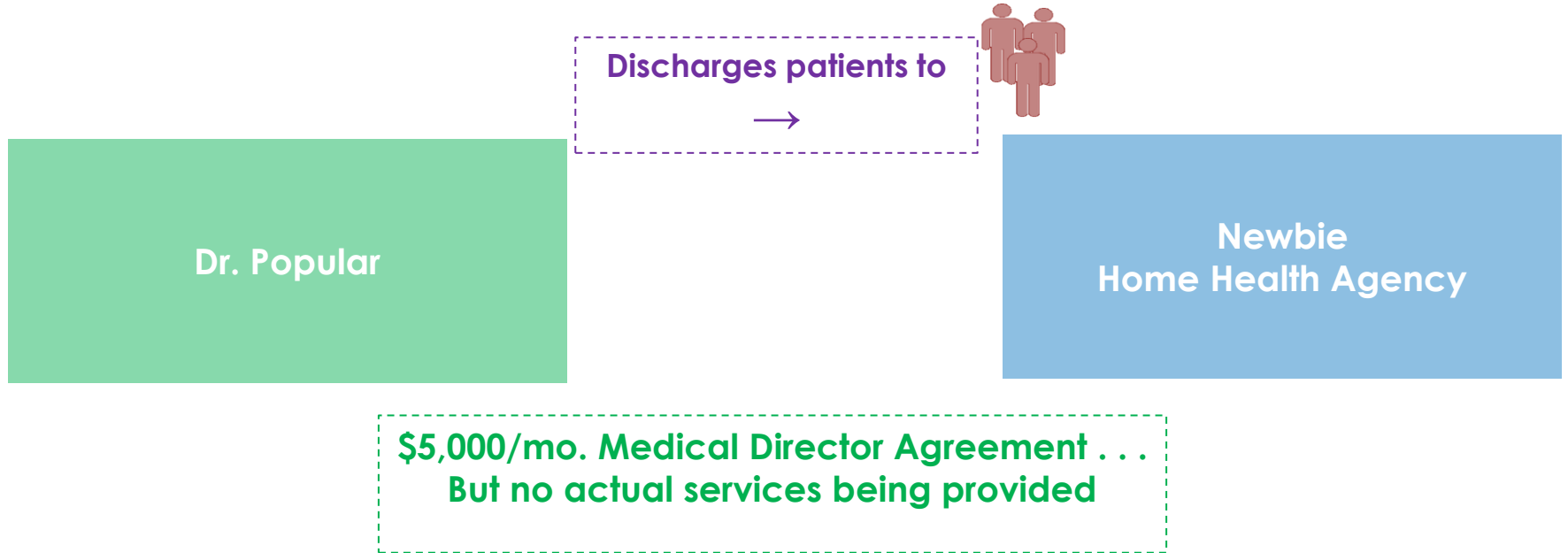
- The good news: there are exceptions
 - Employment
 - Recruitment
 - Rental of space, equipment
 - Personal service arrangements
 - Fair market value
 - Charitable donations by physicians
- The bad news: you must comply with every element of exception

Anti-Kickback Statute

It is unlawful to “offer or pay” (or “solicit or receive”) remuneration intended to induce referrals or the ordering of items and services payable under Medicare, Medicaid or federally-funded health plans

- Not limited to contracts with physicians; broadly applicable to all types of health care providers and referral sources
- Intent based
 - Intent can be inferred from facts
- “One purpose” test
 - Even if there are other legitimate non-referral related reasons for arrangement, if even one of the purposes is to induce referrals, statute will be violated

Kickback Scenario



Anti-Kickback Statute – The “Smell” Test

- Does the transaction make sense in absence of referral relationship?
- Would parties contract on these terms if one was not in position to refer to other?
- Is compensation fair market value and on commercially-reasonable terms?
- Did you need and did you receive what you bargained for?



Anti-Kickback Statute – Issue-spotting

- Core elements of typical violation:
 - Paying for items/services not *provided*
 - Paying for items/services not *needed*
 - Compensation taking into account volume or value of referrals
 - Payments not *fair market value*
 - Transaction doesn't make commercial sense without taking referrals into account

HIPAA & BUSINESS ASSOCIATE AGREEMENTS

Definition of Business Associate

- “*Business Associate*” means
 - A person who, on behalf of a covered entity, but other than in the capacity of a workforce member, creates, receives, maintains, or transmits PHI for a function or activity regulated by HIPAA.

Definition of Business Associate

- Including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities, billing, benefit management, practice management, and repricing; or
- Provides, other than in capacity as workforce, legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services

Business Associate Mistakes

- Incorrectly identifying BAAs
 - If not a BA, is a vendor confidentiality agreement appropriate? (for example, maintenance or HVAC)
- Not executing BAA when one is required (\$31,000 settlement)
- Not updating BAAs for 2013 Omnibus Final Rule (\$400,000 settlement)
- Vendor says BAA cannot be negotiated (or pricing is tied to terms of their BAA)

Business Associate Agreement Tips

- Timeline for notification of impermissible use, disclosure, or breach is negotiable
 - Recommend 3-5 business days
- Costs associated with breach (include that BA is responsible in the BAA)
- Indemnification
 - BA should be responsible if caused breach or if breach occurred in their systems
 - What if you are fined?
- Keep a copy of the BAA with the contract

PITFALLS IN CONTRACT PROVISIONS

Do's and don'ts (aka contract pet peeves)

I've Read this Agreement Twice and I Still Can't Tell What It Is For . . .

- Remember business team that negotiated agreement may not be around when issues of interpretation come up
- Use recitals, description of services, exhibits, etc. to create full picture of arrangement
- If helpful, save emails, pro formas, and key drafts with contract file

Yes, We Can Terminate This Agreement . . . In 2040

- Even if you believe things will go great as you are negotiating contract, remember they may not!
- Ensure termination without cause clause is included
 - If not, can end up owing full fees for entire term if need to terminate
 - Can be difficult to prove breach of contract occurred
- Difference between true termination without cause provision and termination before renewal

Balanced Provisions

(“We’ve Got to Promise the Moon and They’re Going to Ensure They’ve Got a Flashlight”)

- Evaluate provisions as you read them for balance/fairness
- Do you have 4 pages of obligations v. their 2 paragraphs?
- Are terms mutual when they can be?
 - You have to indemnify; they don’t
 - You are contractually required to keep certain amounts of insurance; they aren’t
 - They can assign contract if get bought out without first getting your consent; you can’t
 - They can terminate with 30 days’ notice; you have to give 180 days’ notice

CONTRACT NEGOTIATION & MANAGEMENT

Tips for negotiating and managing contracts

Do You Know Who You Are Contracting With?

- What do you know about other party?
- Any brief background research?
- Have they been in the news?
- Any references from other organizations?
- Who referred you to vendor? (Or vice versa)

Negotiations

- Should always expect negotiation will be necessary
- Think about your bargaining position – do you have options?
- Negotiating strategy
 - Get everything on the table – wants and needs
 - Be realistic but assertive
- Do you need an attorney?
 - Who are you negotiating with?

Common Negotiation Tactics

- Sales pitch:
 - It's the end of the month/quarter/year
 - This has to be signed right away to get this deal
 - Pricing depends on these terms (it probably doesn't)

Common Negotiation Tactics

- Contract was only sent in PDF
 - Ask for it in Word (or convert it)
- “Everyone else agreed to the standard terms”
- “You’re the first organization that wants to negotiate these terms”
 - Don’t believe it and don’t be thrown off track!

Contract Management

- Make sure you get signed copy back
- Develop way to store contracts
 - Can be electronic folder, particular file cabinet, etc.
- Create contract management system
 - Use calendar reminders (upcoming termination/renewal)
 - Contract management software
 - Excel spreadsheet

Contract Management

- Establish process for new vendors
 - Conduct excluded provider screenings
- Establish periodic review periods
 - Have services been delivered as promised?
- Track milestones
 - Dates of automatic fee increases
 - Contract expiration/renewal dates

Contract Renewal and Termination

- Set up alerts for termination timeframes
 - If right to terminate is limited to certain time period, make sure you have enough time to evaluate and give notice of termination (if you want to)
- Determine if extension, amendment, or new contract is needed

Questions?