



Review of Systems: Remembering Your Worth When Negotiating Your Contracts

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Presentation Topics

- Understanding and Negotiating
 - Employment Contracts
 - Independent Contractor Agreements
 - Payor Agreements





Presentation Goals

- Following the presentation, you should
 - Know what it takes to make a binding contract
 - Know the difference between employees and independent contractors
 - Understand basic limitations on non-competition clauses
 - Understand the difference between termination “for cause” and termination “without cause”
 - Be able to begin to analyze compensation clauses
 - Know what factors affect your ability to negotiate reimbursement rates





What is a Contract?

- A contract is a set of enforceable promises.
- A promise to you is enforceable if you gave something for it in return.
 - The law says the promise to you is supported by “the consideration” you gave in exchange for it.
- The consideration you gave could be a present payment, a present act, or a future promise that remains to be fulfilled.





Pure Views of Contracts

- There are two *pure* views of contracts.
 - The first view is moral: people always *ought* to keep their promises.
 - The second is economic: people are *entitled* to break their promises, *provided* they are willing to pay for the damage they cause.
- Courts tend to emphasize the second view.





Written Contracts

- Contracts do *not* have to be in writing, except in special cases.
- The problem with oral contracts is that people *disagree* about what they say, and their contents are *hard to prove*.





Bad Contracts are Contracts

- A bad contract is still a contract, and you will be bound by the agreement you make, even if it is not as good as it should be.
- So, the point of this presentation is to help you remember your own worth in contract negotiations, and make sure the contract reflects your worth by being fair to you.





Employment Contracts





Employees Have Contracts

- If you are an employee, you have an employment contract.
- The employment contract may be oral instead of written.
- But it exists, and it establishes your rights & duties with respect to your employer.





Letters of Intent

- Signing a Letter of Intent (“LOI”) is a common early step in employment contract negotiations.
- The LOI describes the job, starting date, salary, and other things, and the parties sign it.
- But it usually says it is not binding. If so either party can walk away without paying damages to the other party; but once it is signed . . .
 - It will be hard to get the employer to change its terms;
 - Nor should the employer change terms on you.





Term of the Contract

- Professional employment contracts are usually for a specific time (the “initial term”), and they usually renew for additional terms unless one party tells the other it wants the contract to expire at the end of the then-current term.
- The initial term may be one year or more, and that does not usually matter.





Compensation

- There may be guaranteed compensation for the first year or more.
- But Compensation is usually, eventually, based on productivity, perhaps with bonuses for:
 - Clinical quality,
 - Patient satisfaction, and
 - Administrative efficiency.
- Compensation may be “back-loaded” to the end of the fiscal year (i.e., no bonus till you finish the year).





Compensation (cont.)

- Your expected work load and compensation should be typical for the area (MGMA data).
- Compensation based on Work Relative Value Units (wRVUs) should:
 - Not vary with patient mix (low-pay & no-pay), and
 - Not drop because of poor collections.
- Beware of compensation that will likely fall off after the initial term (“bait & switch”).





Negotiating Compensation

- Know what the market pays before you start to negotiate compensation.
- Know your employer. What do they need?
- Know the special skills and interests you bring to your employer. How are you valuable to it?





Negotiating Compensation (cont.)

- Negotiate the compensation before you get the LOI.
 - Your “ask” should be more than you would take but not out of line with the market.
 - Even if you cannot get a better base salary, there are other ways to add value:
 - Signing bonuses
 - Benefits
 - Scheduling
 - Favorable productivity bonuses





Outside Work

- You will assign to your employer the fees you bill while working for your employer.
- You may have to assign to your employer some or all earnings from moonlighting, consultation, research, lectures, writing, and testifying; if you do, these earnings need to factor into your compensation formula.
- You should be allowed to keep all earnings from any work that is not medical and is on your own time, e.g., whether investments or novels.





Termination Clauses

- NC is an employment-at-will state.
 - Unless the contract says something different, any employee can be terminated for good reasons, bad reasons, or no reason at all;
 - Except, some reasons – such as race, religion, and sex – are illegal.





Termination Clauses (cont.)

- Most employment contracts specifically say that they can be terminated both
 - with cause, and
 - without cause.
- The contracts will discuss the difference between termination with and without cause.





Termination for Cause

- Employers like to list reasons that let them terminate an employment contract immediately, without having to pay damages.
 - Some are unobjectionable, such as loss of licensure.
 - Some are vague and undesirable, such as “disruptive behavior.”
 - Some are concrete but undesirable, such as failing (even just once) to meet the standard of care.





Termination for Cause (cont.)

- Employees can guard against overly broad grounds for termination.
 - Ask for a reasonable amount of time *to cure* any breach that can be cured (e.g. to catch up on notes or correct bad behavior).
 - Try to narrow the grounds (e.g., instead of allowing termination if the employee is *arrested* for an *alleged* crime, only allow termination if the employee is *convicted* of a *felony*).





Termination for Cause (cont.)

- Employers do *not* like to specify the grounds for which the employee may terminate the agreement for cause.
- At a minimum, employees want the contract to say they may terminate it on account of any material (i.e., fundamentally important) breach that is not cured by the employer within a specified number of days.





Termination w/o Cause

- Usually, either party may end the contract *without cause* by giving the other party prior written notice of termination.
- The amount of notice (i.e., time) varies a lot, but it ought to be the same for both parties.
- There is no perfect amount of notice.
 - On balance, 90 or 120 days is probably best.
 - Hospitals often ask for more, saying it takes them many months to recruit a replacement.





Termination w/o Cause (cont.)

- Termination without cause provisions do *more good than harm* because they allow parties to part ways reasonably quickly without one party alleging misconduct or incompetence by the other.





Work & Salary after Termination

- If the employee . . .
 - Is *fired without cause*, the employer can make the employee leave but must pay for the time left in the notice period.
 - *Quits without cause*, the employer may accelerate the employee's leaving date without paying for the days not worked.
 - Is *fired for cause*, the salary will end immediately.
 - *Quits for cause*, the employer should have to pay damages in lieu of the salary the employee would have earned.





Tail Coverage

- Departing employees usually have to pay for their own tail coverage, and contracts usually have provisions to enforce this requirement.
- Sometimes larger employers will agree to pay for the whole cost of tail coverage.
- A compromise is to have the party “responsible” for ending the contract pay for the tail.
 - If the physician quits without cause or is fired for cause, the physician pays for the tail.





Non-Competes

- North Carolina law enforces non-competition agreements, provided they are:
 - Supported by *consideration*, i.e., “paid for,”
 - Reasonable as to their geographic *area*,
 - Reasonable as to their *duration* (i.e., time), and
 - Reasonable as to patient needs (i.e., not against *public policy*).





Non-Competes (cont.)

- Rough and ready indicators of reasonableness:
 - Consideration might be new employment, new benefits in present employment, promotions, or raises.
 - A reasonable geographic area needs to be based on where you work and the actual area your patients come from.
 - A one-year period is certainly reasonable; two is almost certainly reasonable; three might be reasonable; four or more are presumptively unreasonable.
 - Specialists who would be forced out of a geographic area often can show this deprives their patients of needed services.
- Courts have just limited authority to fix improper non-competes.





Injunctions & Damages

- Injunctions
 - Employers often ask employed physicians to *agree* the non-competition provisions can be enforced by injunctions.
 - Injunctions are exceptions to the idea that people may break contracts provided they pay damages.
- Liquidated damages
 - Contracts often include “liquidated damages,” i.e., include a clause saying the breach of the non-compete will cause a specific amount of damages.
 - Be sure the contract says that paying the liquidated damages extinguishes the non-compete so you can “stay if you pay.”





Independent Contractors





Contractor Agreements

- Elements of Independent Contractors
 - ICs work under their own direction
 - ICs do not define the job
 - ICs do choose the method and schedule
 - ICs manage their own business operations
 - ICs do not receive benefits from the person for whom they are doing the job





Examples of Contractors

- Part-time Medical Director
- Locum Tenens
- Peer Review Consultant





Things for an IC to Consider

- IRS Concerns
 - Does the “hirer” have so much control that the IC is actually an employee, not a contractor?
- Outcomes
 - Is the outcome precise enough so that the IC knows if it has been achieved?
- Compensation
 - Is the compensation reasonable and calculable?





Compliance Issues

- Referrals: If you are in a position refer patients for Medicare or Medicaid services:
 - Make sure the contract is in writing & for one year
 - Make sure the compensation is reasonable
 - Make sure there is no requirement to refer
 - Make sure compensation is not related to referrals
 - Consult counsel





Payor Contracts





Negotiating with Payors

- Know your payors
 - Who are your payors?
 - Who is your contact at each payor?
 - What does each payor pay for each code?
 - What fraction of your total billings does each payor account for?





Negotiating with Payors (cont.)

- Know your payors (cont.)
 - When does each payor contract renew or expire?
 - Is it evergreen?
 - Do your rates automatically increase?
 - Is the increase reasonable?
 - When must you give notice of . . .
 - Intent to renegotiate?
 - Intent to appeal?
 - Intent to terminate?





Negotiating with Payors (cont.)

- Know your practice
 - What are your specialties and strengths?
 - Who are your referral sources?
 - What is your market share?
 - What is your break even point for each service you provide (each code you bill)?
 - It's one thing to tell a payor it pays less than others;
 - It's better to show it pays less than your cost of services.





Negotiating with Payors (cont.)

- Tactics
 - Be very well prepared to prove . . .
 - Your quality
 - Your efficiency
 - Your essential presence in the area
 - Negotiate as often as you can.
 - Accept that you may make progress gradually.
 - Be prepared to quit if you should.





Conclusions

- Everything is negotiable.
- Know what you need.
- Know what you bring to the table.
- Know who you are negotiating with.





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