

Contract Review: A Pillar of Healthcare Risk Management

Consider the following liability scenario:

A consultant pharmacist was hired by the physician-owner of a freestanding endoscopy center, where her chief responsibility was to verify that medications were properly stored and outdated drugs safely destroyed. Among the drugs utilized at the center was the anesthetic Propofol, available in both 20cc and 50cc single-dose vials. As many patients required a dose between 20 cc and 50 cc, the physician-owner routinely required nursing and anesthesiologist staffs to draw the unused amount from partially filled 50cc vials for use on other patients.

This reuse of needles or syringes from single-dose vials on multiple patients violated infection control standards, resulting in the potential exposure of thousands of patients to hepatitis C. Several hundred lawsuits were filed, culminating in multi-million-dollar plaintiff verdicts. The physician-owner and the center declared bankruptcy, causing plaintiffs to seek other potential defendants – including the consultant pharmacist, who was alleged to have failed to follow proper sterile technique, among other assertions.

Legal proceedings revealed that the pharmacist had no knowledge of the negligent practices and had not been specifically instructed to monitor the staff's use of Propofol. However, it was also discovered that her contract stated that she was "responsible for all matters pertaining to the use of drugs in the center." Primarily due to this broad contractual provision, the case was settled at the full limits of the pharmacist's insurance policy, with the proceeds divided among the claimants.

For healthcare business owners, written contracts govern numerous issues, ranging from the delivery of clinical care to outsourced administrative services and building repair and maintenance. When well drafted, these agreements can help mitigate exposure in case of injury, as well as avert costly countersuits and vicarious liability if the organization's employees are sued for alleged wrongdoing.

In the case scenario, the contract's extremely broad indemnification agreement worked in favor of the owner of the endoscopy center, and against the interest of the pharmacist. However, not every contract offers equal protection against the threat of financial loss. A poorly drafted contract can just as easily work to a business owner's disadvantage. Because a poorly drafted contract can result in prolonged and expensive disputes between the parties, business owners must ensure that all written agreements are fair, enforceable and explicit in terms of defining mutual responsibilities and limiting liability.

This edition of *Healthcare Perspective* offers a practical guide to contract terminology and the essentials of contract review. Also included are the following helpful sidebars to assist healthcare business owners in various aspects of contract development, maintenance and review:

- A self-assessment tool to aid in reviewing both new contracts and those up for renewal. ([See page 4.](#))
- Sample healthcare contract clauses. ([See page 6.](#))
- Sample job description for contract manager. ([See page 7.](#))

CONTRACT TERMINOLOGY

Contract terminology can be difficult to understand and the terms used can be intimidating. Below are a few key terms with their definitions that can be found in most contracts. However, healthcare business owners are advised to consult legal counsel regarding contract terms as they relate to operating a business in their respective state.

Indemnification. Most written contracts contain an indemnification clause. Other terms used to describe these risk allocation arrangements include *hold harmless*, *release* and *waiver*. Each such designation addresses a distinct risk component. These clauses are an important business tool, designed to efficiently and economically allocate risk among contracting parties and to avoid additional up-front costs associated with liability coverage. The choice of risk control measures often depends upon specific organizational objectives, such as ensuring operational efficiency or continued growth in a business segment.

Indemnification is a common element in many types of healthcare contracts, including those involving:

- Clinical practicum and research.
- Equipment leases and rentals.
- Information technology outsourcing.
- Shared service agreements among hospitals.
- Licensing of intellectual property.
- Physicians and licensed independent healthcare practitioners.
- Temporary staff arrangements.

Indemnification clauses typically permit an organization to assume the liability exposure of another party for all losses, claims, suits, costs and expenses in connection with the organization's breach of contract, negligence or willful misconduct. These provisions also may extend coverage to third-party claims, so healthcare organizations should thoroughly review indemnification language to ensure protection against such liability.

Because of the broad range of liability exposure created by indemnification provisions, contracts tend to incorporate reciprocal indemnification clauses, whereby each party may demand indemnification from the other. Fair and effective clauses typically limit indemnification to claims that are entirely or primarily the fault of one party. Thus, under these business agreements, an organization is relieved of its obligation to indemnify the other party to the extent that party caused or contributed to the loss.

Hold Harmless. Hold harmless clauses are often considered synonymous with indemnification. Both permit one party to assume the liability of another, ultimately relieving the other party of responsibility for damages or other liabilities. Some courts have found that a duty to hold another party harmless can impose an obligation on the indemnitor to assume the expenses for defending a claim, as well as related losses.

As a general rule, if an indemnification clause must be included in a contract, it should take the form of a narrowly defined, mutual hold harmless clause. Each party should agree to "indemnify, defend and hold harmless" the other for losses arising solely from its own actions or omissions, and declare that it will not pursue a liability claim against the other. Provisions that address a variety of risk issues offer the greatest protection.

Additional insureds. An increasing number of business owners are no longer satisfied with healthcare organizations agreeing to hold them harmless in the event of a claim through contracts entered into in the ordinary course of business. Many are seeking additional insured status on the insurance policy of the healthcare organization. This additional insured coverage provides business partners a direct form of liability coverage that is not predicated on the enforceability of a contractual indemnification provision.

The protection afforded an indemnitee by an indemnification agreement and the coverage afforded an additional insured by an additional insured endorsement are independent protections that may not be equally as broad. An additional insured endorsement does not "insure" the indemnification agreement. Rather, it describes direct coverage available to the additional insured under the Named Insured's policy, and subject to all terms and conditions of that policy (and not to the provisions of any indemnification agreement). Thus, an organization may successfully negotiate a reciprocal indemnification provision, and then inadvertently undercut this contractual protection by making the indemnitee an additional insured. For this reason, insurance companies may decline to extend additional insured coverage, especially if the party to be added presents a significant liability risk. An insurance underwriter will seek to understand the relationship between the named insured and the additional insured and any possible liability consequences before offering such coverage.

Subrogation. Subrogation clauses refer to the substitution of one person or group by another with reference to a lawful claim, demand or right, so that the person who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights.

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INITIAL CONSIDERATIONS

The first step in reviewing any contract involves verifying that the parties:

- Are competent to contract with each other. (i.e., can make decisions on behalf of their employer and are authorized to sign contracts on behalf of their organization).
- Agree on their mutual obligations (i.e., the specific services and payments to be rendered).
- Have given appropriate consideration to the arrangement, including review by legal counsel and other relevant parties.

Those responsible for reviewing the contract should consider the following criteria, among others:

- *Language should be as simple and specific as possible*, while at the same time allowing for later amendment and revision, if necessary.
- *Rights and responsibilities of the contracting parties should be clearly articulated* and organized into logical sections with headings for quick reference.
- *Basic terms should be defined within the body of the contract*, especially if the agreement involves new technology or legal standards of care.
- *New contracts should have an initial term of no more than one year*, when possible, to allow for a relatively quick exit in case issues emerge.

Both parties should have the right to examine and negotiate contractual provisions, especially in regard to such key elements as scope of responsibility and dispute resolution methods. Beware of boilerplate language and agreements drafted prior to negotiations and presented on a take-it-or-leave-it basis.

DUE DILIGENCE

Due diligence refers to the process of learning as much as possible about the other party before signing a contract. It should be conducted by the entity's leadership structure, including ownership as well as the financial officer, risk manager and legal counsel. Complex contracts require the scrutiny of an attorney conversant with the legal issues relevant to the agreement.

When contracting with larger organizations, the due diligence procedure should include a review of important supporting documentation, such as organizational mission statements, audited financial reports, and regulatory filings, as well as proof of insurance, reinsurance and insolvency coverage. When entering into an agreement with smaller independent contractors, either medical or non-medical, request that they produce appropriate certificates of insurance before performing any work at the facility.

PROVISIONS

Indemnification clauses and hold harmless agreements demand careful legal review, as do termination clauses. The contract should specify acceptable grounds for termination, both with and without cause, as well as the length of notice required prior to termination of the agreement.

Insurance clauses should be reviewed by legal counsel to examine whether requests for additional insured protection would undercut reciprocal commitments not to sue each other, and whether the organization is comfortable with the extent of additional insured coverage requested for other parties' negligence.

It is good practice to request substantial advance notice of termination and to place limits on when during the year the contract can be ended, such as dates in proximity to the anniversary date of its signing. Be cognizant of provisions that automatically renew the arrangement if neither party exercises its right to terminate.

PROBLEM RESOLUTION

Contract disputes typically result from either unequal bargaining power between the two parties at the time of negotiation or ambiguity in contract language. While a scrupulous review process and due diligence can minimize the possibility of future conflict and litigation, the contract should include a process for resolving disputes that protects both parties' rights and interests.

Clear, detailed, mutually satisfactory contracts are the key to optimizing business relationships and minimizing potential misunderstanding and litigation. The guidelines and suggestions contained in this newsletter can help healthcare business owners begin the process of assessing existing agreements, as well as the organization's overall process of negotiating, reviewing and executing contracts.

*Beware of boilerplate language
and agreements drafted prior
to negotiations and presented
on a take-it-or-leave-it basis.*

Contract Self-assessment Checklist

The following questions are designed to help healthcare business owners evaluate basic policies and procedures. For additional risk control tools and information on a wide and growing range of topics, visit www.cna.com, www.hpsso.com and/or www.nso.com.

| SELF-ASSESSMENT TOPIC | YES/NO | ACTION(S) NEEDED TO REDUCE RISKS |
|--|--------|----------------------------------|
| BUSINESS | | |
| <ul style="list-style-type: none"> Are both parties' expectations clearly expressed within the contract? | | |
| <ul style="list-style-type: none"> Does the contract include a provision regarding termination, both for cause and without cause? | | |
| <ul style="list-style-type: none"> If the contract imposes post-termination obligations on the payer, such as returning intellectual property or keeping identifiable patient information confidential, are these obligations clearly stated? | | |
| <ul style="list-style-type: none"> Does the contract specify the renewal arrangement, i.e., whether renewal is automatic or must be agreed upon by both parties at or prior to the renewal date? | | |
| <ul style="list-style-type: none"> Are there requirements for ongoing review of the contract, i.e., are there quality indicators that must be met or patient satisfaction initiatives that must be achieved? | | |
| <ul style="list-style-type: none"> Is there a "disruption of business interest" clause, as well as a stipulation that the party responsible for any business interruption must be given an opportunity to cure the disruption or reimburse the other party for lost earnings? | | |
| <ul style="list-style-type: none"> Are antitrust issues addressed, preventing competitors from collectively negotiating prices, i.e., through a clause that requires the parties to abide by federal and state laws and regulations regarding the subject matter of the contract? | | |
| <ul style="list-style-type: none"> Can reimbursement arrangements be administered, i.e., can the healthcare organization give or receive something of value in exchange of business paid for by Medicare or other government programs? | | |
| <ul style="list-style-type: none"> Are payment methods and risk-sharing issues expressly addressed? | | |
| <ul style="list-style-type: none"> Does the contract protect against the potential consequences of criminal actions – such as Medicare fraud and abuse – committed by the contracted party? | | |
| <ul style="list-style-type: none"> Does the contract prohibit disclosure of negotiated rates and fees? | | |
| <ul style="list-style-type: none"> Is there an opt-out clause to protect against payer insolvency? | | |
| CLINICAL | | |
| <ul style="list-style-type: none"> Is there a reasonably restrictive non-competition clause for clinicians who may terminate services with the healthcare business? | | |
| <ul style="list-style-type: none"> Are the contract's credentialing procedures for contracted healthcare professionals consistent with applicable laws and organizational policy? | | |
| <ul style="list-style-type: none"> Are contracted personnel required to participate in facility committees, such as those involved with risk management, safety, quality and clinical service? | | |
| <ul style="list-style-type: none"> Does the contract address the issues of healthcare information access, confidentiality and disclosure in a manner consistent with HIPAA and other state and federal laws? | | |
| <ul style="list-style-type: none"> Does the contract reference peer and clinical care review processes? | | |

| SELF-ASSESSMENT TOPIC | YES/NO | ACTION(S) NEEDED TO REDUCE RISKS |
|--|--------|----------------------------------|
| INSURANCE | | |
| <ul style="list-style-type: none"> Does the contract specify the type and minimum limits of coverage to be carried by each party? | | |
| <ul style="list-style-type: none"> Is tail coverage required for parties carrying claims-made liability insurance? | | |
| <ul style="list-style-type: none"> Does the contract discuss sufficiency of coverage for self-insured parties, i.e., self-insured parties must maintain, at a minimum, the state required professional liability coverage(s) for the duration of the contract? | | |
| <ul style="list-style-type: none"> Is a hold harmless provision included in the contract to minimize vicarious liability? | | |
| <ul style="list-style-type: none"> Does the contract limit indemnification to the scope of insurance coverage? | | |
| <ul style="list-style-type: none"> Is the organization named as a certificate holder with respect to practitioners' professional liability carrier? | | |
| <ul style="list-style-type: none"> Does the contract require written notice of changes in insurance coverage? | | |
| <ul style="list-style-type: none"> Does the contract address joint cooperation in the event of a claim, as applicable? | | |
| <ul style="list-style-type: none"> If the contract involves performance of administrative duties, does the facility's directors and officers liability insurance policy cover associated exposures? | | |
| <ul style="list-style-type: none"> Is there a contractual right of subrogation, which provides adequate notice of each party's interest in any claim settlement, and which permits recovery of expenses incurred for a specific event involving a subrogation matter? | | |
| LEGAL | | |
| <ul style="list-style-type: none"> Does the contractor have the appropriate legal structure and authority to contract, i.e., are the parties signing the contract authorized to make decisions on behalf of their business? | | |
| <ul style="list-style-type: none"> Have all necessary documents and references been obtained and carefully reviewed? | | |
| <ul style="list-style-type: none"> Is the contract wording clear and unambiguous? | | |
| <ul style="list-style-type: none"> Are contractual obligations explicit, comprehensible and reasonable? | | |
| <ul style="list-style-type: none"> Is every word of the document specific, clear and well-defined? | | |
| <ul style="list-style-type: none"> Are both parties permitted to negotiate changes in the contract prior to execution? | | |
| <ul style="list-style-type: none"> Does the contract contain guidelines for dispute resolution, such as mediation and arbitration? | | |

Sample Contract Clauses

The following examples of contract language may serve as starting points when drafting provisions involving relatively common healthcare exposures. Note that every organization must examine the specific implications of such provisions and consult with legal counsel regarding their usage.

ANTI-KICKBACK PROTECTION

If [vendor] provides any “discount or other reduction in price” as referred to under Section 1128B(b)(3)(A) of the Social Security Act 42 U.S.C. § 1320a-7b(b)(3)(A), it shall disclose the discount or reduction in price on its invoice to Healthcare Business, and Healthcare Business agrees to disclose that discount or reduction in price under any state or federal program that provides cost- or charge-based reimbursement to Healthcare Business for services and products covered by this Agreement.

CONFIDENTIALITY OF PATIENT INFORMATION

[Vendor] acknowledges that patient medical information is confidential and protected by state and federal law. [Vendor] shall not disclose patient-identifiable information to any third party, and shall use patient-identifiable information only to the extent necessary to perform the services specified under this Agreement.

[Vendor] shall be liable for any misuse, misappropriation, disclosure or other breach of the private nature of patient-identifiable information arising out of [vendor’s] performance under this Agreement.

CORPORATE COMPLIANCE

[Vendor] understands that the Healthcare Business has adopted a Corporate Compliance Program and is committed to complying with all applicable laws, rules and regulations. Accordingly, [vendor] shall comply with all laws, rules and regulations concerning the services or items furnished to the Healthcare Business under this Agreement.

In addition, [vendor] shall bring to the attention of the Healthcare Business’s Compliance Officer, or a designee, any alleged improper practices [vendor] may discover in association with this Agreement, so that the Compliance Officer may take appropriate action.

MUTUAL INDEMNIFICATION

Each party shall indemnify and hold the other – its officers, employees and agents – harmless from any and all liability and damages, costs and expenses, including reasonable attorney’s fees and costs, which the other or its officers, employees or agents become obligated to pay due to the negligent or intentional acts or omissions of the party or any of its personnel arising out of its duties and obligations under this Agreement, provided that no indemnification will be required to the extent it would result in the loss of available coverage under the liability insurance maintained by either party. This provision shall survive the termination of this Agreement.

PROPRIETARY INFORMATION

All information about the Healthcare Business furnished to or obtained by [vendor] in connection with the performance of its duties hereunder, including information about the Healthcare Business incorporated into [vendor’s] documents, is “Proprietary Information.” Proprietary Information does not include information that (a) is generally available to the public; or (b) was available to [vendor] on a non-confidential basis prior to its disclosure by the Healthcare Business Except to the extent permitted by this Agreement, or as required by applicable law, [vendor] agrees (a) to keep all Proprietary Information confidential; and (b) to take reasonable steps to safeguard and protect the Proprietary Information. [Vendor] shall not disclose any Proprietary Information to any third party unless the third party has a need to know such Proprietary Information to fulfill [vendor’s] obligations hereunder. [Vendor] will cause its subcontractors, agents and other representatives to observe the terms of this agreement. In the event that [vendor] is required by applicable law to disclose any Proprietary Information, [vendor] shall provide the Healthcare Business with prompt notice of such request.

Source: “Suggestions and Checklist for Review of Hospital Contracts.”

Sample Job Description for Contract Manager

The networks of contractual relationships between healthcare businesses and providers, agencies and vendors have become increasingly complex. To keep pace with ever-changing contractual arrangements, many business owners have established the position of contract manager to oversee the development and maintenance processes. Below are key attributes of a contact manager.

ROLE

The contract manager's task is to ensure consistent management of all proposals and contracts. This generally includes oversight of the contract management process, as well as development of specific standards for bidding and submission, contract negotiations and document management. The contract manager's role in the contract development process requires close collaboration with various departments, including clinical operations, project management, account management, business operations and finance.

RESPONSIBILITIES

- Oversee organizational contract development and management activities, and enforce organizational principles of integrity and compliance.
- Ensure that contracts and proposals are properly entered into organizational databases and securely maintained.
- Develop standards for contracts, including presentation of budget, payment terms, general language and provisions.
- Perform appropriate clinical, administrative and operational research to support proposal and contract development.
- Conduct contract strategy meetings to identify issues and client requirements, facilitate pricing discussions, and obtain senior management input on timelines and deliverables.
- Draft contractual provisions based on strategy discussions, senior management input, and organizational needs and expectations.
- Assure accuracy and appropriateness of contract text and attachments.
- Interface with insurance companies regarding adequacy of coverage and purchasing needs.
- Serve as primary organizational contact during contract negotiations.

- Engage relevant stakeholders in negotiation decisions involving legal or regulatory requirements, contract standards and cost targets.
- Develop and execute negotiation strategies that minimize potential losses and benefit the healthcare organization's financial performance.
- Maintain deadlines on deliverables and communicate on an ongoing basis with business partners and internal clients about contractual issues.
- Review contractual performance of both parties to ensure compliance with terms and to identify conflicts or changes requiring resolution at contract renewal.

QUALIFICATIONS

- Bachelor's degree in business, healthcare management or related field preferred. (In some cases, an advanced degree may be desirable.)
- Prior work experience in a contract management role, such as purchasing or contracting.
- Proficiency in utilizing and interpreting financial models and analyses.
- Experience in applying organizational standards when developing requests for proposals, negotiating terms and drafting contracts.
- Ability to systematically analyze complex problems, draw relevant conclusions and implement appropriate solutions.
- Strong verbal and written skills, and ability to convey complex information in a way that others can readily follow.
- Excellent negotiating and persuasive skills, both in one-on-one and group situations.

RELATIONSHIPS

- Reports to chief business operations officer.
- Supervises proposals and contract development staff.
- Aligns with managers of business operations, including relevant divisions of finance, legal and project development.



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