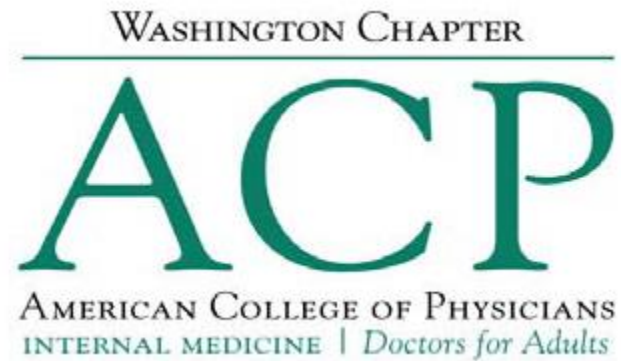


Physician Contracts: Legal Tips for Negotiating a Better Deal

Thomas A. Pedreira, Esq.
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I. Pre-Contracting Considerations

A. Market analysis

- 1. Research the market place for your specialty through whatever resources can be accessed**
- 2. Medical Group Management Association**
- 3. Medical associations (e.g., www.wsma.org)**
- 4. Trade associations (e.g. www.acponline.org)**
- 5. Pick the brains of counselors, mentors, peers, business associates**
- 6. Regulatory environment (e.g., impact of The Patient Protection and Affordable Care Act)**

I. Pre-Contracting Considerations (cont.)

B. Assess relative negotiating strengths

- 1. Financial resources of the parties**
- 2. Demand for specialty**
- 3. Experience**
- 4. Reputation**
- 5. Payor contracts**
- 6. Alternative contracting possibilities**

I. Pre-Contracting Considerations (cont.)

C. Due diligence on prospective employers/contracting parties

1. LexisNexis

2. Dun & Bradstreet

3. Search engines

4. State corporate departments and licensing boards

5. Social media (e.g., LinkedIn, Facebook)

6. Specialty websites (e.g., Healthgrades)

7. Wikipedia

8. Blogs, RSS feeds

I. Pre-Contracting Considerations (cont.)

D. Contact state medical board to determine licensing requirements

E. Insurability issues

F. Costs of living

G. Professional networking

1. Talk to other physicians in the area

2. Get referrals on lawyers, accountants, and bankers

I. Pre-Contracting Considerations (cont.)

H. Hire a good lawyer

1. Use available resources to find lawyers with healthcare expertise, especially in representing physicians and providers. In addition to the resources suggested above, these include:

- a. www.martindale.com (and www.lawyers.com)**
- b. www.avvo.com**
- c. ABA**
- d. State bar associations**
- e. County bar associations**

I. Pre-Contracting Considerations (cont.)

2. **How to hire a lawyer. Articles from Lawyers.com:**
 - a. <http://business-law.lawyers.com/business-enterprises/Business-Preparing-to-Meet-with-a-Lawyer.html>
 - b. <http://business-law.lawyers.com/business-enterprises/Business-Selecting-a-Good-Lawyer.html>
 - c. <http://business-law.lawyers.com/business-enterprises/Business-Meeting-with-a-Lawyer.html>
3. **Where do you hire a lawyer?**
 - a. **Local counsel here or there?**
 - b. **Cost**
 - c. **Terms of engagement**

II. Initial Discussions

A. Reconsider all the points above

B. Prepare talking points

- 1. For your own use and not to be given to the other side.**
- 2. List everything that comes to mind and try to prioritize**
- 3. Be careful about mentioning emotional points that the other side may use to their advantage**
- 4. Develop a talking knowledge about the community**

II. Initial Discussions (cont.)

C. Review existing contracts and consider departure terms

- 1. Required notices**
- 2. Stated term**
- 3. Forfeiture or penalties**
- 4. Restrictive covenants**
- 5. Insurance Issues**

D. Meet and confer with legal counsel

- 1. Understand the importance of the attorney client privilege**
- 2. Develop a rapport with counsel, be a good patient**
- 3. Ask questions**
- 4. Follow your attorneys' advice**

III. Letter of Intent

A. Non-binding ≠ negotiable

B. Always best to retain counsel before signing a letter of intent and have counsel review before signing

C. Talk to an accountant about tax consequences

1. Taxable income

2. Pre-tax benefits

3. Possible income recognition on termination

4. Withholdings

III. Letter of Intent (cont.)

D. Common terms and conditions – parameters of the deal

- 1. Job description**
- 2. Compensation**
- 3. Benefits**
- 4. Start date**
- 5. Term and termination**
- 6. Moving allowance**
- 7. Schedule**
- 8. Insurance**
- 9. Restrictive covenants**
- 10. CME**
- 11. Time off**
- 12. Confidentiality**
- 13. Binding or non-binding**

IV. The Agreement

A. What you can expect:

- 1. Health facilities will have their own template that may be presented as largely non-negotiable – but everything is negotiable. The smaller or more remote the group the more negotiable the contract.**
- 2. Contracts will inevitably have a lot of similarities, but every agreement has its hidden traps for the unwary – that typically will not come to light until one wants to leave**
- 3. Every medical center and the medical staff will have their quirks and their own unique personalities**
- 4. Even boilerplate provisions can have a tremendous impact on an agreement**
- 5. Keep in mind that there is no such thing as a perfect agreement**

IV. The Agreement (cont.)

B. Negotiation strategies

1. When to involve an attorney in direct negotiations

- a. Sometimes never – an attorney oftentimes best serves the client from the background**
- b. Deflecting questions and pressures**
- c. When the other side has an attorney**

2. Contrast other situations when direct attorney involvement is a must

- a. IRS audit**
- b. Litigation**
- c. Staff privileges**
- d. Licensure issues**

IV. The Agreement (cont.)

3. When and how to negotiate deal points

a. The advantages and disadvantages of negotiating minutia

b. Clarity is best but sometimes vagueness is also a benefit

c. Ambiguity cuts both ways

d. Keep it simple and don't reinvent the wheel

e. Watch out for double edged swords

f. The ultimate trump card – being able to walk away

g. Never burn bridges

h. Always try to consider unintended consequences

IV. The Agreement (cont.)

C. Evaluate risks

- 1. Financial viability of the contracting parties**
- 2. Legal compliance and risk sharing arrangements**
- 3. Methods of compensation**
 - a. Base salary**
 - b. Percentage of collections**
 - c. Incentive payments**
 - d. Bonuses**
 - e. Equity arrangements**

D. Regulatory no-no's

- a. Stark**
- b. State anti-referral statutes**
- c. Fraud and abuse laws**
- d. Restrictions on competition**
- e. HIPAA**

IV. The Agreement (cont.)

D . Look at exit strategies before striking a deal

1. Walk through a termination with or without cause
2. Try to consider all the “what if’s”
3. Consider worst case scenarios
4. Assume that restrictive covenants are enforceable. See: <http://www.mikkelborg.com/news.php?id=199>
5. Litigation should be avoided at all costs unless there is no other option or one is willing to bet the farm on the outcome
6. Who has more time, money and resources to fight a legal battle?
7. Look for leverage points – who needs who more?
8. How would arbitration or mediation help? See: <http://alternative-dispute-resolution.lawyers.com/arbitration/Arbitration-and-Mediation.html>
9. What are the options on new opportunities?
 - a. Starting up a new practice? <http://www.mikkelborg.com/news.php?id=1681>
 - b. Other employment possibilities?
10. Consider possible income tax consequences on termination

IV. The Agreement (cont.)

E. Typical terms and conditions

1. Contracting capacity

- a. Individual**
- b. Professional corporation or other limited liability entity**
- c. Employee or independent contractor**

2. Employment Description

- a. Broad discretion in describing**
- b. Duty of loyalty**
- c. Right to manage and control, subject to professional judgment**

3. Term

- a. Early termination rights?**
- b. Evergreen clause?**

IV. The Agreement (cont.)

4. Duties

5. Licensure and Board Certification

6. Compensation

a. Base Salary + Incentives?

b. Collection based?

c. Guaranties?

d. Advances and deficits?

e. NO referral fees or discounts!

7. Collection and Bonus Formulas

8. Defined Terms

9. Outside Activities and Compensation

IV. The Agreement (cont.)

10. Employment-Related Benefits

- a. Health benefits**
- b. Life insurance**
- c. Disability Insurance**
- d. Office space and staffing**
- e. Retirement plans**
- f. Cafeteria plans**
- g. Meals and other amenities**
- h. Communication tools**
- i. Auto allowance**
- j. Parking**
- k. Vacations**
- l. CME**

IV. The Agreement (cont.)

11. Billing Requirements and Assistance

12. Vacation and Leaves of Absence

13. Professional Society Membership

14. Continuing Medical Education

15. Patient Records

16. Confidentiality

17. Representations and Warranties

IV. The Agreement (cont.)

18. Restrictive Covenants

- a. Covenant not to compete**
- b. Scope**
- c. Term**
- d. Non-solicitation**
- e. Records**
- f. Injunctive relief**
- g. Damages**

IV. The Agreement (cont.)

19. Medical Staff Privileges

20. Claims, Investigations, and Peer Review

21. Notices

22. Indemnification Requirements

23. Insurance

a. Malpractice

b. Tail coverage

c. Other coverages

i. General liability

ii. Employment practices

IV. The Agreement (cont.)

24. Termination

- a. Automatic Termination**
- b. Optional Termination for Cause**
- c. Termination without Cause**
- d. Rights after Termination**

25. Shareholder/Member Considerations

- a. Buy in requirements**
- b. Timeline**
- c. Benefits to being a shareholder or member**

IV. The Agreement (cont.)

26. Boilerplate Provisions

- a. Waiver**
- b. Authority**
- c. Governing Law**
- d. Arbitration and Mediation**
- e. Attorneys Fees**
- f. Headings**
- g. Counterparts**
- h. Severability**
- i. Superseding of Prior Agreements**
- j. Inurement Clauses**
- k. Integration**
- l. Modifications and Amendments**

IV. The Agreement (cont.)

F. What to ask:

- 1. Relocation allowance**
- 2. Signing bonus**
- 3. Professional societies reimbursement**
- 4. CME reimbursement**
- 5. Reimbursement for health coverage, life and disability insurance**
- 6. Tail coverage reimbursement.**
- 7. Practice amenities (cell phone, reimbursement policy for like travel)**
- 8. Guaranteed salary during first year**
- 9. Severance pay during initial term**
- 10. Annual review**
- 11. Incentive bonuses**

IV. The Agreement (cont.)

F. What to ask (cont.):

- 12. Guaranteed salary during first year**
- 13. Severance pay during initial term**
- 14. Annual review**
- 15. Incentive bonuses**
- 16. Arbitration of disputes (this can cut both ways, but tends to work in the doctor's favor)**
- 17. Mutual indemnification**
- 18. Guaranty of obligations on newly formed entities**
- 19. Future shareholder status**
- 20. Information on payor contracts**
- 21. Staff privilege requirements**
- 22. Office and staffing support**
- 23. Information on subsidiary or affiliated entities**
- 24. Pending litigation**
- 25. Staffing issues or concerns**
- 26. Right to an accounting on termination**

IV. The Agreement (cont.)

G. Things to watch out for:

- 1. Definitions that do not make sense**
- 2. Reference to documents, or policies and procedures that are not provided**
- 3. Any formula for compensation or bonuses**
- 4. Payback requirements on guaranteed salaries**
- 5. Scheduling and on call requirements**
- 6. Lack of mutuality on termination rights**
- 7. Indemnification provisions**
- 8. Tail insurance requirements**
- 9. Evergreen clauses**
- 10. Binding restrictive covenants regardless of terminating party**
- 11. Exclusivity arrangements with one health system**
- 12. New entities without a proven track record**

V. Forming One's Own Practice

- A. Consider as an option or as an exit strategy. See: <http://www.mikkelborg.com/news.php?id=199>**
- B. Work on a business plan and transition issues**
- C. Office lease – risk of long term commitment**
- D. Talk to your advisors**
- E. Consider regulatory environment**
- F. Learn the inner-workings of the group**
- G. Be active in the community**
- H. Develop a network ASAP**

VI. Post-Contract Considerations

A. Keep agreements handy and review periodically

B. Provide a signed copy to counsel

C. Annual review of contract

D. Calendar dates immediately

E. Keep notes on issues that come up

VI. Concluding Comments and Questions