

CONTRACTS FOR HEALTHCARE LEADERS

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TODAY'S GOALS:

- Big Picture Perspective
- Focus on what is important to organization leaders
- Ask lots of questions
- Practical guidance and practical takeaways

SOURCES

The Biggest Legal Mistakes Physicians Make – And How to Avoid Them, SEAK, Inc.

Enterprise Risk Management Handbook for Healthcare Entities, American Health Lawyers Association

The Contract Negotiation Handbook, An Indispensable Guide for Contract Professionals, Stephen R. Guth.

ENTERPRISE RISK MANAGEMENT

Historical Risk Management Functions

The medical professional liability crisis of the 70s and 80s was the impetus for development of most risk management programs.

Movement toward clinical risks to improve patient safety, with the belief that efforts to would preserve the financial assets through the delivery of safe patient care.

Management of organizational risks fragmented into silos of responsibilities and accountabilities across the organization.

What is Enterprise Risk Management (ERM)?

ERM calls for change from a reactive incident-based, clinically-focused risk management program to a more holistic, multidisciplinary program focused on all risks facing the organization.

Risks do not exist in isolation and can best be understood in terms of importance or contribution to a portfolio of risk domains.

The Seven Typical ERM Domains

1. **Operational.** Risks related to the business operation that result from inadequate or failed internal processes, people, or systems. **Examples:** documentation, patient falls, medication errors, “never events”.
2. **Financial.** Risks affecting the profitability, cash position or financial ratings of the organization. **Examples:** billing, collections, loss of tax exempt status, charity care, interest rate fluctuations, days of cash on hand, capital structure, capital equipment, growth in programs and equipment.
3. **Human Capital.** Risks relating to the organization's most valuable asset, the workforce. **Examples:** tight labor market, retention and turnover, compensation, recruitment, culture, wrongful termination, sexual harassment, disruptive behavior, morale, diversity, staffing and safety.

Typical ERM Domains (continued)

4. **Strategic.** Risks associated with brand, reputation, business strategy, failure to adapt to a changing healthcare environment, changing customer priorities and competition. *Examples:* managed care relationships, antitrust, advertising, media relations, business ventures, mergers, **contract administration**.
5. **Legal and Regulatory.** Risks arising out of licensure, accreditation, statutes, standards and regulations. *Examples:* EMTALA, HIPAA, CMS, accreditation, OIG.
6. **Technology.** Risks associated with the use of machines, hardware, equipment, devices and tools, but can also include techniques, systems, and methods of organization. *Examples:* ERM, robotics, simulation, telehealth, computerized physician/provider order entry system (CPOE).
7. **Hazard.** Risks attributable to physical loss of assets or a reduction in their value. *Examples:* facility management, plant age, flooding, windstorms, fire, parking (lighting, location, security); and construction/renovation.

Implementation of ERM

Once all risks are identified, evaluated and measured using risk scoring and risk mapping, the organization can develop prioritized, organizational-wide solutions and strategies for dealing with those risks.

CONTRACTS: AN ERM APPROACH

A well-devised contract review process is an integral part of any ERM program. In an ERM environment, it is important to identify the nature of the contractual exposures facing the organization and to attempt to minimize those exposures.

- **Signature authority.** Balance between one person signing all agreements and that function being all over the organization.
- **Contract file management.** Database, copies, calendaring, termination, BAA, renewals.
- **Review.** Business and legal, remember other impacted departments (IT, facilities services).
- **No Insurance.** Generally, there is no such thing as “breach of contract insurance”. A failure to cover one’s contractual obligations is viewed as a business risk within the control of the insured. Insurance policies have a “contracts exclusion”.

CONTRACT BASICS

What is a contract?

- An agreement between two or more parties
- Enforceable by law
- A contract can be oral or written
- Must contain the following five elements:
 - ✓ Debtor's name must be correct
 - ✓ UCC1 must be filed in the correct location

1. **Offer.** A promise (for example, "I will mow your lawn") and a request for something in return ("if you will pay me \$X").
2. **Acceptance.** An assent by the person to whom the offer is made, showing that the person agrees to the terms offered.
3. **Consideration.** Both parties must receive something of value, this is the inducement to a contract. The concept is often misunderstood.
4. **Legal Purpose.** The contract cannot be for an illegal purpose (i.e., hiring a hit man).
5. **Competent Parties.** The parties must have the capacity to contract (e.g., minors, old age).

What happens when a party does not perform as promised?

- **Breach.** The failure of a party to perform is commonly referred to as a “breach”
- **General Rule.** Put the nonbreaching party where it would have been had the contract been performed.
- **Money Damages.** The damaged party can sue for money damages.
- **Specific performance.** This remedy is less common.

What is not a contract?

- Letters of intent (however, be aware of some provisions that are binding such as confidentiality or no-shops and also beware of a binding letter of intent).
- *Most* verbal and “hand shake” agreements.
- Unauthorized deals or unauthorized signers (sometimes).
- Jumping the gun or taking action before a written agreement.
- Gifts (however, there are exceptions for charitable gifts).

Amendments, Addendums and Attachments

- **Amendment.** Serves to change the original agreement.
- **Addendum.** Serves to add to the agreement.
- **Attachments.** Contracts feature two kinds of attachments:
 - Exhibit.** Consists of a stand-alone document.
 - Schedule.** An attachment containing information

THE MYTHS OF NEGOTIATIONS

- Many people do not like to negotiate. Why?
 - They believe they are not good at
 - They do not feel comfortable doing it
 - Negotiation can create discomfort/anxiety because of the inevitable uncertainty
- This may be largely because we are led to believe that negotiation is either:
 1. An art that deals with the human element; or
 2. A science, which deals with the technical aspects of the negotiation process.
- Truth: negotiation is neither art nor science.

THE MYTHS OF NEGOTIATIONS (CONTINUED)

- Why do some negotiate better? Is it not because they are extroverted or have some other personality trait, such as aggressiveness.
- Certain attributes help but there are probably not any immutable characteristics needed to be a good negotiator. Rather, it is a learned skill and all that is needed is preparation (mostly) and training.
- There is no one-size-fits-all negotiation strategy.
- “Negotiations are 60% planning and preparation, 20% negotiating, and 20% timing.” Learn as much as you reasonably can before getting to the bargaining table.
- Many of the negotiation objectives between parties are adversarial, but that does not mean you cannot come to a "win-win" or that you have to pound on the table to be effective.
- Be comfortable with contradictory feelings: be calm and alert.

THE MYTHS OF NEGOTIATIONS (CONTINUED)

Practical Tips:

- Learn and educate yourself about the subject matter
- Always step back and ask “how does this help the organization” or “what is in the best interest of organization”
- Be cognizant of your emotions. Recognize if you are worrying about being too trusting, too suspicious or if you are feeling insecurity, defensiveness, hostility or making the matter personal.
- Be authentic
- Be patient
- Be strategically agile and not too rigid

CRITICAL CONTRACT PROVISIONS: ERM

Insurance Requirements

- Make sure the language reflects self-insured or captive situations
- Be cognizant of self-insured or captives taking too much risk (or policy limits)
- Consider the various coverages in both directions

CRITICAL CONTRACT PROVISIONS: ERM

Indemnification/Hold Harmless

- Most challenging to understand for nonlawyers
- Severe financial consequences
- Represent a contractual risk transfer
- Best example of indemnity is in the context of insurance, where an insurance company insures a homeowner from damage to their home—the insurer indemnifies the homeowner.
- In the business context, an indemnification provision protects one party against damages and expenses caused by the other party's failures and mistakes

CRITICAL CONTRACT PROVISIONS: ERM

Limitation of Liability

- Limits the contracting party's ultimate liability to a predetermined amount (often tied to contract price) and essentially transfers the liability exposure beyond that level to the organization.
- An important but frequently overlooked aspect of limitation of liability provisions is the "disconnect" between value of the contract and the full liability potential being limited. For example, the total value of a contract for security services and personnel might be \$120,000 per year or \$10,000 per month. If the maximum liability potential for the security vendor is limited to no more than the prior 12 months' contract price, the entity purchasing the security services may unknowingly become the "deep pocket" for any claims exceeding this amount

CONTRACT PROVISIONS: GENERAL TIPS AND GUIDELINES

- Not simply filling in blanks on forms
- No such thing as the perfect agreement or template, agreements must be tailored to the specific situation
- Understand the deal
- Answer: who, what, when, and think about how much
- Three P's: **P**redict what might happen, **P**rovide for that contingency and **P**rotect yourself with a remedy
- Make sure all exhibits and schedules are attached

CONTRACT PROVISIONS: GENERAL TIPS AND GUIDELINES

- **Parties.** Make sure the correct parties are in the agreement
- **Purpose.** Describe what the parties are agreeing to do with sufficient clarity
- **“Weasel Words”** - words that do not commit the other party to much of anything.
 - *"Vendor will endeavor to assist Customer by providing..."*
 - Examples: aid, assist, attempt, contribute, endeavor, facilitate, help, make an effort, support, try
 - Replace weasel words with **“Words of Commitment”**:
acknowledge, agree, build, create, deliver, enable, generate, guarantee, manufacture, produce, represent, shall, undertake, warrant, will

CONTRACT PROVISIONS: GENERAL TIPS AND GUIDELINES

- **Specific Descriptions.** List precisely what you expect to obtain, e.g.: list the time of performance, the final product quality, deliverables, product descriptions, delivery date, deadlines, place for performance
- **Price.** Look for ambiguity, escalators, change price when they want, terms of payment
- **Term of Agreement.** Have a fixed time period with beginning and end dates and avoid automatic renewal provisions.
- **Outs and Termination.** Need to terminate for breach and an appropriate cure period. Be very cognizant of without cause outs in both directions.
- **Forum Selection vs. Choice of Law vs. Jury Waiver vs. Arbitration**

COMMON LEGAL MISTAKES

Mistake 1: Not Getting an Attorney Involved Early Enough

- Waiting until a problem arises in the performance of contractual duties. That's like calling the building inspector after the house has fallen down. A good contract is built on a strong legal foundation that protects the organization's interests and furthers the intent in entering into the contract.
- It is much less expensive (in terms both of dollars and aggravation) to have their counsel review proposed contractual arrangements.
- Make sure the attorney knows everything they know about the deal.
- The U.S. legal and health systems are perhaps the most complex in the world. An attorney in general practice is no more qualified to handle physicians' legal matters than a family practitioner is qualified to perform transplant surgery.

COMMON LEGAL MISTAKES

Mistake 2: Not Including Antifraud, Abuse and HIPAA Provisions when Necessary

- Avoid problems with HIPAA, fraud and abuse liability in contractual relationships, antikickback statute, the False Claims Act, etc.
- Just merely stating, for example, that a transaction reflects “fair market value” when it does not isn’t an effective way to protect the organization.
- Key: Operate a compliant organization and maintain an effective HIPAA privacy and security plan

COMMON LEGAL MISTAKES

Mistake 3: Believing Less Is More

- Some believe that the shorter a contract is, the less “trouble” it can get them into. The reverse is generally true (but not always).
- Balance: The organization needs to be apprised of the reasons provisions are in a contract and conversely, the attorney needs to be realistic and have a reason for the provisions.
- Try not to insist on “short and sweet” contracts against the advice of counsel.

COMMON LEGAL MISTAKES

Mistake 4: Relying on Boilerplate Forms and Leaving Blanks

- Some organizations use “boilerplate” forms to document their contractual relationships. In some cases, use of such a form may not be a problem; in most cases, the “generic” nature of the forms is simply a lawsuit waiting to happen.
- Worse yet, some use the boilerplate forms and fail to “fill in the blanks” or only partially fill in the blanks.

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Employment Contracts

- In reviewing material and considering the nature of leadership emphasis briefly discussing employment contracts from the employer's perspective seemed appropriate.
- Montana has very different employment laws:

Not “at will”

Good Cause

Brown v. Yellowstone Club

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Employment Contracts (Continued)

- Many concentrate so much on the salary and other proposed provisions of the employment contract that they often neglect to do “due diligence” on the employer or employee.
- Understand the significance of all the terms in the agreement
- Understand Covenants Not to Compete, Montana Different
- Relying on oral promises not in agreement

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Leases

- Almost always negotiable
- Gross Lease vs. Triple Net (taxes, insurance, maintenance)
- Personal Guaranty
- Termination and Renewals
- Signage, Remodel, Restrictions, Future Space

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Independent Contractor Agreements

- Misunderstood and Misused
- Supplemental Staffing Agreements

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Equipment Purchases and Leases

- Delivery Dates
- Testing and Calibration
- Service Contract
- Firm Price
- Warranties
- Option to Purchase at the end of the term
- Cross-Defaults
- Software Interfaces

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

JV's, Operating Agreements and Partnerships

- Can be one of the most costly and crippling contracts

SPECIFIC ISSUES IN HEALTHCARE CONTRACTS

Distribution, GPOs, Supplies

- Long term (with no early out)
- Automatic renewals
- Exclusivity
- Minimum Purchase Requirements
- Pricing – firm or flexible