Contract Terms to Know

Part II

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Part I of "Contract Terms to Know," printed in the May issue of *M.D. News*, addressed various contract terms to which a party to a written agreement should be alerted to, such as parties, term, termination, scope of goods and service, and price and payment. Part II explores additional important contract terms and issues. This series is not an exhaustive treatise on contract negotiation or interpretation and is intended to provide basic information. Every agreement is unique and must be evaluated — sometimes with professional assistance — on its own.

You may feel that you do not have the time or even the desire to read the fine print but skipping over the "legalese" and fine print can result in problems later on. Written and signed documents govern a practice's relationship with business partners and require serious attention.

1. Indemnification and/or limitation of liability — Many agreements contain language that sets limits on the liability of the parties or assigns certain liabilities to one party only. Such a provision is often referred to as an indemnification or limitation of liability provision. It operates to shift financial liability from one party to the other. You need to know if the practice will be responsible for not only its own negligence but also that of third parties. Is this obligation reciprocal? If not, why not? If the practice is indemnifying the other party, it is advisable to determine if insurance is available to cover any resulting financial liability. If not, the practice must consider whether the financial risk of providing the indemnification is acceptable. Limitations on liability should also be carefully evaluated. How much will each party be entitled to recover as damages under the agreement? In what circumstances? Does the agreement limit the type of damages either party may recover?
2. Warranties — If the agreement is for the purchase of goods or services, is there a warranty as to the nature and quality of those goods or services? If so, how long does it last? Most often, warranties are of limited duration. They also often describe and limit the available remedies in the event goods or services are defective.
3. Confidentiality — Many agreements contain confidentiality provisions prohibiting the

parties from disclosing certain information, including the terms of the agreement, to third parties. In the case of a medical practice, there is heightened legal sensitivity to disclosure of patient-related information. If patient-identifying information may be disclosed in carrying out the agreement, the practice should consider whether a business associate agreement is necessary to assure compliance with the Health Insurance Portability and Accountability Act (HIPAA). In addition to HIPAA, there are state laws on patient confidentiality that must be complied with. Other confidentiality issues can also arise in contracts. For example, many software or intellectual property agreements state that any breach of the confidentiality provisions can result in automatic termination of the agreement and/or payment of pre-defined damages. Therefore, before signing an agreement, the practice must determine whether it can abide by any proposed confidentiality terms.

4. Restrictive Covenants, Non-Competes, Non-Solicitation Provisions — In personal services agreements, there may be language that limits when and where physicians or others affiliated with the practice can work or otherwise provide services. Such "restrictive covenants" often last beyond the term of the agreement and apply to a specific geographic area. Some contracts prohibit the parties from soliciting employees or customers/patients of the other. The practice must determine whether any such provision is consistent with its business plan and operations.
5. Choice of Law and Venue — Many agreements specifically set forth which state's laws will govern interpretation in the event of a dispute and where any litigation about the agreement must be brought. It is best to have your own state law and local court identified in such provisions, to avoid having to participate in a lawsuit at a distance.
6. Arbitration and/or Fee Shifting — Agreements can preclude litigating disputes in court in favor of arbitration or mediation. Such language should be carefully evaluated so that the practice understands its options if the contractual relationship deteriorates. Sometimes, provisions of this nature require the losing party to pay the winning party's attorneys' fees. While such a fee-shifting provision may sound even-handed in the abstract, the other party may be able to leverage it to the disadvantage of the practice, particularly where the other party has deep pockets. The practice should decide carefully whether it feels comfortable agreeing to any arbitration and/or mediation provision. Further, the agreement may include a set dollar amount the parties agree to pay in the event of certain breaches or disputes. These provisions are called "liquidated damages" clauses. The practice may need legal advice to understand the practical ramifications of such a provision.
7. Exhibits — Many agreements have exhibits, attachments or appendices, which contain additional binding terms and conditions. It is advisable to make sure these materials are actually attached to the final written agreement and that they are reviewed in detail, as they often contain the "meat and potatoes" of the deal.

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Ms. Catherine A. Diviney, a partner with Hancock & Estabrook, LLP, advises health care providers and organizations on diverse legal issues including federal and state regulatory compliance; professional licensing; fraud and abuse and Stark prohibitions on self-referral; EMTALA; hospital/physician contracting; patients' rights; confidentiality of medical records and peer review matters; policy and procedure development and drafting; compliance plan development and implementation; and corporate organization and structuring. Prior to joining the firm, Ms. Diviney was at Nixon, Hargrave, Devans & Doyle in New York City, following where she practiced law in the public sector specializing in elder and public benefits law. She is admitted to practice in New York and can be reached at (315) 471-3151. ■

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