

Contract Law for the Physician 2010

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Contract law is not the most exciting of topics, even for most lawyers. However, like it or not, the professional life of a physician typically involves numerous contractual relationships. Having an understanding of pertinent contract terms and how they can help or hurt the physician, and putting the knowledge to good use in the form of acceptable contracts, can make for a much more enjoyable and prosperous career. To that end, below is a collection of synopses on various distinct contract points about which it may be, sooner or later, useful for physicians to know.

Restrictive Covenants

Restrictive covenants in Florida are largely controlled by statutory law. There has been no significant change in the statutory law for many years, yet misconceptions about whether and when restrictive covenants are likely to be enforced by the courts linger. Many physician employment contracts contain an assortment of restrictive covenants, including, most notably, a restriction against competition, commonly referred to as a "non-compete." But the interpretation of the statutory law by the courts in the various appellate court jurisdictions within Florida on whether and how a non-compete might be enforced in one area of the State differs from that in another. Regardless, throughout Florida, they are not easy to enforce. They cannot be enforced simply for the sake of keeping someone from competing; there must be a "legitimate business interest" in prohibiting the competition.

This doesn't mean that non-competes shouldn't be put in contracts. It just means that it should be taken into

account when using them that they may or may not be enforceable.

What are much more likely to be enforced are restrictive covenants concerning solicitation of patients or employees and use of truly confidential information. So, it's imperative when seeking protection from business piracy that all of these restrictive covenants be used and, of course, used properly. Suffice it to say that poor drafting can cause what would otherwise be an enforceable restrictive covenant to be unenforceable.

Something which seems to surprise and disappoint many a physician is the fact that referral relationships have been found not subject to protection in some portions of the state, including our own. The logic which has been used for this is that there is no secured expectation with a referral relationship, since referrals are discretionary and, therefore, it is not something capable of protection. Again, this does not mean that efforts shouldn't be taken to protect the relationships only that, as it stands, those efforts may or may not be successful.

Alternative Dispute Resolution

Alternative dispute resolution processes, both mediation and arbitration, have been available for decades but many physician employment contracts, and other contracts between owners of medical practices and related real estate, still have no alternative dispute resolution provisions included and those which do are often not what they could be. Ordinarily it is preferable for physicians to settle their differences through either



mediation or, if that fails, final binding arbitration rather than litigation. While physicians are generally seen sympathetically by juries in medical malpractice trials, they are not seen so sympathetically in disputes between themselves. Furthermore, depending on the nature of the dispute, there can be considerable unwelcome fallout for the practice due to unflattering attention generated by the litigation, within and outside the profession, which may not be good for business. Typically litigation is also more expensive and time consuming than these alternative dispute processes. While some forms of arbitration can be nearly as involved and costly as litigation, there are now many forms of more simplified arbitration that are quicker and far less costly. The right to enforce restrictive covenants and seek an injunction, if desired, can be preserved even while requiring disputes of all other sorts to be mediated or arbitrated to conclusion. Even if alternative dispute resolution provisions aren't to be included in a contract it might be worth incorporating a waiver of jury trial provision to save money and avoid any possible negative jury reaction. These same provisions can be required of non-physician employees whether or not they have a written employment contract, but, of course, would have to be commemorated to a writing which in some fashion is signed by the employee.

Production-Based Employee Compensation

Production based bonus compensation is quite common in physician employment contracts. While not particularly popular with the physicians, there is a growing trend toward employment contracts which provide for a reduction in salary for the physician if certain production standards aren't met. It is not so common that employees of physicians have similar provisions in a contract. For

those wary of entering into written employment contracts with employees, this can be done stand-alone, as with a variety of other matters, such as alternative dispute resolution, as discussed above. There is no reason for an employer not to commit to writing that which they feel comfortable is advantageous to them, even while avoiding writings of other sorts. Properly structured production-oriented compensation for employees, such as physician assistants, can be a win/win for the practice and the employee. There is a lot to be said for a motivated employee.

Independent Contractors

Due to the economy the use of independent contractors has grown in popularity. Independent contractor relationships can be legitimate and financially advantageous; however, caution should be exercised in entering into such arrangements because there can be rather severe adverse consequences as a result of what was characterized as an independent contractor relationship being found otherwise by the IRS, the Department of Labor or others. These relationships often work smoothly until workers become disgruntled and decide maybe they were employees after all. With any independent contractor relationship where professional services are being rendered, it is advisable to have some form of independent contractor contract in place clearly setting forth the terms.

Employee Pay-Back Provisions

In many physician employment contracts there are provisions which require pay-back to the employer for expenses incurred for, or loans made to, the physician. Some examples of such expenses are tail insurance coverage, relocation expenses and CME expenses. However, if there is not also language in the contract which allows the employer to deduct

this amount to be paid back to the employer from the salary due the employee at the time of termination of employment, then the employer is required by law to pay the employee his salary and not withhold the money that the employee owes the employer. This is something, of course, which should be kept in mind with non-physician employees as well, even if they do not have an employment contract. It is very disconcerting to an employer, who is owed money by a terminated employee, to go ahead and pay him his salary when there are no realistic prospects of ever seeing the money owed to them. This can be avoided.

Ownership Valuation and Vesting

The value of a practice interest, or an interest in any legal entity, such as one holding real estate, including a surgery center, can be pre-determined by contract. Ideally at any point in time, by formula or some other mechanism resulting in a sum certain figure, the value of the ownership interest of any owner can be determined

without too much difficulty. It is much easier to determine value when the valuation is based on information kept in the ordinary course of business. Owners need to be alert that due to economic conditions outside their control values over time may fluctuate significantly, so having a value that it at least closely, and realistically, tied to actual value might be preferred. If not, then inequities, for buyer or seller, might result, much to the consternation of the party who fared poorly.

Something which often seems to be overlooked by physicians in contracts concerning ownership in practices or other legal entities is how to handle the valuation of an ownership interest of a physician who is to be bought out of their interest but hasn't fully paid for it. If nothing is agreed to, there are at least a couple of ways that the valuation of a partially paid interest could be valued. It's better, of course, to have definiteness with something like this to avoid conflict.

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