Negotiation of a Hospital-Based Physician Exclusive Contract

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Overview of Exclusive Contracting for Physicians and Hospitals
Benefits of Exclusive Contracting for Physicians and Hospitals

- Enhances patient care;
- The assumption by Group of responsibility for effective administration, supervision and coverage;
- The development of necessary working relationships between the Group and other hospital personnel and departments;
Benefits of Exclusive Contracting for Physicians and Hospitals (Cont’d.)

- Aids in obtaining continuous supervision, training, administration, scheduling and coverage;
- Hospital control over operation of its department;
- Assures full-time availability of services;
- Lowers costs through standardization of procedures and centralized administration of the departments;
Benefits of Exclusive Contracting for Physicians and Hospitals (Cont’d.)

- Allows better scheduling of the use of the facilities;
- Facilitates maintenance of equipment;
- Improves supervision of the support staff and working relations between staff and physicians;
- Assures that physicians perform sufficient procedures to maintain and upgrade their skills and maintain high standards of professional quality of care;
Benefits of Exclusive Contracting for Physicians and Hospitals (Cont’d.)

- Assures of the most effective and efficient teaching services for the benefit of the patients, medical staff and other appropriate personnel; and

- Assures compliance with the accreditation and licensing requirements.
Trends in Exclusive Contracting

- Exclusive arrangements are common place among the traditional hospital- based specialties. Examples include:
  - Anesthesiologists;
  - Radiologists;
  - Emergency room physicians; and
  - Pathologists.

- Specialists such as neonatalogists, surgeons and neurosurgeons are increasingly entering into exclusive arrangements with hospitals.
Critical Legal Issues to be Considered in all Exclusive Hospital Contracts
State Law, Anti-Trust & Other Legal Challenges to Exclusive Contracting

1. Check state law to see if exclusive contracts are permitted.

2. If granting exclusive privileges, check hospital bylaws and/or state law to determine how to address physicians currently on staff.
State Law, Anti-Trust and Other Legal Challenges to Exclusive Contracting (Cont’d.)

3. What claims may a physician assert after he/she is excluded from a Hospital staff due to the granting of an exclusive contract?
   - That the exclusive contract violates federal or state antitrust laws.
   - That the exclusive contract violates constitutional due process protections.
   - That the exclusive contract constitutes the prohibited corporate practice of medicine
Considerations for Tax-Exempt Hospitals

• The impact of an exclusive contract on a hospital’s tax-exempt status must be considered.

• Under the Internal Revenue Code and IRS regulations, a tax-exempt hospital must be organized and operated exclusively for an exempt purpose.
Considerations for Tax-Exempt Hospitals (Cont’d.)

1. Private Inurement

- No part of the hospital's net earnings may inure to the benefit of private individuals (“insiders”).
- Insiders may include physicians on a hospital's medical staff if the facts and circumstances tend to show substantial influence by the physician over the hospital.
- If any compensation is given under an exclusive contract, to avoid private inurement concerns, it must be reasonable and the result of arms-length bargaining.
2. Private Benefit

- The hospital must be operated for public benefit, rather than for the benefit of any private interest.
- Private benefits is permissible only if it is incidental to effecting an exempt purpose.
- To avoid a violation of the private benefit prohibition, physician services under an exclusive must be necessary for the Hospital to pursue its charitable activities and the amount paid must be reasonable for the services actually rendered.
Excess Benefit Transaction / Intermediate Sanctions

• Intermediate sanctions may be imposed for transactions between a tax-exempt organization and persons who can exert substantial influence over the organization (a “disqualified person”) in situations where the transaction results in excess benefit.

• These sanctions are deemed intermediate because they lie between taking no action and revoking an organization's tax-exempt status.
Excess Benefit Transaction / Intermediate Sanctions (Cont’d.)

• Some Group physicians may meet the definition of “disqualified person” for purposes of the intermediate sanction rules.

• Whether an excess benefit is provided turns on whether the value of the economic benefit provided by the hospital exceeds the value of the consideration (including performance of services) received by the Hospital
Private Use Considerations

- The private use of property financed with tax-exempt bonds may result in private business use which implicates certain requirements for contractual relationships between the private interest using or benefiting by use of the property and the owner of the bond-financed property.

Federal Fraud and Abuse Concerns
Anti-Kickback Law

- 42 U.S.C. § 1320A-7b(b) prohibits the payment of an "inducement" (anything of value) for the referral of Medicare and Medicaid business. This prohibits both the solicitation or receipt of the inducement, as well as the offer or payment.
Anti-Kickback Law (Cont’d.)

- Any compensation paid by the Hospital to the physician group under the contract (e.g. medical director fees) cannot be intended as an inducement for the physician members of the physician group to refer patients to the Hospital.
- If feasible, structure the exclusive contract to comply with the personal services safe harbor.
Stark Law

- The Federal physician self-referral law (the “Stark Law”) prohibits a physician from referring patients to entities with which he/she has a financial relationship for the provision of designated health services ("DHS") reimbursable by a federal health care program, unless an exception to the Stark Law applies.
Stark Law (Cont’d.)

- Because an exclusive contract would be with a physician group rather than with its physician members, the Stark Law requires a determination whether the direct financial relationship created between the hospital and the physician group by the exclusive contract would result in an indirect financial relationship between the physician members of the Group and the Hospital.
Stark Law (Cont’d.)

- If such an indirect financial relationship is present, a determination must then be made whether the exclusive contract satisfies the requirements of an exception to the Stark Law for indirect compensation arrangements.
Careful Drafting of Exclusive Contracts is Important

Common drafting errors include:

- Proper legal name for both parties is not included.
- Defined contract terms are used consistently.
- Section numbers referred to incorrectly.
- Remember which side you represent.
- Don’t rely on exhibits and schedules prepared by your client.
Factual Background for Negotiation of Exclusive Radiology Services Agreement
Factual Background

- **Memorial Hospital (“Hospital”)**
  - 250 bed Community Hospital
  - Wants to expand its radiology service

- **Radiology Associates (“Group”)**
  - Sole Radiology service provider at Hospital for past 15 years
  - Also performs reads for local multi-specialty groups
Factual Background (Cont’d)

- Group uses office space at Hospital
- Dr. May is President of Group & Hospital Med Staff
- Group has experienced difficulty obtaining adequate professional insurance coverage
- Hospital cardiologists concerned about possible exclusive arrangement with Group
Factual Background (Cont’d)

• Exclusive offer does not include MRI reads
• Ancillary personnel to be employed by Hospital
• Hospital wants to assume billing for Group
• Hospital will require round-the-clock on-site coverage
Format of Contract Negotiation

For each contract issue:

- The Hospital will first present a contract provision to address the issue being negotiated;
- The Group will then present its concerns/comments to the Hospital’s proposed provision;
- After the Hospital has had a chance to respond to the Group’s concerns/comments, any compromise contract provision will be discussed
Live Negotiation of an Exclusive Radiology Services Agreement
Scope of Services – Radiology Services (pages 9 & 10)

- Hospital engages Group to perform all professional radiology services ("Group Services"), defined in Exhibit A
- At the Hospital locations on Exhibit B
- Excluded services reduce definition of Group Services
- Group Services include all services required for purposes of organizing, supervising, and operating the Radiology Service at the Hospital
Group’s Comments/Concerns

- MRI exclusion
- Need to restrict other physicians (i.e., Cardiologists) from performing Group Services through a different department
- “Radiology Service” should be changed to “Group Services” in the second to last sentence.
- Should be at all locations
Negotiation/Resolution
Expansion of Services - Right of Consideration (page 11)

- Right to be considered first whenever Hospital requires radiology services at any facilities owned or controlled by Hospital.
- This right of consideration requires good faith negotiation of any expansion of the scope of services.
- If the parties are unable to reach agreement, Hospital reserves the right to terminate Agreement in its sole discretion upon sixty (60) days prior notice to Group.
Group’s Comments/Concerns

- The right of consideration should be a right of first refusal
- Clarify so that expanded services do not begin until the later of (a) ninety (90) days from date Group agrees (or later if Group must recruit specialist(s)) or (b) the date Hospital actually requires such services.
Negotiation/Resolution
Coverage Requirements – Coverage (pages 11 & 12)

- Group available twenty-four (24) hours a day, seven (7) days a week, fifty-two (52) weeks a year
- Sufficient number of Physicians available in accordance with the schedules developed by Hospital, in its sole discretion, but in consultation with Group
- At least one Group Physician shall be on-site at the Hospital at all times
Coverage Requirements – Coverage (pages 11 & 12) (Continued)

- Hospital develops schedule and can modify
- Physician on-call shall be immediately available via telephone or pager and able to arrive at Hospital and be ready to provide Group Services within thirty (30) minutes.
Group’s Comments/Concerns

- Not necessary to have a physician on site 24 hours a day, 7 days a week, 52 weeks per year
- At all times outside 8-5 M-F and 8-12 on Saturday, Group shall have a doctor on call
- Discuss and agree to the coverage schedule upfront
- Any change to coverage schedule should be as mutually agreed upon
Group’s Comments/Concerns (Continued)

• Define “immediately available”
• Stipend for 24 hours a day, 7 days a week?
• Use of physician extenders?
Negotiation/Resolution
Ancillary Personnel  (page 13)

- Hospital to employ ancillary personnel
- Hospital, in its sole discretion, shall make all decisions regarding appropriate staffing of ancillary personnel
Group’s Comments/Concerns

- Clarify that Hospital is responsible for all salaries and expenses for ancillary personnel
- Need procedure to determine when additional ancillary personnel are necessary
- No right “in its sole discretion” to make all decisions regarding staffing of ancillary personnel
- Group needs right to terminate personnel for any reason
Negotiation/Resolution
Department Director (page 14)

- Hospital designates the director of the Radiology Service (the "Director")
- Director performs the duties set forth in Exhibit C
- Dr. Marcia May initial Director
- Hospital, with Group’s input, designates a new Director
- No compensation from Hospital for Director
Group’s Comments/Concerns

- Director should always be a physician of Group and appointed by Group
- Hospital should not have the right to remove Director without cause
- “Cause” should be defined
- Director should be compensated
- Exhibit C (Duties), should be looked at carefully
Negotiation/Resolution
Loss of Medical Staff Appointment /Clinical Privileges (pages 15 & 16)

- Each Physician providing services shall be a member of Hospital’s Medical Staff
- Termination of Agreement or Physician's right to provide Group Services terminates Physician’s privileges without recourse to a hearing or appeal as set forth in the Bylaws
Group’s Comments/Concerns

- Unfair to the existing physicians as they currently possess due process rights pursuant to the Bylaws
- Delete and permit the due process rights afforded pursuant to the Bylaws
Negotiation/Resolution
Malpractice Insurance (page 16)

- Group maintain professional liability insurance for Group and for each employee of Group
- Minimum amount of $3,000,000 per occurrence and $5,000,000 in the aggregate
- Maintain a policy on an occurrence basis or require a tail policy
- Thirty (30) days notice to Hospital of cancellation or termination of any such insurance
- Group to provide Hospital a certificate of insurance
Group’s Comments/Concerns

- $3,000,000/$5,000,000 is excessive
- Should be reduced to $1,000,000/$3,000,000
- If Hospital requires $3,000,000/$5,000,000, Hospital should pay excess premiums
- Hospital should pay for the tail insurance, if necessary
Negotiation/Resolution
Term (page 17)

- Initial term one (1) year
- Automatically renew for successive one (1) year terms unless at least sixty (60) days prior written notice of termination
Group’s Comments/Concerns

- Initial Term and Renewal Terms of one year are too short
- Propose three years
- Notice of non-renewal of 60 days is too short
- Notice of non-renewal must be upon at least 365 days
Negotiation/Resolution
Termination (pages 18 & 19)

• [In addition to containing a provision allowing either party to terminate the Agreement on 30 days notice due to breach of the Agreement by the other party, the Agreement also contains the following provisions.]
Without Cause
Termination by Hospital

- Hospital may terminate this Agreement at anytime without cause upon ninety (90) days prior written notice to Group
Other Termination by Hospital

- Hospital may immediately terminate upon:
  - drunkenness, controlled substance abuse, immoral conduct, violation of any law other than minor traffic offenses, willful insubordination, conflict of interest, or neglect of duty by any Physician;
Other Termination by Hospital
(Continued)

– Failure to maintain and operate consistent with the highest standards established for the operation of similar services;
– Failure of Group to remove any Physician that the Hospital deems unacceptable;
– Group and/or the Physicians, in Hospital's sole determination, are disruptive or fail to work cooperatively
Other Termination by Hospital (Continued)

– Hospital in good faith determines that the health, safety, or welfare of patients would be jeopardized by Group's continued performance of duties;

– Failure to maintain malpractice insurance

– Group files a petition under a bankruptcy act, has a receiver appointed or makes an assignment for the benefit of creditors;
Other Termination by Hospital
(Continued)

– Group is liquidated or dissolved, or initiates proceedings to liquidate or dissolve; or

– Group fails to remove Physician who fails to meet the requirements of Agreement and to adequately cover such individual’s duties without interruption; or
Groups Comments/Concerns

- Hospital should not have the right to terminate the Agreement without cause
- Hospital should not have the right to terminate a physician without cause
- The term “highest standards” is too subjective and should be replaced with “community standard”
Groups Comments/Concerns
(Continued)

- The reference to Group being disruptive should be deleted
- Hospital’s sole determination should be replaced with reasonable determination
- Add a reasonable opportunity to cure with respect to Paragraphs (b), (c), (d), (e), and (h)
- Should have a period of ninety (90) days to get an involuntary bankruptcy or insolvency set aside
Negotiation/Resolution
Compensation (page 20)

- Group’s separately bills
- Hospital does not pay any payment (including any stipends, director fees, etc.)
Group’s Comments/Concerns

- On site 24 hours a day, 7 days a week, 52 weeks a year if Hospital bears the additional cost
- Director should be compensated for the services provided at fair market value
- Hospital should provide a stipend with respect to the required malpractice insurance
Negotiation/Resolution
Billing and Collection
(pages 21 & 22)

- Hospital bills for technical fees and retains the collections
- Hospital, on Group’s behalf, separately bill patients for professional Group Services and Group retains the collections from such billings
- Group’s fee schedule shall be reasonable and competitive with the prevailing charges in service area
Billing and Collection
(pages 21 & 22) (Continued)

• Group to pay Hospital $ __________ on a monthly basis for the billing services
• Fee is subject to increase by Hospital at anytime, in its sole discretion, upon thirty (30) days prior written notice to Group
• Group shall not bill for any technical fees associated with the provision of Group Services
Billing and Collection
(pages 21 & 22) (Continued)

- Global fees are apportioned between Hospital and Group as Hospital determines appropriate in its sole discretion
- If Hospital enters into an agreement with a payor, Group must participate
- **Write-Offs.** when Hospital deems it necessary, Group will reduce or write-off, in direct proportion to the Hospital’s reduction or write-off, its charges to the same patient or patients
Groups Comments/Concerns

- Group prefers to continue to perform its own billing and collection services
- A separate agreement outside this Agreement is necessary for billing and collection services
- In the event a billing relationship is entered into, the billing and collection fee should be based upon a percentage of the collections instead of a flat fee
Groups Comments/Concerns

(Continued)

- Hospital not be entitled to increase fees during the term of the billing relationship
- Group should not be required to write-off charges
- Is Hospital currently in negotiations with third parties with respect to global fees?
Groups Comments/Concerns

(Continued)

• Apportionment must be reasonably determined and agreed to by Hospital and Group

• Group should be entitled to participate in, and consent to, global fee negotiations
Negotiation/Resolution
Office Space Rental (page 23)

- Hospital provides Group exclusive use of the Leased Space for use as medical offices from 8:00 a.m. to 5:00 p.m. Monday-Friday of each week (excluding Hospital recognized holidays) ("Leased Time")
- 200 square feet of office space (the "Leased Space")
- Group to pay Hospital $600 per month for rent of the Leased Space (fmv)
Groups Comments/Concerns

- Didn’t pay rent for office space in past
- If the Hospital insists, then a separate office lease
- The office is not used solely by Group, it is a department office
- Permitted usage of the office should similarly be 24 hours a day, seven days a week.
Negotiation/Resolution
Restrictive Covenants
(pages 24 & 25)

A. Non Solicitation

• During Term and 2 years after the expiration or termination for any reason or no reason

• Group and Physicians shall not:
  – induce or attempt to induce any employee or agent of Hospital to leave Hospital's employ or
  – employ any employee, contractor or agent of Hospital
Restrictive Covenants
(pages 24 & 25)

B. Non-Compete Covenant

- During Term and 2 years after Group nor any Group Physician may not:
  - conduct a private practice on premises of the Hospital,
  - see any patients at the Hospital
  - render Group Services in any setting within ten (10) mile radius of the Hospital
Restrictive Covenants
(pages 24 & 25) (Continued)

- Group shall have in force an agreement between it and each Group Physician (and future) agreeing to comply with the terms of this Section
- Group agrees to assign any right of action for a violation or alleged violation of this provision to Hospital
Group’s Comments/Concerns

- Excessive and may violate applicable law as against public policy
- In the event Hospital insists, the term should be for the lesser of 1 year or the term of the Agreement
- 10 mile radius is excessive
Group’s Comments/Concerns
(Continued)

- Hospital must agree to a non-solicitation covenant similar to that required of Group with respect to Group’s physicians, employees and agents
Group’s Comments/Concerns
(Continued)

- The MRI center (9 miles from Hospital) should be excluded from such restrictions
- In the event Hospital insists, Hospital should buy such ownership interest at fair market value
- Group should be permitted to continue to perform reads for the multi-specialty groups which it currently provides services for
Negotiation/Resolution
Questions or Comments?

Thank you.
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