

# The Five ‘er Seven or More Absolute “Must Knows” About Contracting

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# INTRODUCTION

Thirty minutes to give you the best kernels of contract law is an impossibility. In reality, there are hundreds. There are both *practical* and *legal* issues with which I deal daily for every year of 43+ years in multiple states. I've tried to distill these into a series of issues, alternating *practical* and *legal* for entertainment and attention purposes, and including more than I can possibly explain in thirty minutes. If we do not get to an issue that you would like to discuss, please call or write me at any time, and I will be happy to discuss with you on a pro bono basis. No issue is raised in any order of priority as they are all important.

THANK YOU FOR THE OPPORTUNITY TO PRESENT. I AM HONORED!

## ALL CONTRACTS ARE NEGOTIABLE

- 85% OF THE AGREEMENTS I NEGOTIATE ARE DESCRIBED AS “NON-NEGOTIABLE”
- LOOK FOR ERRORS OR INCONSISTENCIES
- IDENTIFY YOUR NEEDS
- UNDERSTAND THE AGREEMENT

# INDEMNITY

- TOO MANY CONTRACTS INCLUDE A GENERAL INDEMNITY
  - WHAT IS AN INDEMNITY?
  - WHAT ARE CONTRACTUAL DAMAGES?
  - WHAT IS THE IMPACT ON INSURANCE?
  - WHAT IS THE INTERRELATIONSHIP WITH AN INDEMNITY CLAUSE?
- SOLUTIONS:
  - ELIMINATE
  - TIE TO INSURANCE COVERAGE
    - NOT TO CHANGE, EXCEED OR LIMIT INSURANCE
    - USE AND MEANING OF “ADDITIONAL INSURED” STATUS
  - MUTUALITY
  - CONTROL OF DEFENSE AND WHAT EXCLUSIONS ARE APPROPRIATE (E.G., NO CRIMINAL VIOLATION, COUNSEL, ETC.)

## WITH WHOM ARE YOU NEGOTIATING?

- NEGOTIATION TRICK OF LAYERS OF NEGOTIATORS
- IDENTIFY SOMEONE IN A POSITION OF AUTHORITY
- **THREE METHODS OF AMENDING AN AGREEMENT**
  - AMEND THE AGREEMENT ITSELF
  - FIRST AMENDMENT EXECUTED AND DELIVERED AT THE SAME TIME
  - ORAL OR WRITTEN CONCESSIONS MADE BEFORE “EXECUTION AND DELIVERY”
  - THE IMPORTANCE OF DOCUMENTATION

## PAY ATTENTION TO CONTRACT TIMING AND INCONSISTENCIES

- COORDINATE TERM AND TERMINATION
  - THINK ABOUT EASE OR COMPLICATIONS WITH TERMINATION
  - RAMP UP COSTS/COSTS OF CHANGING OR TERMINATING
  - OFTEN INCONSISTENT
  
- YOU CANNOT ASSUME THAT CONTRACTING PARTY UNDERSTANDS OR EVEN KNOWS WHAT IS IN THEIR AGREEMENT

## NEGOTIATION TIPS

- IDENTIFY YOUR NEEDS AND CONCERNS WHEN NEGOTIATING
- ELICIT THE OPPOSING PARTY'S NEEDS AND CONCERNS WHEN NEGOTIATING
- OFTEN SOLUTIONS WILL PRESENT THEMSELVES AS NO ONE IS CLOSER TO YOUR BUSINESS THAN YOU
- ***WHEN YOU GET TO SALIENT AND ESSENTIAL NEEDS, MAKE YOUR REQUESTS AND DO NOT SAY ANOTHER WORD—NO MATTER HOW LONG THE SILENCE LASTS***

## UNIFORM SAVINGS CLAUSE

MODIFICATION TO COMPLY WITH LAW. It is the desire of \_\_\_\_\_ and Physician that this Agreement comply in all respects with applicable federal and state laws and regulations, particularly those relating to Medicare and Medicaid reimbursement [and to \_\_\_\_\_'s tax-exempt status]. Therefore, \_\_\_\_\_ and Physician agree to negotiate in good faith to modify/reform this Agreement in any manner necessary to: (a) ensure such compliance with applicable laws, rules and regulations, including those relating to Medicare and Medicaid reimbursement; [(b) revise any provision that jeopardizes or causes loss of the tax-exempt status of \_\_\_\_\_, or any party related to, or affiliated with it, so that after the revision, \_\_\_\_\_ (or the affiliated corporation) will qualify or continue to qualify for tax-exempt status; and (c) eliminate the imposition of intermediate sanctions under Section 4958 of the Internal Revenue Code.] The terms of this paragraph will survive the termination or expiration of this Agreement.



# QUESTIONS

LET'S OPEN UP THE FLOOR FOR QUESTIONS EITHER IN THE NEGOTIATION PROCESS OR TERMS OF AGREEMENTS. REMEMBER THAT THERE ARE NO STUPID QUESTIONS.

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