# The Five 'er Seven or More Absolute "Must Knows" About Contracting

## **Philip M. Sprinkle II** vrs annual meeting august 13, 2023



### INTRODUCTION

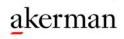
Thirty minutes to give you the best kernels of contract law is an impossibility. In reality, there are hundreds. There are both *practical* and *legal* issues with which I deal daily for every year of 43+ years in multiple states. I've tried to distill these into a series of issues, alternating *practical* 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:

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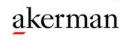
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- ELIMINATE
- TIE TO INSURANCE COVERAGE
  - NOT TO CHANGE, EXCEED OR LIMIT INSURANCE
  - USE AND MEANING OF "ADDITIONAL INSURED" STATUS
- MUTUALITY
- CONTROL OF DEFENSE AND WHAT EXCLUSIONS ARE APPROPRIATE (E.G., NO CRIMINAL VIOLATION, COUNSEL, ETC.)



### 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





- 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 <u>NOT</u> 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.





### 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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