Writing Your Contracts For Smooth Entry Into And Exit From Anesthesia Groups

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Long gone are the days when a physician can join a group of other physicians of similar interests with a handshake and a smile—this reality is highlighted when the physician is an anesthesiologist looking to join an anesthesia group that enjoys one or more exclusive contracts for professional services with a local hospital. With so many interrelated factors governing the relationships between the anesthesiologist, the anesthesia group and the hospital (e.g., a medical directorship agreement between the anesthesiologist and the hospital, an exclusive contract between the anesthesia group and the hospital, the anesthesiologist's staff privileges to provide general anesthesia at the hospital pursuant to the exclusive contract, the anesthesiologist's staff privileges to provide pain management services at the hospital outside of any exclusive contract, the hospital's desire to have the anesthesiologist provide labor epidurals requested by OB/GYNs, whether the anesthesiologist is an independent contractor or an employee of the group, etc.), carefully drafted written agreements between the parties are essential to protect the interests of all parties involved. While the number of provisions contained within a typical engagement agreement between an anesthesiologist and a group varies, as does the wording of each provision, there are a number of key provisions that should be included in any such engagement agreement in order to avoid potential issues from arising that could adversely affect one or more of the parties involved.

First, the engagement agreement should clearly define the anesthesiologist's status with the group as either an employee or an independent contractor. When the group has an exclusive contract with

the hospital, the typical arrangement has the anesthesiologist as an employee of the group. This is consistent with the notion that the group is exercising control over the manner in which the anesthesiologist is performing his or her duties which is often one of the key factors that motivates the hospital to enter into an exclusive arrangement with the group in the first instance.

Second, when an anesthesiologist is looking to join a group that has an exclusive arrangement with a hospital, he or she should recognize that, but for his or her membership with the group, the anesthesiologist would not have staff privileges at the hospital. Accordingly, the engagement agreement will almost certainly provide that if the anesthesiologist is terminated from the group, there will be an automatic termination of the anesthesiologist's medical staff privileges at the hospital If you are considering a contract that has an automatic termination clause, you will want to make sure that it extends to the privileges that are governed by the exclusive arrangement (e.g., if the anesthesiologist has medical staff privileges to provide general anesthesia services and chronic pain management services and the group has an exclusive arrangement with the hospital to provide general anesthesia services but not pain management services, upon termination from the group, the anesthesiologist's medical staff privileges to provide general anesthesia services may automatically terminate but his or her medical staff privileges to perform pain management services should remain unaffected).

Third, the engagement agreement should clearly define what constitutes termination "for cause." Although certain events should result in immediate termination (e.g., the anesthesiologist's loss of his or her medical license or departicipation from a significant third party payor), other adverse events capable of being effectively rectified should trigger an opportunity by the anesthesiologist to cure the problem within a reasonable amount of time.

Fourth, while nearly all engagement agreements contain provisions addressing termination of the agreement by the group "for cause" (e.g., anesthesiologist's conviction of a felony), surprisingly, many engagement agreements fail to address "for cause" termination of the agreement by the anesthesiologist (e.g., group's repeated failure to timely compensate anesthesiologist). Many agreements likewise fail to provide for "without cause" termination by either party (e.g., allowing either party to terminate the agreement without cause with 60 days prior written notice to the other party). Such provisions should be included in order to avoid circumstances where a party's expectations are not being met and departure is desired.

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Fifth, the engagement agreement may provide that, upon termination of the agreement, the anesthesiologist must complete all documentation in accordance with applicable standards to allow the group to bill for the services rendered consistent with usual and customary business practices. To enforce this provision, most states will allow withholding of monies owed to the anesthesiologist until completion of such documentation if an express provision allowing the withhold is also added to the agreement.

Sixth, the scope of services covered by the engagement agreement should be clearly defined (e.g., operative v. non-operative anesthesia services, medical directing of CRNAs, performing labor epidurals, onsite schedule, and on-call responsibilities). A clear delineation of the scope of services will avoid potential conflicts between the anesthesiologist, the hospital and other health care providers at the hospital who may have different understandings of the services to be covered by the anesthesiologist under the agreement.

Seventh, covenants not to compete are quite common in physician contracts today as the majority of states will uphold them (for the most part). However, where a group has an exclusive contract with a hospital that includes a provision for the co-termination of medical staff privileges with termination from the group, a covenant not to compete is not really necessary since the anesthesiologist is not likely to have a significant number of patients following him or her to a competing facility for general anesthesia services. In such instance, if the anesthesiologist is able to find another position within the relative vicinity of the hospital, he or she does not really pose a competitive threat to the hospital and therefore he or she should not be forced to uproot his or her family and move due to a covenant not to compete. Nonetheless, a covenant not to compete

may be appropriate where chronic pain management services are to be provided by the anesthesiologist at the hospital as such patients are more likely to follow the anesthesiologist to a new location that is within relatively close proximity to the hospital. If a covenant not to compete is included in the engagement agreement, it should be reasonable in scope, duration and geography to adequately protect the legitimate business interests of the group but not to place an unfair burden upon the anesthesiologist. Additionally, the engagement agreement should provide that if the anesthesiologist is terminated by the group without cause, then the covenant not to compete will not apply.

Eighth, the engagement agreement should provide that while the group is deemed to be the owner of all medical, financial and billing records related to the professional services rendered by the anesthesiologist, the anesthesiologist should have access to all such records during, and after termination of, the engagement agreement as reasonably necessary in order to defend against third party payor actions (e.g., malpractice actions or insurance payor audits) and/or to verify compensation paid and/or owed to the anesthesiologist under the engagement agreement.

Ninth, the engagement agreement should clearly address the responsible party for obtaining and paying for professional liability insurance, including who is responsible for obtaining and paying for "nose" and "tail" insurance and the limits of coverage.

Lastly, in order to avoid significant potential issues in the future, the engagement agreement should, at a minimum, include an outline of the partnership opportunities being offered to the anesthesiologist. Although the "buy-in" price and other important terms and conditions may not be known with certainty at the time the parties are entering into the engagement agreement, an outline of the partnership track should be included which provides each party a reasonable understanding of when the opportunity will be available and the key features of the partnership.

By including the provisions described above within the engagement agreement, and making sure that each party's understanding of the engagement agreement is set forth clearly in writing at the onset of the relationship, the parties can protect themselves against many of the adversarial issues that can arise during such engagements—facilitating a smooth entry into, and exit from, the anesthesia group. Hiring an attorney with knowledge and experience in drafting and negotiating anesthesia employment contracts can further facilitate a smooth entry into, and exit from, the anesthesia group. As Benjamin Franklin once said: "an ounce of prevention is worth a pound of cure."

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