



Protect Your Revenue Through Proper Contracts

By Jennifer Kirschenbaum, Esq.

Would you believe me if I told you that you are primarily in the contract business, not the billing business? We explored this concept at the HBMA Spring Educational Executive Symposium and took a hard look at service contracts as the window to our right to revenue and protection against liability. This article is a recap for our attendees and an overview for anyone unable to be with us in Naples.

Many of us operate with service contracts, having accepted we no longer live in a handshake world. However, for many, our service contracts are treated as a formality and nuisance we have signed out of obligation (and sometimes with opposition from our clients). But, understanding the value of a proper service contract allows us to utilize our service contract as a tool to enhance our company's functionality, revenue, and protections through the following categories in your service contract, which are not expansive of all recommended, but serve as a sampling of proposed provisions:

- **SCOPE OF WORK.** Don't be shy; instead, detail with specificity the services you plan to provide to your client. Make sure you are not overcommitting your company to a task list you cannot perform. By delineating in detail your intended scope of work, you are establishing expectations and also limitations around what services the client should look to you for. For example, at no point in your service contract (presumably) did you agree to personally drive to a patient's home to pick up absconded checks, nor did you commit to serving as the client's HIPAA guru.
- **FEE STRUCTURE.** Be specific and intentional. Your contractual fee structure establishes your right (and continuing right) to payment. Make sure you understand

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the laws in the states you operate. Fee splitting is still a problem in many states. Your clients will thank you for structuring your fees in compliance with applicable law; you are protecting them as well as yourself and your company by complying with applicable regulations.

- **TERM/TERMINATION.** The longer the term and the termination periods, the longer you have an expectation of payment. Certain industries have continuity in service because it's just too hard for a client to switch providers. This concept rings especially true in the billing realm. Like it or not, many of your clients are going to be stuck with you if your contracts are structured properly, even if a new, shiny company offering to bill at 3 percent comes along to try to woo their business. Be careful with automatic renewals or terms in excess of five or ten years, as either scenario may be prohibited by statute.



SPEAKER WRAP-UP

- **EXCLUSIVITY.** Depending on the size of your company and the size of your potential new client, you may be developing and devoting substantial efforts toward managing their account, including hiring new staff and reallocating resources. You are most likely doing so with the expectation that you will be the sole provider of billing services for this client, or at least the sole provider of billing services for a specific capacity. Do not make assumptions – if this is your understanding, require this commitment by the client in your service contract.
- **DEFENSIVE PROVISIONS.** This section of your contract is often the most overlooked and arguably the most important. Many companies fail to avail themselves of enforceable risk shifting or exculpatory provisions (contracting away liability caused *from your own negligence*), to their detriment. Failing to have a properly worded and enforceable limitation of liability, indemnification, and exculpatory provision allows your client to hold you accountable for more than you signed up for – namely, their complete collections and potential losses. Courts nationally have recognized that as a billing service provider, you are not stepping into the shoes of purveyor of all funds to your clients; you are merely serving as an accessory conduit in the billing process. However, you must correctly classify yourself as such through contract to receive such treatment. Failing to do so may result in a claim that it is your fault a client has not recovered their accounts receivables, and, what's worse, there is a chance the client may prevail, resulting in massive potential exposure. Yes, this is one reason why you have insurance, but if you are allowed to shift your risk – or limit your liability – why not do so? In contract, words are key; make sure you have properly contracted away your liability. For

example, limitation of liability is a recognized concept, but courts have routinely denied the right to limit if the fixed amount of liability by contract is not proportionately related to the cost of the service.

Less defined, but equally important as the contract itself, is the skill set necessary to effectuate clients executing your service contract. We regularly field inquiries from billing companies asking what a sales person should or should not say when discussing a potential relationship and contract with a potential client. We recommend you leave contract interpretation to your potential client and their team (whether your potential client elects to hire an attorney is their

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business). If you are presented with requested changes to a contract, there are most certainly provisions I would be less inclined to recommend you compromise on. I also recommend you discuss modifications to your service contract with your counsel prior to agreeing to any modification of a defense provision.

In addition to arming your company with a proper service contract, it is imperative to adopt and utilize a proper business associate agreement with any covered entity you provide services for. Not only is a business associate agreement required by law, it will serve to protect your company from exposure caused by others from unauthorized disclosures of protected health information. A key toward availing yourself of such protection is adopting a business associate agreement with a proper indemnification clause – shifting risk and cost away from your company attributable to or contracted for by other parties.

It is easy to place adopting and effectively utilizing proper contracts on the to-do list, then push this off to another day. Accomplishing this requires effort, investment, and

distraction from your day to day. But, each day you let pass without addressing your contracts is another day you may be operating with exposure or failing to maximize your company's revenue. ■

Jennifer Kirschenbaum, Esq., manages K&K's healthcare department and specializes in representing healthcare practitioners, IPAs, healthcare consultants, and billing companies in all areas of transactional, compliance, and defense work. Contact Kirschenbaum at 516-747-6700 (ext. 302) or at Jennifer@Kirschenbaumesq.com. To view K&K's customizable billing contracts, visit www.billingcontracts.com; to sign up for K&K's free healthcare newsletter, visit www.legalhealthcarenewsletter.com.

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