Contracts

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ABSTRACT

Residents completing colon and rectal surgery training should take seriously the terms of contracts offered to them. Contracts should specify how and how much salary will be paid, what benefits the surgeon will receive, and what services are to be provided. However, contracts frequently fail to disclose what costs the surgeon will have to cover, what will lower that salary, what hours the surgeon must keep, and what time off the surgeon may expect. Signing a contract is easily done, but getting out of a contract to take a better job or move to another community may be difficult because of the wording in the contract. Surgeons need to have professional help to determine whether to sign a contract and what that contract should provide. An attorney experienced in representing physicians can be recommended by the medical association.

KEYWORDS: Contract, employment, lawyer, job offer

Objectives: Upon completion of this article, the reader should be familiar with the complexities presented in employment and affiliation contracts offered to surgeons.

As residents finally completing a fellowship, or finally completing that final fellowship, you may day-dream (because you do not have the luxury of dreaming at night, as that would require sleeping) that life will now become less complicated and more controlled.

Get real.

Perhaps the most significant difference is that you will have more control, or more responsibility for control, over your work life. This affects not only your life but also that of your spouse, children, and other dependents—in other words, your family, or even your pet, which maybe now you can finally afford to have. But there are important steps that you need to take to make the transition from residency to real life go smoothly and to lay the groundwork for a more realistic real life.

If you read no further in this article, what you need to know is this: although you are now or soon will be eminently qualified to sit for a series of written and oral board certification examinations and to take colons and a variety of other things out of your patients, you are

not qualified to evaluate and negotiate the contract you have been offered or execute the other documents that are stacked on your desk. Hire a lawyer. Do not believe that what your employer offers you will take care of you and your family from now on. Hire a financial advisor. Do not bet everything you have worked so hard to achieve on your ability and availability to pay bills and calculate taxes. Hire an accountant. You are not going to find the right professionals to hire in the Yellow Pages, either. Consult your local, county, or state medical society for referrals to lawyers, accountants, and financial advisors who have experience working for doctors. In other words, physician, do not even attempt to heal thyself. Too much is at stake for amateur hour. Invest in your future because the future is almost here.

YOUR CONTRACT

For those who can brave some details, let us have a look at that paperwork. It may or may not be labeled

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“Contract”—it might say “Agreement” or “Letter of Understanding”—but our focus is a written document to be signed by you and your future employer or partner, setting out the rights and responsibilities of the people who sign it.

Just because the document may seem daunting at first glance does not mean a contract should be avoided. Anyone entering into a business relationship, a small group of surgeons, a big incorporated practice, or just one other person, should have a carefully drafted contract to define the relationship. Before you accept a job, the contract lets you know what you are in for and what you will get out of it. If there are problems in the practice, the contract can help prevent misunderstandings and help you to get what you were supposed to have. When you want or need to leave the job, the contract tells you how to do it. In the long run, the terms of a contract can be extraordinarily important.

If you are offered not a contract but just an oral invitation to “come in with us,” insist that the relationship be reduced to writing. Doing so may be a revealing exercise in organizing a joint medical practice that will benefit all involved. Reluctance or refusal to do so on the part of your potential partners may provide a good insight into how things would go if you were to cast your lot with those surgeons. It is much better for you to have a contract than not. Make it a good one, as a bad contract can be devastating. Hire a lawyer with experience in writing good contracts for surgeons, not just good contracts for real estate or janitors or brothers-in-law.

Know the nature of the arrangement you are entering. Are you becoming an employee under this contract? That usually means you are working for a set salary and maybe for benefits such as insurance, that you are not getting a stake in the practice, that you have to do what you are told, and that you can be fired. Are you an independent contractor? That relationship is somewhat attenuated; you would be expected to act without supervision or direction and be liable for your own actions, perhaps under your own malpractice insurance. Are you becoming a shareholder or partner? Typically, that means you get a cut of the take and that you have some role in the decision-making for the organization. It also means that you may be taking on liabilities and responsibilities for an entity that you need to become very familiar with before you sign on.

Signing means that you know, understand, and agree to everything that is on those pieces of paper and anything else incorporated by reference, so do not sign until you understand and accept everything. If there are other documents incorporated, get them and have your attorney review them before you sign, or else you are signing blind. Signing also means that everything you agreed to is in that document. If there were “promises”—a certain salary, a guarantee of future partnership, a

particular schedule—made to you when you were being recruited, and those promises are not in the document, you have no right to them. The contract means what it says and should therefore say what you mean. Once it is signed, changing a contract or getting out of a contract can be difficult. Any questions or uncertainties should be resolved before you sign.

These points are basic to a discussion of any contract of employment or affiliation. There are issues particular to medicine, even particular to surgery, even particular to colon and rectal surgery, which you should know to understand your contract before you sign.

ISSUES IN YOUR CONTRACT

Qualifications

Check the terms of your contract to determine whether you have the qualifications it calls for and whether you want to continue to maintain them over the life of your contract. Following are several typical requirements commonly stipulated in contracts and some of the complications that can arise.

STATE LICENSURE

To practice medicine in any state in the nation, you must be licensed by that state. Your contract is likely to stipulate this minimal requirement, but even if the contract is silent on the subject, you will have to be licensed in the state in which you are going to practice. Different states' procedures vary and may include a personal interview and a long application process. If you know you will be moving to another state after residency, work on meeting licensure requirements as soon as possible.

BOARD CERTIFICATION/RECERTIFICATION

Board certification is a common requirement for jobs, medical staff membership, and managed care contracts. For those still in residency or just recently out of residency, requiring board certification does not make sense because you do not yet qualify for board certification. Nonetheless, your contract may be a form contract or written by someone who does not realize you are just now finishing your training. Make sure your contract does not require you to be board certified before you actually can be.

The American Board of Surgery (ABS) and the American Board of Colon and Rectal Surgery (ABCRS) both have recertification requirements. A contract may well require that you maintain board certification for the term of the contract, which may involve recertification, depending upon where you are in the board certification sequence. Some contracts may stipulate only that you have been board certified, the use of the past tense meaning arguably that you were once, at some time in

the past, board certified but are not currently. A contract may stipulate that you currently and for the term of the contract maintain both ABS and ABCRS certification. Know what board certification obligations are conditions of your contract. It is all in the wording.

HOSPITAL MEDICAL STAFF PRIVILEGES

To admit and treat patients in a hospital, you must have hospital medical staff privileges and medical staff membership. An application for privileges and initial medical staff membership typically calls for comprehensive information about the applicant's background, education and training, and references. The information may take some time for you to gather. Accuracy is key; omitting or misrepresenting information on an application can result in automatic termination from the medical staff. Honesty is definitely the best policy.

The hospital medical staff office might take weeks to process an application, as it must independently verify all the credentials with their sources. The application is then subject to review and action by medical staff departments and committees and the hospital board of trustees. Even an immaculate application can take months in processing before privileges are granted. If your contract requires that you have privileges to admit and treat patients from the beginning, plan accordingly.

Remuneration

Getting paid is what it is all about, isn't it? Well, no; or this article would be much shorter. One purpose of a contract is to lay out how and how much you will be paid, and those issues can be complicated. Consider, for example, the following.

SIGNING BONUSES AND OTHER INCENTIVES FOR RECRUITMENT

Some job offers are sweetened by bonuses payable upon signing a contract, or other payments, reduced rents, low-interest loans, are offered. Too good to be true? Quite possibly. Some incentives can violate the law against receiving kickbacks for referring patients to a hospital or other prohibited arrangements. Penalties are high. Do not assume that the contract writer is familiar with all the law's limitations on incentive payments. Make sure your attorney is knowledgeable about and has considered these issues in advising you on whether to accept any incentives.

WHAT, HOW, AND WHEN

The basic remuneration question comes down to what amount you will be compensated. Your contract should be specific as to what you will be paid and when. Being paid quarterly, even monthly, may not meet your cash flow needs. Being paid by a check in the mail as opposed to immediate automatic deposit may not meet your cash

flow needs either. Know what to expect, as misunderstandings about money can be embarrassing, frustrating, and volatile.

DEDUCTIONS FROM SALARY

Just because an amount is specified as your salary does not mean that is the amount you will be paid. There may be the usual diminution for social security and other payroll deductions, but some arrangements include deductions for some of the expenses of the practice, such as malpractice insurance premiums, equipment, or staff. If under your contract you will be immediately acquiring an interest in the practice as a partner or shareholder, immediate deductions from your salary as a part of your buy-in may significantly lower your take-home pay. Know in advance how low your salary can go.

PERSONAL INSURANCE BENEFITS

A key part of any compensation package is the benefits in addition to salary that compensate for the work and responsibility undertaken. What should be an obvious priority to a physician is health care coverage. If health insurance is included in your benefits package, take the time to investigate it to determine what is included and what is not and how those limitations mesh with your needs, understanding, as physicians must, how health care needs will change. Know whether ophthalmologic and optician services are included and whether dental coverage, if provided, includes orthodontia or implants or cosmetic treatments. If you have or hope to have a spouse, children, other dependents, you need to know whether dependent coverage is either provided or available for an added charge. If coverage you anticipate needing is not provided for by your contract or if what is offered is not as inclusive as you want or need for yourself or your family, get an estimate of the cost of supplemental coverage and add that in as a cost of doing business under that contract.

At this point in your relatively young life, life insurance might not be on your list of priorities. Nonetheless, you need to know whether life insurance is offered as one of your benefits and, if so, how much and what kind. Life insurance that is part of your employment package but that benefits the company rather than your family is not particularly helpful to you. You may need to supplement the life insurance offered by your employer or partnership or corporation; consult with your financial advisor (yes, you need one now).

Disability insurance is another common element of a benefits package. As a surgeon, you need to investigate what disability insurance is provided. Some long-term disability coverage kicks in only if your disability prevents you from practicing medicine. Thus, if you lose your fingers in an accident and can no longer operate, you may still be able to practice psychiatry, so you are not

considered “disabled” for purposes of that disability policy. Obtain the specifics of what long-term disability insurance coverage is offered, or if none is, when you purchase it yourself, make sure it applies to the practice of surgery.

If long-term disability seems far too remote for someone as young and buff as you, short-term disability insurance may seem somewhat more realistic because you can see hurting yourself trekking in the Himalayas and swimming the English Channel next year after this residency is finally and successfully completed. Short-term disability coverage will be particularly important if you are paid strictly on the basis of production (also known as the “eat what you kill” scheme, common in surgery practices). If you are unable to work because you are recovering from a broken ankle, a pregnancy, or sprained thumbs after the airbags on your new Porsche go off, short-term disability coverage could hold off starvation, not to mention mortgage bankers. Find out whether the disability coverage offered in your contract includes short-term disability. If it does not, talk to your financial adviser (you really do need one.)

PENSION

If you are going to work for a university practice plan (discussed in other articles in this issue), a corporation, or other well-organized practice, you may have access to preexisting tax-deferred retirement or savings accounts. Consult your financial adviser, of course, but generally speaking, failing to pay into pension plans matched by employers is ill-advised. If you are considering a contract with a group or individual offering no pension structure, this does not mean that you do not have to decide what to do about retirement now. Not deciding is a decision to have no funds for retirement. Put this on your list of discussion topics when you meet with that financial advisor you are going to work with.

Hidden Costs

Your contract says you will be paid, and now you know to make sure it says when and how much. Does it say anything about what you will pay? Under your contract, you might be expected to pay for things you thought would be free to you or for things you have never heard of. Find out whether your new job has these hidden costs:

APPLICATION FEES AND DUES

You might be required to participate in your specialty society, your local and state medical association, and, of course, to have medical staff membership and privileges under the terms of your contract. These are not and probably did not read as if they were particularly onerous duties but rather seem like reasonable expectations for one no longer in a postgraduate year. But who pays for

these trappings of professionalism? Membership in your metro area or county medical society, your state medical society, and the American Medical Association can cost more than a thousand dollars. You obtain a price break from the AMA for being newly in practice and may from your county/metro and state associations. Find out whether you are expected to write those checks or whether your employer or group covers those costs for you. Specialty societies are separate from the geographic organizations such as your state medical association, but your contract may require that you join your local, state, and national specialty societies, too. Again, know whether you must pay for those dues yourself or whether those costs are taken care of for you under your contract. In a few years, these dues may seem trivial, but on July 1, writing those checks might be a little scary.

Medical staff privileges may or may not be stipulated in your contract but are a necessity for any surgeon planning to provide tertiary care or have any practice at a hospital. Many medical staffs or hospitals charge an application fee, which may run from \$75 to \$1000, just to apply for privileges. You must renew your membership every 2 years, so these application fees will not go away once you are more established. If you are expected to operate at more than one hospital, multiply accordingly. Once you are accepted as a member of the medical staff, there may be membership dues, charged annually or biannually, typically until you retire or leave the medical staff. These costs of being a professional may or may not be covered under your contract and will have to be paid.

PROFESSIONAL LIABILITY INSURANCE

Going “bare”—without professional liability insurance coverage—is not an option for most surgeons. Hospital medical staff bylaws almost uniformly require every member with clinical privileges to have malpractice insurance. Health maintenance organizations (HMOs) and other managed care companies condition participation on professional liability insurance coverage. Given some of the devastating court cases, just being able to sleep at night might require professional liability insurance. But just because professional liability insurance is necessary does not mean that your contract identifies who pays for it or even mentions it. If your contract is silent on the issue, you could have a hidden cost and you need more information. If your employer or group provides you with insurance, your contract should say that and in what amounts and with what carrier. Determine whether those amounts are adequate for the medical staffs you are joining, the managed care arrangements you are entering, and for your own comfort level. If you have to pay for your own coverage, be prepared to write a big check. Your contract may require that you cover the cost of buying insurance in the amounts that the employer requires, from a company that the employer names. This will save

you the inconvenience of having to shop around but obviously gives you no control or choice over the coverage that you will have to pay for.

Any discussion of professional liability insurance coverage in your contract must include “tail coverage.” Because claims of malpractice may not arise until after the insurance policy has terminated (because you have changed insurers or changed employers, who changed you to another insurer), it is important to have coverage that applies retroactively, commonly referred to as tail coverage. Your contract may or may not state that your employer or group will pay for tail coverage. Silence does not help you; if tail coverage has been verbally promised, that needs to be in the contract. If the coverage is not paid for, you will need to obtain it. Price it before you sign; even current costs may be high enough to make you reconsider the deal.

Note that professional liability premium rates vary tremendously from state to state. Further, the market has a history of volatility, and rates that seem unreasonably high now may get even higher, but possibly could go lower, depending upon geography, tort reform legislation, and other factors.

EQUIPMENT

Your contract should let you know whether you will be supplied with the equipment you need to carry out the job the contract describes. Furnished and equipped examination rooms, beeper, telephone, and records systems are necessary but should not be assumed to be provided at no cost. There may be equipment that you cannot fathom working without, such as a personal digital assistant (PDA), cell phone, and current computer, which your new employer, partner, or group may not be interested in or even familiar with. Your contract should state what equipment you will be provided with and at what cost.

Working Conditions

Remuneration is not the only issue to consider in a contract. All the money in the world may not be enough to compensate you adequately for being on call every night and doing cases you do not want to do all day. Know whether the working conditions are worth it. Make sure the following working conditions are addressed in your contract.

SERVICES TO BE PROVIDED

What kind of services are you going to be providing under your contract? It may seem a stupid question, but for subspecialists, it is a very important question. The contract should be specific about what your duties are in terms of your specialty and subspecialty. If it says that you are to provide “surgical” services, understand that you will be expected to practice general surgery and

provide coverage for general surgery patients and emergencies. If your expectation is to limit your practice to colon-rectal surgery, your contract should clearly state that your responsibilities are limited to the subspecialty. Note that some hospitals require surgeons to provide emergency call coverage for general surgery even if the surgeons want to limit their practices to their subspecialty. Check with your colleagues-to-be about whether they are providing call service beyond their subspecialty because of hospital requirements.

If you will be doing research, your contract should address the issue. If you are an employee, the rights to the research may well belong to your employer. If research and writing are done on your own time and outside your work-related duties, those rights should be yours. To avoid a fight later, the contract should clarify who has what rights regarding what research.

CALL SCHEDULE

The bad news about finishing your residency is that real life does not lose accreditation for making you work more than 80 hours a week. Residency work hours will no longer even pretend to protect you. Contracts do not always clarify how much call is required as part of the duties undertaken, but they should. Know whether as the “new kid on the block” you will be expected to take all the call or most of it, to make up for the months or years others have been on call before you, or whether call is distributed equitably.

VACATIONS AND HOLIDAYS

Now you actually get vacation time! Maybe. As with call, time away from practice should be addressed in your contract. Know whether you are guaranteed time away and, if so, how much. Know whether that time off will be paid or unpaid. Find out whether you can accumulate time over the years, so that if you pass on a week off the first year, you can pad your vacation the second year, or whether the practice takes a “use it or lose it” approach. Scheduling vacation time can be challenging and may lessen the desirability of even lengthy vacation time if you are not allowed to take it during ski season, summer, or over major holidays because of the already-scheduled vacations of your future colleagues.

Holiday scheduling may also create discomfort or outright dissent, at the office and at home. Find out whether holiday coverage is rotated, distributed equitably, or assigned by seniority, to know when, if ever, you will be able to honor holidays or whether you will be working even harder those days.

TERMINATING YOUR CONTRACT

Even if your contract looks great, even to your lawyer, you still must know how to quit if you want or need to do so. Do not discover the hard way the basic truth of

contracts—that signing a contract is much easier than getting out of one. Termination clauses will also disclose how and when your employer or group can terminate you. Become familiar with the termination mechanisms of your contract.

Cause/Without Cause

Generally, employment is “at will”; that is, either the employer or employee can terminate the relationship for no reason—“without cause.” Contracts typically set rules for terminations. Your contract may state that the employer will terminate it only “with cause” and may name the causes to which termination is limited—failure to maintain the qualifications or neglecting duties, for example. The contract may protect you against termination unless you are provided with a warning or warnings, an opportunity to improve, or stages of discipline or monitoring.

Contract Term

Your contract may set a term, a time period after which it dies a natural death. However, even a contract that states that it has a 2-year term may include a termination clause that allows the contract to be terminated by one party or the other with notice of 30 or 60 or 90 or more days. A termination clause can thus transform a document entitled “Two Year Contract” into a 30-day contract.

Notice Provisions

Your contract may require that certain notice provisions be met to terminate the contract. Warning is helpful on both sides, obviously; giving you time to find a job if you are getting fired and giving your employer or group time to replace you if you decide to leave. Obviously, notice can be inconvenient. Know the rules for timing your departure under your contract.

Restrictive Covenants

A restrictive covenant or “covenant not to compete” or “noncompete clause” is a contractual device used to protect the employer or group from generating its own competitors, by barring the person terminating the contract from setting up shop and competing for the employer’s patients. Usually, a noncompete will bar the departing contractor from providing the same services in the surrounding area for a period of time.

Such contract clauses can be controversial, as limiting competition is not usually what a market economy is supposed to be about. On the other hand, noncompetes can be looked upon as a necessary evil to allow groups to protect the investment they make in recruiting, moving, and breaking in a new surgeon, who may well not bring much of a payback to the group for a while. Different jurisdictions have different positions on noncompetes, with some states prohibiting their use. Generally, however, a noncompete may be enforceable if it is reasonable in distance and time. Of course, everything is relative; a noncompete that bars services within 15 miles may be too restrictive in the borough of Manhattan but may be reasonable in Manhattan, Kansas. Your contract’s noncompete may become a point of contention downstream, reinforcing why you should have consulted an attorney before you signed it.

Records Access

However your contract terminates, you may well need to have access to the records of that practice after you leave it, to defend yourself from a malpractice action that arises down the road, or for defense in other legal entanglements, such as a complaint filed by a coworker. If your contract is silent, your attorney should add a clause permitting access to both patient and business records necessary to defend against claims made against you, even after your relationship with the employer or group is ended.

CONCLUSION

This has been just an overview of the issues that little piece of paper may create for you. It is worth the investment you are about to make to get some professional help to lay the groundwork for a satisfying and stable professional life. Right now, while you are thinking about it, hire a lawyer to help you with your contract. Your medical association—the one you will be joining and maybe paying for—can help you find a lawyer who is experienced not merely with contracts but with physician contracts. This is no time for a generalist. Your lawyer should not have to read this to get ideas on how to help you. Consult a physicians’ attorney today.

DISCLOSURE

The author is a practicing lawyer who has reviewed employment contracts.