



## Who is Minding the Contracting Process?

Healthcare organizations enter into many contracts each year. Some agreements are straightforward for services such as lawn maintenance. Others are more complicated, including those that involve equipment leases, accreditation contracts, and HIPAA Business Associate Agreements. Because many of these agreements are seen as “routine” contracts, neither legal counsel nor the risk management practitioner has the opportunity to review the content prior to someone signing the document.

Recent concerns about an accreditation contract have brought to light the importance of reviewing agreements with an eye to the details. However, some suggest that in today's fast pace healthcare facility there may not be sufficient time for legal counsel or the risk management practitioner to review agreements prior to signing the document. Such a view may be short-sighted, particularly if seemingly innocuous contract terms might leave the healthcare organization open to unwanted liability exposure.

**Risk Management Strategies for the Contracting Process.** Some practical solutions are at hand. The result will be that *someone is minding the*

*contracting process.* The following are some suggested risk management strategies for an effective contracting process.

1. **Develop and Implement a Contracting Policy and Procedure.** Institute a healthcare organization policy and procedure that contemplates who may contract on behalf of the entity, acceptable terms, and what must be avoided in agreements.
2. **Set Limits on Contracting Authority.** Restrict who can execute contracts on behalf of the healthcare organization *and* for what purpose.
3. **Develop a Contract Template.** Work with legal counsel to identify what terms and conditions should be in an acceptable contract, including those for the lease of equipment, purchase and sales agreements, and accreditation contracts.
4. **Target Contracts that Merit Legal Review.** Identify those agreements that should be evaluated by legal counsel including those that include:
  - a. Information technology (IT), software or hardware maintenance that might include access to patient

level data, proprietary information, or intellectual property.

b. Clauses that permit the other party to sell or assign the agreement or to sell or assign maintenance responsibilities.

c. One-way indemnification clauses and hold harmless terms.

d. Unrestricted use or re-use of clinical data at the discretion of the other party.

e. Unilateral termination clauses favorable to the other party.

f. Terms that are inconsistent with applicable federal or state requirements.

g. Perpetual or so-called "evergreen contracts" that automatically renew absent someone taking action to stop the agreement or modify the terms and conditions.

5. **Pre-empt Potential Risk Exposures.** Anticipate problems by developing standard terms for specific contracts. For example when contracting with radiology groups, specify that the agreement prohibits any "after hours." teleradiology interpretation by third parties without the prior approval of the healthcare organization. Similar action can be taken with respect to contracts that

might violate federal Anti-Kickback or Self-Referral provisions.

6. **Educate.** Provide education for personnel responsible for signing agreements on behalf of the healthcare organization. Build into the education programs practical information, including what to do when language on the back of a purchase and sale agreement attempts to void the warranty for an expensive piece of equipment.
7. **Monitor.** Recognize that contracts do not end when the parties sign the agreement. Monitor contract activities to determine compliance with the agreement. Ongoing contract assessment helps to avoid possible risk exposures with a view to rectifying the identified problem areas.

**Conclusion.**

Risk prevention is a powerful tool in the contracting process. Knowing what to sign, what to refer to legal counsel and what to do when questions arise lessens the confusion about a key operational management concern for healthcare organizations and medical practices.

***If you would like assistance in developing a risk management contract template tool, please call us at (860) 242-1302.***