

Legal Challenges for the Startup DPC Practice

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DPC Nuts and Bolts to 2.0

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OUTLINE

Basic contracting issues, pitfalls and precautions

- Breaking up with your employer
- Setting up your entity
- Terminating private insurance, Medicaid, Medicare
- Patient Agreements
- Employer Agreements
- Moonlighting Agreements
- Consultants, Brokers, Vendors and Networks

Making Your Escape



Read Your Contract Carefully

(maybe for the first time)

- Notice requirement for termination
- Tail insurance requirements
- Restrictions while employed
- Restrictions after employed

Restrictive Covenants

- Prohibited in California, Delaware, Massachusetts, Montana, North Dakota, and South Dakota.
- Elsewhere becoming harsher and wider in scope as health systems and physician groups consolidate and corporatize
- Often possible to negotiate out of restriction with health systems looking to preserve downstream referrals
- Argue that DPC is not competition for traditional model

Restraining Order

Physician agrees that if s/he breaches [the restrictive covenant] Employer shall suffer irreparable harm.

So, in the event of a breach *or threatened breach* . . . Employer shall be entitled, without having to post a bond, prove irreparable harm . . . to a temporary restraining order, preliminary injunction, and permanent injunction to prevent any such breach by Physician and any persons acting directly or indirectly for Physician.

Notifying Your Patients

- Most states require patient notification
- Negotiate the process with employer
- Have yours ready first for employer to review
- Advertising not specifically directed to your patients is not “soliciting”

Creating Your Entity

- Form before entering into any agreements
- Requirements vary by state
- some require professional entity
- Some allow only physician owners (CPOM)
- Some require medical board certificate of good standing
- If >1 member/shareholder = bylaws/operating agreement essential
- It's a prenuptial agreement — get a good local attorney

**Choosing
Your
Practice Model**

Hybrid

- No meaningful reduction in administrative hassle or overhead
- Added time commitment to DPC patients
- The worst of both worlds
- Can be a compliance, billing, and record keeping nightmare

DPC and Cash FFS

- Cash pay patients help with cash flow during startup
- Good way to introduce DPC to prospective patients
- FFS patients see the value of membership
- FFS pay at time of service —no insurance — no billing compliance or administrative hassle

Terminating Third Party Payors



**Ba Bye
Felicia!
We're
Outta
Here!!**

Private Plans

- Most physicians in hospital systems and large groups are contracted at the corporate level
- If contracted individually must terminate
- Requirements vary by plan so review plan documents carefully
- Typical notice period – 60-120 days

Medicaid

- ACA changes require that all physicians who wish order, prescribe, or refer for Medicaid patients enroll in Medicaid
- Physicians who privately contract can enroll under OPR status (not Kentucky)
- Most states have OPR Provider Enrollment forms online

Opting Out of Medicare

- File valid opt out affidavit with all relevant MAC's
- To order, refer, and prescribe, SSN and NPI *must* be on the opt out affidavit (they won't necessarily warn you)
- Keep a copy of beneficiaries' signed private contracts on file and available for inspection
- Opt out effective date depends on Medicare participation status

Timing Your Opt Out

- Participating Providers - opt out affidavit must be received by the first day of the month before quarter you want the opt out to be effective
- Non-Participating Providers - opt out is effective on the date you sign the opt out affidavit

Are You Par or Non-Par?

- **Participating-** Accept assignment and Medicare allowable as payment in full - may not collect more than the deductible and copay from the beneficiary - payment sent directly to provider.
- **Non-participating-** Do not accept assignment or Medicare allowable as payment in full - Payment sent directly to beneficiary - Medicare pays 95% of allowable

But . . .

- MACs don't always follow CMS or their own rules about par/non-par
- If you worked for a hospital system and/or reassigned your rights, they may consider you non-par
- This is a problem if you are employed and the MAC opts you out early

What to Do?

- Check PECOS
- If in doubt, call your MAC for confirmation
- Get a name . . . because they kinda are



**“We don't care. We don't have to.
We're the Phone Company!”**

Legal Implications of Opting Out

- Mandatory two years before you can opt back in
- Cannot bill Medicare for any services you personally provide
- Neither you nor *any other person or entity* may receive payment from Medicare for your services
- No “billing under employer’s ID number”

So Never Never Never



... allow an employer or other entity to bill Medicare for your services

Opted Out But Still Need to Moonlight?

- Employer onsite primary care
- Occupational Medicine
- Correctional Medicine
- Veterans Administration
- Emergency Medicine
- Urgent Care

Emergency and Urgent Care Exception

- “If the services are emergency or urgent care services furnished by an opt-out physician . . . to a beneficiary with whom he/she has not previously entered into a private contract.”
- No participating physician available
- Claims reimbursed at Medicare non-par rate
- Use CPT modifier - GJ

The Patient Agreement



Basic Requirements

- 1) Written agreement between a patient and a health care provider
- 2) For ongoing primary care services in exchange for a periodic fee
- 3) Allows either party to terminate the agreement anytime after written notice
- 4) Specifies the primary care services included under the agreement
- 5) Specifies the amount of the periodic fee and any additional fees
- 6) Prohibits billing insurance or other third parties for services included in the periodic fee – but does allow a third party to pay the periodic fee
- 7) Conspicuously states that the agreement is not health insurance and does not meet any individual health insurance mandate that may be required by law

HELPFUL
CLAUSES
FOR
PATIENT
AGREEMENTS

Medicare Acknowledgment (Opted Out)

Medicare. You acknowledge by placing Your initials at the end of this paragraph that you understand and agree that the Physician has opted out of Medicare and, as a result, Medicare cannot be billed for any services performed for the Patient by the Physician. The Patient agrees not to submit a bill to Medicare or attempt to obtain Medicare reimbursement for any such services. If the Patient is eligible for Medicare, or becomes eligible during the term of this Agreement, then s/he will sign the Medicare Opt Out and Waiver Agreement attached and incorporated by reference. The Patient shall sign and renew the Medicare Opt Out and Waiver Agreement every two years, as required by law. _____ **(Initial)**

Medicare acknowledgement (Not Opted Out)

Medicare. Your initials on this clause of the Agreement acknowledge Your understanding that neither the Physician nor the Practice is opted out of Medicare so, at this time, Medicare Beneficiaries are not eligible to be treated by the Practice or its Providers, and Medicare cannot be billed for any services performed by the same. Therefore, Patient acknowledges that s/he is neither a Medicare beneficiary nor Medicare eligible. The Patient agrees that if s/he will become eligible during the term of this Agreement, s/he will notify the Practice within 60 days of becoming eligible and this Agreement will be terminated upon Medicare eligibility. Any excess fees will be refunded to Patient, and the Practice will make every effort to provide the Patient with names and contacts for primary care alternatives. _____ **(Initial)**

Included Services

The Services included in Patient's Membership Fee under this Agreement are limited to those specified in Appendix A. Any service or product not included in Appendix A is specifically excluded.

CLARIFY THIS TO DEATH

Explain Extra Charges

Patient is responsible for the costs associated with any laboratory or specimen analysis and will be informed of the price in advance.

Although You are always free to use any pharmacy of choice, You have the option of obtaining most generic medications from the Practice at considerably discounted prices. These are subject to an additional charge, for which You are responsible. You shall be informed of the cost in advance.

Manage Expectations

After Hours Access. Clinic will make all reasonable efforts to provide telephone and text access to the Physician after hours for urgent needs. Patient shall be given a phone number where patient may reach the Physician directly for guidance regarding *urgent* concerns that arise *unexpectedly* after office hours.

Physician Absence

Physician Absence. From time to time, due to vacations, illness, or personal emergency, the Physician may be temporarily unavailable. When dates of absences are known in advance, the Practice shall give notice to Patients so that they can schedule non-urgent care accordingly. During unexpected absences, Patients with scheduled appointments shall be rescheduled at the Patient's convenience. In the case of an acute illness requiring immediate attention, Patient should proceed to an urgent care or other suitable facility for care. Charges from urgent care and any other outside provider are not included under this agreement and are the Patient's responsibility, but may be submitted to Patient's insurer for payment consideration.

Don't

- Bundle purchased goods/services (labs, drugs) into membership fee
- Bundle cost of services from outside providers into membership fee
- Offer unlimited services (“as appropriate, in sole discretion of Physician”)

Employer Agreements

- Don't negotiate from Employer's agreement— have your own ready to go
- Keep the agreement confined to payment terms, processes, etc. — employer is not a party to the patient agreement
- Don't accept too many patients from one employer
- Onsite? Remember ERISA
- Data requests- make them explain- explain why they don't need it- if they insist make them pay

Other Contracting Tips and Precautions

- Employment (Moonlighting)
- Networks
- Brokers
- Consultants
- Vendors



Conventional Contract Wisdom

- Most are one-sided in favor of the drafter
- Essential to read every line — twice
- Decide on the deal breakers
- Negotiate those which are merely offensive
- Be able to walk away

**Expect to hear a dozen reasons
you should accept a bad contract**

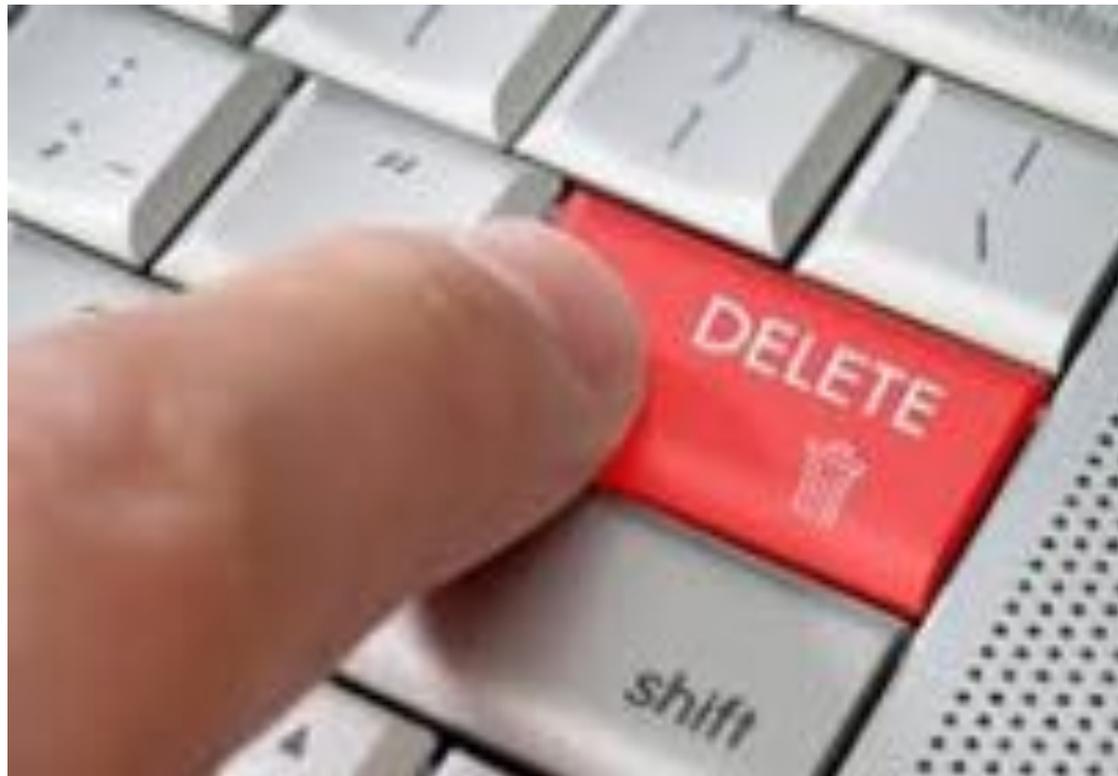
IGNORE THEM !

*The
Classic
Collection*

Compelling Reasons You Should Really Sign That Contract

- We have 100 (or 1,000 or 1,000,000) of these agreements... can't make any changes
- It's just a formality, we never actually hold anyone to (fill in the offending clause)
- Everyone else signed it, everyone else is happy
- It's corporate policy — non-negotiable

The One Clause in any Agreement that Deserves the Delete Button



Indemnification

- Should be a deal breaker in any agreement
- You promise to be responsible for the other party's liability in a lawsuit
- You pay for the depositions, expert witnesses, legal fees and any award or judgment rendered against other party
- You pay upfront for defense (including Attorney fees) even if it's frivolous – even if it's dismissed

Sample Indemnity Clause

1. Employee agrees to indemnify and defend;
2. Employer, its officers, shareholders, agents, accountants, attorneys, and employees;
3. From any and all claims, judgments, liabilities, penalties, damages, administrative actions, costs, and expenses, attorneys' fees and defense costs) (Claims) and ***threatened Claims***;
4. By ***any*** third party, including employees of either party, ***arising out of, or in connection with*** Employee's duties under this Agreement.

Indemnity is Usually an Out-of-Pocket Risk

EXCLUSION

This policy excludes coverage for any third party liability which [you] are obligated to assume because of [your] assumption of such liability in a contract or agreement. We will defend professional liability claims against *you* if they are covered under this Policy, but we will not provide coverage, for liability of any kind (including attorneys' fees) or pay for the defense of any claim or suit against another party.

Response

Demand that indemnity language be deleted

OR

Indemnify “to the extent that such indemnification is covered by any insurance coverage that [your] may have.”

Moonlighting Agreements

(Employee, Contractor, Consultant, Medical Director, etc.)

Ground Rules

- No prohibitions on outside activities
- No restrictive covenants/prohibitions on working your DPC practice during or after employment
- No indiscriminate renting of your license
- Absolutely, positively, no indemnification

Keep Things In Perspective

- This is a *part time* job
- They aren't paying you enough to own your license or limit your outside opportunities
- No investment or commitment to you
- Promises of equity are often illusory

Illusory Promises

“Company shall agree to consider possible bonuses”

“Employee may earn, and shall be eligible for the above stock options contingent on the approval of the Board of Directors”

“Consultant shall be eligible to be considered for a grant of equity interest”

Other Assorted Indignities

“Physician employees are neither eligible for severance nor afforded the rights to employee appeal or grievance procedures”

“Termination will not entitle Physician to the hearing and appeal rights provided for in any medical staff bylaws”

“Employee shall not be entitled to the benefits, policies or procedures set forth in the Employee handbook”

No Prohibitions On Outside Activities

Delete This

During the term of this Agreement, Physician shall not engage in the practice of medicine or related activities except as an employee of the company or with company's written permission which shall be given at sole discretion of the company.

Replace with this

Nothing in this Agreement shall prohibit Physician from engaging in outside activities related to the practice of medicine, so long as such activities do not interfere with Physician's duties under the Agreement.

**No Mid-Level Supervision
Without Your Approval**

Downloading Liability

Physician covenants and agrees to be responsible for the supervision of medical support staff, including but not limited to nurse practitioners and physician assistants, to closely monitor them in the performance of their duties and to abide by all relevant Employer policies in supervision of such personnel, including, but not limited to signing any supervision or collaboration agreements required by law.

HAIR ON FIRE!!



Here are the Problems

- Supervising mid-levels exposes physician to liability for mid-level errors
- Employed physicians rarely have control over the caliber of the mid-levels they supervise
- You could have to defend a malpractice action from a patient you've never even examined

Licensure Risk

- State Medical Practice Acts generally hold physicians liable for the acts of mid-level practitioners they supervise.
- Texas Medical Board recently limited supervising physician's license when NPs found to have delivered incompetent care, despite evidence that NPs concealed their acts from physician.

North Carolina Medical Board

The physician is ultimately responsible for ensuring that high quality medical care is provided to each patient. Physicians may be held accountable if PAs or NPs under their supervision make errors or exhibit poor clinical judgment.

Reasonable Conditions Of Supervision

- Require well defined scope of practice and supervision policies
- Require that mid-levels have adequate malpractice insurance
- Retain the right to draft or approve — not just sign — the supervision agreements
- Require that no supervisee be assigned to you without your approval

Contracting With Networks

- Beneficial under specific and limited circumstances
- Can morph into HMO lite.
- Read the agreement and ask lots of questions
- Due diligence is a must – remember what you fled from.

Important Questions

- Do they have the network they claim? Do you even need them?
- Will they dictate the terms of your patient agreement? Your fees? Your services?
- Require you to perform data collection and/or other duties?
- Control your office policies and procedures?

Beware of the Following Abominations Unto All That is DPC



Is this A Network Agreement or an Employment Contract?

- a) Physician agrees to perform educational, supervisory, and administrative services as reasonably required by Network
- b) Physician shall participate in and abide by quality assurance and risk-management programs as required
- c) Physician shall provide to Network, documentation of all complaints, including patient complaints, relating to the services provided by Physician.

Don't Sign Away your Autonomy

Physician agrees that Network shall:

- (a) Enroll DPC patients as patients of the Physician
- (b) Bill and collect payment of monthly fees for Physician's services to DPC patients enrolled through the Network
- (c) Be appointed by Physician to accept any complaints patients may have about the DPC services provided by Physician
- (d) Share all such complaints with Physician as soon as practicable under the circumstances.

Working With Brokers

- Can be beneficial to collaborate with a broker who understands DPC
- Keep it loose — no contractual agreement
- Do not pay a broker
- Could implicate state anti-kickback statutes
- CPOM (fee splitting)
- It is mutually beneficial relationship and they already get paid

Consultants/Management Services

- Do you need them?
- Do they add value?
- Do they understand DPC?
- Better than your DPC Face Book groups or your colleagues attending this conference?
- Will they increase your liability or reduce your autonomy?

THE **BAD** STUFF

or

More Clauses to Delete

Nonsensical Indemnity Requirements

Physician agrees to indemnify Consultant and all of its agents and affiliates against all liabilities and expenses of any kind (including attorneys' fees and defense costs) arising directly or *indirectly* from Physician's Services; Physician's failure to perform any obligation or any act of Physician employees, or agents.

Physician shall immediately pay Consultant on demand, all amounts owing under this indemnity.

Never Cede Your Autonomy

Physician shall make all reasonable efforts to use the Electronic Health Record system chosen by Consultant.

Physician shall permit Consultant and/or Consultant's agents to inspect and make copies of the records of Physician's DPC Members for the purpose of monitoring and helping to improve the overall health of such Members, subject to the Business Associates Agreement.

Vendors/Supplier Agreements

- These agreements are vital to DPC practices
- Patient access to at-cost drugs, imaging and supplies goes to the heart of DPC philosophy
- But scrutinize to see that the product actually has value and the agreement is palatable

Example - Curbside Consults

- Growing new electronic consult service
- One company claims for about \$350 per provider per month, it will “[e]mpower community clinicians with on demand specialist access to drive better outcomes.”
- Promise to “give patients access to specialty care regardless of their insurance status or income.”

Except they do none of this

Marketing Fluff vs Contract

Advertising says: We give patients access to specialty care regardless of their insurance status or income.

Contract says: The medical information provided [by Consultant] is not to be used or relied on for any diagnostic or treatment purposes. This information is not intended to be patient education and should not be used as a substitute for professional diagnosis and treatment

Advertising says: We provide onsite PCPs with timely access to specialist expertise

Contract Says: If you are a PCP you agree that you will not use or rely upon the information provided by the Consultants in directing patient care.

Advertising Says: We go above and beyond the community standard of care to provide timely specialist expertise.

Contract Says: Consultants provide their *informal thoughts* regarding patient care . . . the Physician agrees that Physician will not rely on information provided by the Consultant in directing patient care.

Advertising Says: Improve access to the right specialist and bring that expertise into the primary care setting, to the front line. So that all patients can access the care they need, regardless of socioeconomic barriers.

Contract Says: If you are a Physician you agree that if you determine that specialist treatment is needed, you will refer the patient to a specialist physician who can . . . provide proper diagnosis and treatment.

Advertising Says: [We] Improve access to specialty care by connecting primary care clinicians directly to high-quality and efficient specialty electronic consultations.

Contract Says: All feedback provided by consultants is provided “as is”, without any warranty, and we make no warranty that [it] is accurate or that [it] may be relied upon.

Neither we nor the Consultants make any representations or warranties with respect to any information offered [] regarding treatment of medical conditions.

No Warranties

Provided as is — use at your own risk

We do not provide any warranties with respect to the Platform or its Content which is provided on an “as is” and “as available” basis. *We disclaim all warranties of any kind including the Implied Warranties of Merchantability and Fitness for a Particular Purpose.*

— Finally —

An Absurd Indemnity Clause

You agree to pay and indemnify us for all losses, damages costs and expenses (including attorney's fees and expenses) that we may incur based on any action or inaction by you. If we . . . get sued or any other claim is made against us related to anything you do, you agree that you will defend us against the suit or claim if we request it.

Verdict

A worthless and probably dangerous product which puts the physician at great risk of liability and patient's health in jeopardy. It's all there in the agreement.

Final Words

Don't let the legal stuff — the compliance, contracts and negotiation — intimidate you. You can do this. You went to medical school, you mastered ICD10. Everything you've done to get here so far is harder than this.

NO SWEAT

QUESTIONS?

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