

# Contracts 101

Fundamental Contract Law

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Employment and Independent  
Contractor Agreements

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# Life is a Series of Contractual Agreements

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- Contracts Create Rights and Obligations



# What Law is Applied to Contractual Arrangements?

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- Federal Contract Law
- State Statutes and Regulations
  - General Law of Contracts
  - Uniform Commercial Code “UCC”
  - State Courts
  - Contracts Create Private Law

# What is a Contract?

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# What is a Contract

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- Enforceable Promise and Risk Allocation Mechanism
  - Offer
  - Acceptance
  - Consideration- each party must promise to provide something of value
    - Nominal value “acorn”
    - Promises to make gifts or Charitable Contributions



# Enforceability

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- Freedom of Contract
- Folly is Not Fraud
- Oral Contracts Enforceable?
- What must be in writing?
  - Real Property
  - The “One Year” Rule
  - Surety
  - UCC Statute of Frauds

# What is Unenforceable?

- Substantive Unconscionability

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- Procedural Unconscionability
- Pre-Existing Duty
- Illegal Contracts
  - Illegal Act
  - General Restraint of Trade- monopolies, but PARTIAL restraint of trade may be enforceable
- Capacity to comprehend- diminished mental capacity, intoxication
- Authority- must have actual authority to enter into contract
- Conditions Precedent and Conditions Subsequent- physician employment conditioned on obtaining a license in the state to practice
- Agreement to enter a medical practice that is acquired and no longer exists- contract is “frustrated” cannot be enforced

# Usual Contract Terms and Conditions

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- Substantive Terms and Conditions: description of goods, services, payment terms, term and termination of agreement
- Special Terms: without limitation, indemnification, warranty, limitation of liability



# Indemnification Clauses

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- Indemnify- to compensate another party for damages, losses, or expenses they incur- most difficult to understand and negotiate...
- Example: “Each party hereby agrees to indemnify, defend, and hold harmless the other party and its officers, partners, employees, and agents from and against any and all deficiencies of any nature whatsoever, including, without limitation, reasonable attorney’s fees and other costs and expenses incident to any suit, action or proceeding, which may arise out of, result from, or constitute any breach of any representation, warranty, or covenant contained in this Agreement.”

# Indemnification Clauses

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- When confronted, most parties request deletion of all indemnification obligations
- If other party insists, usual response is to make the indemnification obligations mutual when this makes sense
- Many negotiate limitations on indemnification obligations- threshold “basket” amount to be reached before any indemnification obligations are reached as well as time limitations for claims



# Warranties

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- Warranty- an assurance of some particular matter- essential element of contractual agreement
- May be stated or implied
- In general, breach of warranties will result in damages to the other party
- Examples: Home seller's warranties, purchase and sale of goods
- Warranty Disclaimers: "as-is"
- Magnuson-Moss Warranty Act- Federal Consumer Protection law applies to the purchase and sale of consumer products that come with an express written warranty. Distinguishes between "full" and "limited" warranties



- **Limitations of Liability**
- **Liquidated Damages-** ex: restrictive covenant agreements
  - Agreements in **Restraint of Trade-** such clauses are enforceable if they are reasonable as to time, territory, and activity restrained and are also reasonable as to each party and the general public
- **Entire Agreement** – all prior representations, oral or written are merged into the agreement
- **Amendements**
- **Waiver of Breach-** technical breach may inadvertently lead to termination
- **Assignment-** Restrictions of assignment to 3<sup>rd</sup> parties
- **Force Majeure-** neither party liable for “acts of God” (9/11/2001)
- **Governing law-**
- **Notices-**
- **Severability-** terms and conditions the agreement may be severable, or unenforceability will not affect remainder of agreement

# Contract Negotiation

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- Adhesion Contracts- must be accepted without negotiation (credit cards, cars)
- Contracts Require Mutual Gain
- Smart is Dumb and Dumb is Smart- rather than refute, ask to rephrase the statement
- Keep Emotions Under Control
- Playing the “Deal Breaker” Card

# Employment and Independent Contractor Agreements

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- Oral Agreements- most employment agreements are terminable at will by either party
- Written Agreements- gives both parties more rights and obligations than the general law provides
- Most aspects of employment and independent contractor agreements are governed by state laws and judicial decisions



# Federal Law

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- Stark, Anti-Kickback, and Tax Exempt Organizations
- Whistleblower Protection
- General Federal Laws- Equal Employment Opportunity Act, FMLA

# Stark

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- Stark I – Enacted in 1989, the Ethics in patient Referral Act prohibits physicians from referring to any clinical laboratory in which physicians (or immediate family) have a financial interest
- Stark II- Amended by the Omnibus Budget Reconciliation Act of 1993, broadened the physician self-referral prohibition to include “designated health services”- PT, speech-language, occupational, radiology/imaging, DME, parenteral nutrition, HHS, prosthetics, inpatient and outpatient referrals

# Federal Anti-Kickback Statute

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- Sanctions against anyone that knowingly offer, pay, solicit, or receive remuneration (or anything in value whether direct or indirect, overt or covert) in return for or to induce the referral of items or services reimbursable by Medicare, Medicaid, or any federal program.



# Essential Elements of a Physician Employment Agreement

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- Duties
  - Full time employment
  - Permitted Activities – outside if any
  - Employer's Right to Possession of Revenue from Medical Services
- Employee Representations and Warranties. - protect the employer
  - Licensure
  - DEA License
  - Staff Privileges
  - Criminal Misconduct
  - General Conduct History

# Physician Employment Agreement cont.

- Reportable Actions- Employee should be required to notify the employer in writing actions that prevent the ability to perform services, disciplines, claims
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- Compensation and Benefits
    - Salary
    - Bonus or Productivity Based Compensation
    - Fringe Benefits- health insurance, retirement plans, auto allowance, cell phone, pager
    - Relocation and Moving Expenses
    - Time Away from Practice: CME Allowance
    - Professional Liability Insurance- tail insurance
    - Deferred Compensation and IRS Section 409A- taxation of deferred compensation or severance pay
      - Triggering event, time of payment
      - Deferred compensation must be included on gross income immediately, even if not paid!

# Physician Employment Agreement Cont

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- Term
- Termination
  - Without cause
  - Employer's Termination for cause
  - Employee's Termination for cause
  - Disability
- Covenants
  - Restrictive Covenant or Noncompetition Agreement
  - The "Reasonableness" Test – to time, territory, and activity restrained
  - Remedies- Liquidated Damages



# Physician Employment Agreement Cont...

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- Consideration for Ownership and Participation in Ancillary Ventures
- Assignment
- Notices
- Governing Law
- Entire Agreement

# Determining Fair Market in Hospital-Physician Employment

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- Stark and Anti-Kickback Laws
- Stark exception and Anti-Kickback safe harbor for bona fide employment, each requires payment of fair market value compensation
- MGMA surveys
- Most hospitals will not pay above 90%

# Am I an Independent Contractor?

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- Compliance- cannot be told when, where, or how to do the job
- Training- no instructional training
- Travel Expense- Responsible for own business or travel expense
- Investment- May rent or lease office space
- Benefits- Not provided company benefits
- Relationship- only for term of contract
- Provides key services for a business or activity



# Independent Contractor Agreements

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- 11 Factor Test
  - Behavioral Control
  - Financial Control
  - Relationship Between the Parties
- Taxes
  - An employee gets W2 with taxes removed
  - An independent contractor gets a 1099 with no tax withholding
- Call/Coverage Agreements