

Contract Law for the Emergency Physician

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I. What Is a Contract

- A. Many types
 1. everything from car payments to employment
 2. written, verbal – both may be legal. Exceptions – love, property – problem being form
 3. found in all human interactions
 4. both English Common Law and Roman Law recognized contracts
 5. we have a basis for contract law going back to the Code of Hammurabi (1760 BC) and Code of Justinian 529 AD
- B. A contract is an agreement between people who have agreed to agree
- C. It memorializes an agreement

II. Defining a Contract

- A. Legally defined by four basic elements
 1. agreement – voluntary offer and acceptance
 2. consideration – something exchanged of legal value –not always money
 3. capacity – i.e. age, duress
 4. legality – can not make a legal contract to do something illegal – you can't really “put out a contract” on someoneConcept: “4 walls concept” – if it is not in the contract it doesn't exist

III. Types of Contracts

- A. Unilateral or bilateral – does one side claim to exchange services or do both sides exchange something in employment – both sides tend to exchange services
- B. Written/oral – very important
- C. Expert or implied – coming to the emergency department is both. The only business relationship made in fear on both sides
- D. Void, voidable, unenforceable
 1. void – no legal effect
 2. voidable – in effect but can be voided by either side
 3. unenforceable – cannot be enforced in court or won't be enforced by the court due to restrictions or limitations, i.e. post service restrictive covenants excessive

IV. Contractual Variants

- A. Quasi-Contracts – not usually favored but substituted in cases where a contract would have been made. i.e. EMS services to comatose patient
- B. Uniform Commercial Code – takes common law and incorporates them into state statutes – limited to transactions and goods – not services – all states except Louisiana
- C. Promissory Estoppel – actions taken based on promise before written contract. Job offer – offer taken. Then, unreasonable withdrawal

V. Offer

- A. Serious intent to be bound
- B. Definitive offer needed – “fair share of the profit”
- C. Communication, verbal, writing – follow up
- D. Termination – time frame
 - 1. revocation
 - 2. counter offer
 - 3. operation of law – termination by law

VI. Acceptance

- A. Method of acceptance
- B. Serious intent to accept
- C. Communication – memorialize the acceptance

VII. Consideration

- A. Detriment – anything given up which has legal value
- B. Bargained for – a “Quid pro Quo” question – the “Christmas present” rule
- C. Pre existing duty rule
- D. Illusory consideration – must be binding – not voidable by unilateral action
- E. Adequacy of consideration – courts do not, in general, examine the adequacy of each sides consideration – fairness not a legal issue

VIII. Capacity

- A. Minors
- B. Intoxicants
- C. Mental incapacity
- D. I’m just a doctor – no

XI. Mistake

- A. Mutual
 - 1. fact – must be a mistake of fact
 - 2. basic assumption – does not apply to money
 - 3. allocation of risk – foreseeable – yes or no

X. Fraud

- A. Misrepresentation of fact
 - 1. must be known – intent
 - 2. some “puffing” allowed
 - 3. omission of silence can be fraud, i.e. hospital closing in 2 years
 - 4. justifiable reliance
 - 5. damages
- B. Duress - force
- C. Undue influence
- D. Unconscionability
 - 1. contract of adhesion – no room for negotiation
 - 2. disparity of power
 - 3. extreme terms – courts avoid this – “Merchant of Venice”

XI. Performance

- A. Perfect performance – exactly meets contract standards
 - B. Substantial performance
 - 1. percent completion
 - 2. degree of benefit
 - 3. personal satisfaction
 - C. Delay in performance
- } rules the entire construction industry

XII. Conditions

- A. Express conditions – i.e. state license, medial staff acceptance, board certification – important
- B. Constructive conditions – good faith, etc.
- C. Excuse of conditions – both parties agree to forgive
- D. Impossibility
- E. Impracticability
- F. Frustration of purpose, i.e. the hospital closed or merged

XIII. Remedies

- A. Damages
 - 1. calculation, reasonable certainty, mitigation
 - 2. reliance – expenses made in reliance
 - 3. restitution – recovery of payments – such as advances, moving expenses, etc
 - 4. liquidated damages – contract specifies damages to be paid for breach of contract, i.e. bond, etc
 - 5. punitive – usually unavailable in business contracts
 - 6. injunction – involves the courts
 - 7. rescission – order regarding the contract – may be used in cases of fraud or illegal activity, i.e. drug abuse conviction, sexual harassment, etc.
 - 8. anticipatory repudiation – when a party declares it’s intent in advance not to perform, i.e. “I’m not coming for the job” – other party may seek legal redress in advance

XIV. Third Party Rights

- A. Third party contract enforcement
 - 1. incidental beneficiaries – i.e. raw materials supplier benefits from construction contract
 - 2. intended beneficiaries
 - a. creditor beneficiaries – i.e. the bank
 - b. donee beneficiaries – when parties contract to benefit a third party, i.e. group and doctor contract to benefit the hospital
 - 3. contract modification – does the third party have an interest which it needs to know when contract is modified? Two way street – doctor – group then group – hospital (very important)

XV. Assignment and Delegations

- A. Assignments
 - 1. assignability of contract
 - a. one group to another
 - b. one doctor to another
 - 2. anti-assignability clause
 - 3. rights of assignee
 - 4. notice
- B. Delegations and non delegations
 - 1. delegatability – what can be delegated – i.e. hospital to group for “all quality” or “EMTALA”
 - 2. delegatee liability – failure to perform opens delegatee up for suit
 - 3. delegator liability – original contracting party making delegation remains liability

XVI. Specific to Doctor Contract Problem

- A. Employee versus independent contractor
 - 1. not a simple issue
 - 2. 20 part governmental test
 - 3. tax, workermen’s comp., private corp. questions
- B. Malpractice coverage
 - 1. huge area – separate talk
 - 2. declaration page of policy
 - 3. notification of change clause
 - 4. site specific
 - 5. type
 - 6. tail
- C. Schedule
 - 1. flexibility
 - 2. group norms – promises, promises
- D. Consideration – the money and benefits, etc.
 - 1. for actual hours or assigned hours?
 - 2. profit sharing – what does that mean?
 - 3. buy in/buy out if applicable
 - 4. benefits if any – what is paid for?
 - 5. ownership questions

6. up front costs
 7. compensation for new clinical responsibilities
 8. extras
- E. Restrictions
1. where you can work, time, radius
 2. what you can do
 3. interference of contract – non compete clause
 4. post service restrictions
- F. Termination clause
1. for cause – needs a list – immediate
 2. not for cause – rules – time line
 3. the “PIN”
- G. Warranty by physician
1. license
 2. DEA
 3. board certification
 4. ACLS, ATLS, etc
 5. medial staff suspension
 6. morals/felony/misdemeanor
 7. records
 8. confidentiality
 9. education/continuing education
 10. standards
- H. Severability – individuality of conditions
- I. Amendments, changes, extensions, etc.
1. the “in house emergency” case
- J. Length of contract
1. notice – both sides – important
 2. renewal
 4. roll over
- K. Contract depending
1. underlying contract – subordinate
 2. group ownership - assignability

XVII. Conclusions