

## Chapter 17

### **MANAGED CARE CONTRACTS — WHAT THE PROVISIONS MEAN<sup>1</sup>**

All contracts are negotiable. An effective strategy for contract negotiation involves having the choice not to enter into it. For any managed care plan(s) you choose to join to, you are in the most favorable position to negotiate the contract provisions when you can select the best from several plans.

Time is precious in negotiations. The longer the time period that exists to review and negotiate provisions of a contract, the better off you will be, as economic and legal issues can be thoroughly analyzed, negotiated and agreed upon by the parties prior to signing. Rushing into a contract without seriously considering the ramifications of doing so may cause problems at a later date because important issues may be overlooked.

The American Dental Association, through its Contract Analysis Service dues, provide for managed care contract review as a service to its members. It is my understanding that certain state dental associations will also provide for managed care contract review. The problem is that doctors enter into the contracts without legal assistance. If you later attempt to terminate participation, problems can arise.

Below are the significant legal issues with which you should be familiar prior to participating in a managed care contract.

#### **Required Documents**

All exhibits, schedules and any other documents referenced under the contract should be reviewed in conjunction with one another to determine if they are complete and current.<sup>2</sup> Failure to review such documents could result in an incomplete analysis and could subject you to significant liability.

#### **Terms of and Parties to the Agreement**

The effective date of the contract will be indicated in this section. After that date, with the provisions of the agreement in effect, all parties to the contract will be bound by its terms and conditions. Additionally, certain terms and conditions may extend beyond termination of the

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<sup>1</sup> William P. Prescott, M.B.A., J.D., "The Law and Managed Care Plans", Journal of the California Dental Association, June, 1995.

<sup>2</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

contract, binding you and/or the practice at a time when professional services are no longer provided.

The parties to the contract are important. Persons or entities not party to the contract may not be bound by it. For example, if you or the practice entity execute the contract and the associate in the practice will be rendering services under it, the terms should authorize the associate to render the services.

If the practice is a professional corporation, the corporation should be a party to the contract as you would be an employee of your professional corporation, rendering services on its behalf.

### **Definitions of Terms**

The definition of terms will help you understand the terminology referenced throughout a particular contract. Because each managed care contract will differ in its format, terms and conditions, the terminology section also will vary accordingly. Words and phrases you think you understand from other sources may be defined differently by various contracts, so this section should be examined carefully.

### **Compensation**

It is critical that you understand how and when the practice will be compensated under the contract. Unless the you understand the compensation provisions, you, and your advisors cannot effectively analyze whether it would be worthwhile to proceed.

These provisions often include sections relating to withheld or pooled funds. Such funds are held in a special account and are used to cover certain situations and contingencies that are paid by the collective dentists providing services under the managed care plan. The excess funds are generally returned to you/provider pursuant to the terms of the contract, which are based upon either the performance of all dentists in the managed care plan or the individual dentist's performance in the plan.<sup>3</sup>

### **Modifications to the Agreement**

You should not allow modifications to any contract without the mutual written consent of the parties to it. However, some managed care plan contracts attempt to include provisions whereby the managed care organization may change certain contract terms at its discretion. In such a case, the contract should allow you to immediately terminate the agreement if you so choose.

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<sup>3</sup> Quattlebaum, B, *Managed Care in Dentistry*. PennWell Publishing, 1994, page 116.

## **Liability Insurance**

The managed care organization will require you to obtain and maintain liability insurance within certain specific limits. In certain situations, the managed care organization may attempt to require its approval of the liability carrier providing the coverage. Because certain insurance carriers have better performance records than others, and because the number of exclusions contained in liability policies is increasing, it would be advisable for you to retain control over the selection of the liability carrier.

## **Patient Acceptance**

Under a managed care plan, you may be forced to treat certain patients that you may not desire to treat. The criteria for acceptance or non-acceptance of certain patients under a particular managed care plan should be considered under the contract.

## **Most-Favored Nation**

Under a most-favored nation provision, you are required to charge the members of a particular managed care plan the lowest fee, possibly pursuant to the fees of another managed care plan, charged to any patient.<sup>4</sup> Such provisions may be present when member co-payments are allowable.<sup>5</sup> However, these provisions have been attacked by the Department of Justice and Federal Trade Commission under antitrust laws.

## **Referral Restrictions**

Some contracts limit specialist referrals. You should always remember that it is your duty to never compromise patient treatment. If a patient receives unacceptable treatment by a specialist, the referring dentist could be liable.<sup>6</sup> Therefore, it is important to know the reputation, geographical location and number of specialists per specialty authorized for referral by the provider/dentist under a contract. Remember also that a specialist presently authorized for referrals may not be a provider authorized for referral at a later date. Finally, you should understand both the legal and economic significance of referring patients to specialists who are not contract providers.<sup>7</sup>

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<sup>4</sup> Ibid, page 120.

<sup>5</sup> Ibid, page 120.

<sup>6</sup> Todd, KM, Managed Care, *CDS Review*, Jan-Feb, 1991, pg. 34.

<sup>7</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

## **Emergency Care**

Contracts typically require you not only to treat managed care patients within a certain time period for non-emergency care, but also to agree to render emergency coverage within a certain time period, eg, twenty-four hours. However, if you are unavailable to provide the required emergency care, it is important to understand and agree to the approval process for another dentist to provide such emergency services.

## **Utilization Review Procedures**

Utilization review clauses allow the managed care organization to evaluate the performance of professional services to assigned patients. If the services provided are not a covered benefit under the managed care plan, you may not be paid. You should understand: (i) how the utilization review is defined; (ii) how it is conducted; (iii) who will be on the review committee; (iv) the standards which will be used; and (v) who sets the standards.<sup>8</sup> Obviously, the utilization review process should never compromise your standard of care regarding treatment. However, the managed care plan may have implemented certain policies that are inconsistent with your philosophy regarding standard of care. Therefore, you should not become a provider for a managed care plan that has implemented policies inconsistent with your treatment philosophy.

## **License to Practice Dentistry**

You must represent and warrant that you are licensed to practice dentistry within a particular state. If the license is terminated or suspended, you will generally be required to provide notice to the managed care organization within a specified time period. Further, loss or suspension of your license usually triggers termination of the contract by the managed care organization.

## **Peer Review**

If peer review provisions are included in the contract, you should understand all relevant details of the process including, but not limited to, who would be evaluating the work, the standards for such evaluation and any appeal process.<sup>9</sup> Similarly, if you are required to review the work of another dentist, the reviewing dentist should request to be held harmless and to be indemnified by the managed care organization for participation in the process.

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<sup>8</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

<sup>9</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

## **Grievance System**

A grievance procedure is similar to an internal arbitration committee. Depending upon the circumstances, such systems effectively assist in resolving disputes inexpensively and quickly. However, it is important for you to understand: (i) your rights to appeal a grievance committee's decision; (ii) whether a particular matter may be litigated; or (iii) whether the right to litigate has been waived.<sup>10</sup>

## **Independent Contractor**

Most managed care contracts provide for you to render services under the contract as an independent contractor. While the independent contractor relationship is not objectionable if certain criteria allowing such a relationship are present, you should understand that if you operate the practice as a professional corporation, and if the professional corporation is not a party to the managed care contract, an assignment of income problem could exist. Revenues generated by you belong to your professional corporation, not you. You are an employee of the entity.

## **Hold Harmless/Indemnification**

Hold harmless provisions provide that you and/or the practice is responsible for any losses or other liabilities that the managed care organization might incur as a result of professional services rendered by you, the practice or its employees.<sup>11</sup> This potential additional liability is shifted from the managed care organization to you and/or the practice.

Indemnification provisions provide that you and/or the practice will reimburse the managed care organization for any losses or other liabilities that are incurred as a result of services rendered by you and/or the practice.<sup>12</sup>

Liability carriers do not always cover you or the practice for this additional liability. Therefore, your legal counsel should always provide a copy of the managed care contract to the liability carrier for review to determine whether the additional coverage is available. To the extent that the additional coverage is unavailable, you and/or the practice bears the risk of the additional liability.

Some individual(s) have suggested that hold harmless and/or indemnification provisions will not necessarily be upheld in court.<sup>13</sup> However, if you are required to litigate to determine

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<sup>10</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

<sup>11</sup> Todd, KM, Managed Care. *CDS Review*, Jan.-Feb, 1991, pg. 34.

<sup>12</sup> Thorne, M, Approaching a Specific Clause. *ADA News*, Jan 23, 1995, pg. 19.

whether the provisions will be upheld, you have already lost due to litigation costs, emotional drain and lost time, irrespective of whether the provisions are upheld. Therefore, I generally find that most hold harmless and/or indemnification provisions should either be revised in some manner or removed from the contract; I rarely find them acceptable as written.

If the managed care organization will not agree to remove the hold harmless and/or indemnification provisions, and you still desire to proceed with the contract, two additional issues should be considered. First, the provisions can be made mutual. You agree to hold harmless and/or indemnify the managed care organization under certain conditions and vice-versa. However, the mutuality of the provisions does not relieve you from potential liability. Second, the dollar amount and category, or character, of the damage and/or loss for which you agree to hold harmless and/or indemnify the managed care organization can and should be subject to negotiation. For example, you may not agree to hold harmless and/or indemnify the managed care organization for attorneys' fees.<sup>14</sup>

### **Non-Competition**

Certain managed care organizations may attempt to prohibit you from participating in other plans during and even after termination of the contract. Such organizations want you to render managed care services exclusively for them in an effort to reduce their own competition. You should review non-competition clauses to determine if compliance with the terms would be difficult or impossible. Irrespective of whether a particular non-competition provision is enforceable, you would find it very expensive to defend actual or threatened litigation.

### **Liquidated Damages**

Because you assume most of the obligations in managed care contracts, liquidated damages provisions are likely to work against you. These provisions basically agree what each party will be required to pay the other in the event of a breach of contract.

Generally, you should not agree to liquidated damages provisions.<sup>15</sup> If they are agreed to, you or your legal counsel should secure a written confirmation from the liability carrier that coverage under such circumstances will be provided.

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<sup>13</sup> Quattlebaum, B, op cit, pg. 118.

<sup>14</sup> Quattlebaum, B, op cit, pg. 118.

<sup>15</sup> ADA Purchaser Information Service and Contract Analysis Service, "What Every Dentist Should Know Before Signing a Dental Provider Contract".

## **Assignment/Transfer**

The contract may or may not allow you to assign responsibilities to a current or future associate employed or engaged by the practice. Similarly, if the managed care organization sells its business or the managed care plan to another entity, you may find such a transfer unacceptable and may desire to terminate the contract. The result of such actions by either you or the managed care organization should be considered in the agreement.

## **Termination**

It is important to understand not only the terms of the contract, but also the methods by which the contract can be terminated. In certain situations, the contract will automatically renew unless it is terminated within a specified time period, e.g., 30 or 60 days, prior to the renewal date. You should understand the circumstances under which the contract may be terminated by either you or the managed care organization. For example, if a certain number of patients are not provided to your practice under a particular managed care plan, you may desire to negotiate the immediate termination of the contract.

It may be appropriate to include a termination event clause to cover the possibility of you sustaining losses by virtue of rendering managed care services. Remember, these provisions must be negotiated prior to executing the contract, not after. Similarly, it is important to understand the events that would allow termination by the managed care organization. Such events also are subject to negotiations between the parties to the contract.

Finally, it is critical for you to understand all of your obligations after termination of the contract is triggered, eg, treatment in process, return of pooled funds, payment of outstanding fees for professional services, etc.

## **Arbitration**

Although arbitration is becoming an increasingly popular method of resolving disputes in contracts, binding arbitration provisions typically preclude you from filing a future lawsuit and leave no right of appeal. Such a provision may or may not be in your best interest. Additionally, prior to agreeing to any arbitration provision, it will be necessary to ensure that liability insurance will continue in effect. Because arbitration is surprisingly more time-consuming and expensive than most people think (just less time-consuming and expensive than the court system), managed care organizations generally are able to force you into accepting their decision or facing arbitration.<sup>16</sup> Alternatively, if no arbitration provision is in effect, forcing the managed care organization into a potential litigation mode may cause the organization to settle in favor of you rather than face expensive litigation in which both parties lose.

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<sup>16</sup> Anderson, PE, op cit, pg. 50.

## **Jurisdiction and Venue**

The contract generally should include jurisdiction provisions, which indicate what means will be used to decide a dispute, in accordance with the laws of the state in which the practice is located. Further, you should designate the state in which the practice is located as having venue over the parties to the contract. In the event of litigation, it could be costly for a dentist to submit to venue in another state.

## **Entire Agreement**

The parties to the contract should agree that the contract represents the entire agreement between them, and that all prior or contemporaneous written or oral statements, negotiations and agreements between the parties are merged into and superseded by the contract. Further, the parties to the contract should acknowledge and agree that there are not other oral or written understandings, arrangements or agreements between them.

## **Impact of Managed Care on Your Practice**

Prior to participating in any managed care plan(s), consider these frequently overlooked issues.

Because managed care patients cannot be easily transferred from you to a purchaser when a practice is ultimately sold, the intangible value of the practice would potentially be reduced by the percentage that the managed care revenues relate to total practice revenues. If a practice would typically sell for approximately 55% of one year's gross revenues, and if the intangible portion of the practice were valued at \$.36 on the dollar, or 36%,<sup>17</sup> the value of a managed care practice would essentially equal the fair market value of its tangible assets; little or no value would be allocated to the intangible assets. This problem easily could result in a significant loss of income at retirement.

Dr. Gordon Christensen summarized his position on managed care by stating: "It is usually impossible to reduce dental costs to a few dollars per person per year and provide quality care."<sup>18</sup> If so, it follows that the work quality of even the best practitioners would decline in a managed care environment. Where quality of work declines, you probably will not enjoy your profession.

Prior to a decision to participate in a managed care plan(s), complete an analysis which takes into account all financial and economic factors associated with any decision to participate in managed care. In reviewing this analysis, you may question any decision to participate in managed care, as it is generally inadvisable to work longer working hours for less compensation

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<sup>17</sup> The Goodwill Registry, 1999, The Health Care Group, Inc., Plymouth Meeting, Pa.

<sup>18</sup> Christensen, GJ, How Should Dental Bills Be Paid? *JADA*, Vol. 125, July 1994, 1014.

than otherwise. An alternative strategy would be for you to make the commitment to educate yourself and staff members on successfully remaining in and/or developing your fee for service practice.