



Credentialing & Peer Review

LEGAL INSIDER

Know your facility's exclusive contracts

Facilities often enter into exclusive contracts with hospital-based physicians—radiologists, pathologists, anesthesiologists, emergency medicine physicians, and, to a lesser extent, hospitalists and neonatologists—that contain so-called “clean sweep” provisions. These agreements call for the privileges of all group members covered by the exclusive contract to terminate at that particular facility when the contract is up. Such contracts are now the norm rather than the exception for many specialties; therefore, it is important for MSPs to know which specialist services are covered by exclusive agreements in their facility, how those agreements may affect the physicians' fair hearing rights, and how to handle termination of privileges pursuant to a clean-sweep provision.

Ensure proper coverage, control

Facilities seek exclusive agreements with certain specialties not for the purpose of excluding physicians

who are not members of the contracted group, but instead to promote 24/7 coverage and high-quality, dependable services in those specialties that are based at the facility, explains attorney **Michael R. Callahan**, a partner with Katten Muchin Rosenman, LLP, in Chicago. Having multiple providers in specialties such as anesthesia, pathology, and radiology can lead to chaotic scheduling, gaps in coverage, and “cherry-picking”—situations where the best or most experienced physicians in a specialty refuse to treat indigent or low-reimbursed cases and instead claim the higher reimbursed procedures for themselves, he suggests.

“Facilities seek exclusive agreements with certain specialties to promote 24/7 coverage and high-quality, dependable services.”

—*Michael R. Callahan, Katten Muchin Rosenman, LLP*

Exclusive agreements eliminate hospitals' need to find an adequate number of physicians in the critical hospital-based specialties to take call and also ensure that services will be provided to indigent, uninsured, or underinsured patients on the same basis as patients with comprehensive private health insurance.

For example, an agreement with an anesthesia group will require that the group provide full-time anesthesia coverage and, in return, grants the group the exclusive right to provide anesthesia services at the facility. Callahan notes that in this way, scheduling challenges are eased. The facility is assured that an anesthesiologist will always be available and that there will be no problems finding a physician to provide anesthesia for indigent patients.

For their part, the group members who provide services pursuant to an exclusive contract know that they will have a fairly predictable caseload and income stream. They know that they will not lose the better-reimbursed cases to competing providers. And because a member of



IN THIS ISSUE

p. 5 Avoid risk when credentialing telemedicine providers

Telemedicine, convenient for both patients and MDs, is rapidly growing. Read why its use can be tricky for MSPs.

p. 7 Sample bylaws language: Telemedicine

Use our sample language to create or update your facility's bylaws regarding telemedicine.

Questions? Comments? Ideas?

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Exclusive contracts

< continued from p. 1

the group is typically the head of the department, the group has a degree of control and influence over services that is often not available to physicians who work independently, Callahan says.

Award of privileges unaffected by exclusive contract

Even when a group has an exclusive contract with a facility, the individual group members remain subject to the credentialing and privileging standards and procedures of the facility, notes **George Indest III**, a partner in the Health Law Group in Altamonte Springs, FL. So neither

the medical staff nor the facility cedes any control of the privileging process through an exclusive agreement.

Typically, the exclusive agreement will require the group to provide specialists who are qualified to be privileged members of the medical staff, and the individuals must go through the same credentialing process as any other physician requesting privileges. The credentialing office will verify the applicant's licensure status and history at other facilities and will ensure that the applicant has the training and experience appropriate for the procedures for which he or she seeks privileges.

If an individual is not awarded privileges, that individual may not provide services at the facility—even if he or she is a member of a group with an exclusive contract to provide services. Specialty groups with exclusive contracts typically build conditions into their own contracts with individual physician group members, stating that the physician must be granted the appropriate privileges at the hospital where the group has secured the exclusive contract to provide services, Indest notes. The employment agreement between the physician and the group will usually state that the failure to gain privileges, at one of the facilities at which the group provides services, or the loss of such privileges, is grounds for termination.

Privileges terminate at contract's end

In addition, contracts between the specialty group and its members usually call for termination of the physician's privileges at the facility when the physician's contract with the group ends. The hospital's contract with the group will make that provision as well, says **Jennifer L. Bragg**, a healthcare attorney in the Philadelphia area.

The termination provisions associated with these contracts usually call for the waiver of any hearing rights or other fair hearing procedures. Although some physicians object to clean-sweep provisions, Indest points out that they benefit the physician, as well as the facility. For example, if a physician is less efficient than his fellow group members and, therefore, sees fewer patients and

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generates less revenue, the group may want to terminate its association with him. The termination will lead to loss of his privileges, but the loss of privileges will not reflect on the physician's competence as a practitioner.

Because terminations pursuant to clean-sweep clauses are contractual or administrative in nature, they are not reportable to the National Practitioner Data Bank, Bragg says. She points out that hospitals usually include in the contract a clause noting that termination of privileges pursuant to the termination of the contract is not a reportable event.

Clean sweeps enable smooth transition

Clean-sweep provisions are indispensable from the hospital's perspective, says Bragg. The hospital must be able to make a smooth transition from one group to another in the event a contract terminates or is not renewed.

If members of the old group are still privileged to provide services at the hospital, that smooth transition is likely to be disrupted, Callahan points out.

Bragg notes that a hospital will have a difficult time recruiting a new group if it cannot offer an exclusive contract. Given the current state of reimbursement, she says that hospital-based groups must be able to count on capturing all of the revenue from available procedures if they are to have any hope of providing the coverage a hospital needs—and even then, in some regions, hospitals must contribute to the costs of call coverage.

Furthermore, the new group is not likely to risk being pulled into conflict with the old group.

Physicians must understand that the clean sweep is simply the cost of the exclusive contract, notes Indest. A physician or group that wants the guaranteed work and revenue of an exclusive agreement must accept that upon termination of the agreement for any reason, privileges to practice at the facility terminate as well. The terminated group cannot have, and should not have, any right to practice that specialty within the hospital, using hospital facilities, after the contract ends.

Other negotiated arrangements

Exclusive contracts typically contain a clean-sweep clause, and although most hospital counsel agree that the clause is critical for the facility and not unreasonable for the physician, there are times when the facility may not be able to persuade a group to agree to the provision. "It's all a matter of negotiating power, and sometimes the group's bargaining position is much stronger than the facility's," Callahan says.

If a hospital needs a particular group to enter into an agreement, and the group will not agree to immediate termination of privileges at the end of the contract, then the parties must negotiate some sort of modified policy, he adds.

For example, negotiations could result in a stipulation

< continued on p. 4

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Exclusive contracts

< continued from p. 3

in the contract stating that if the hospital is seeking to terminate an agreement for cause, the dispute or issue would first go to the medical executive committee and/or a board committee for the purpose of reviewing and resolving the issue and keeping the contract in place. Or, in a case in which a hospital wishes to restrain a particular group member from practicing at the facility, the contract may call for a truncated or expedited review process, rather than the full hearing and appeal process to which other medical staff members are entitled, Callahan suggests.

Beware of pitfalls

Problems occasionally arise in exclusive contract agreements, and facility administration and the medical staff office must be aware of this. Failure to plan for these issues can result in administrative headaches and potential legal liability. To help avoid issues with contracts, observe the following practices.

First, the physician group members' employment contracts must mirror the contract between the group and the facility. The contracts should:

- Be conditional on the physicians receiving privileges to perform the services called for in the group's contract with the facility
- Require provision of services on the schedule the facility requires
- Call for immediate termination if the physician loses privileges at the facility (unless the group has agreements with more than one facility)
- Call for immediate loss of privileges if the group loses its contract with the facility (unless another arrangement has been negotiated with the facility)

Next, the facility should have a clear policy about which individual (e.g., group representative, medical director) will oversee operation of the group's services under the contract, Callahan says. Typically, one member of the group is designated the department head or medical director of the service.

Ask questions about your facility's exclusive contracts

It is critical for MSPs to familiarize themselves with the facility's provider contracts—especially exclusive contracts. Yet sometimes this crucial information is not disseminated to the medical staff office (MSO). To ensure that the MSO is aware of exclusive agreements and can adapt privileging and credentialing procedures to comply with the agreements, ask the hospital counsel or medical director the following questions:

1. Does our facility have exclusive agreements with any medical groups? If so, what specialties are covered by exclusive agreements?
2. Do the contracts set forth specific privileges covered by the contract? If so, which privileges are exclusive to which medical groups?
3. Do any of the agreements contain provisions calling for termination of privileges upon termination of the contract? If so, which agreements contain such a provision?
4. Do any of the agreements contain modified due process rights or other provisions that may affect the rights of individuals bound by the contracts? If yes, which individuals have these modified rights, and what are their specific rights under the contract?
5. When do the exclusive contracts terminate?
6. How is the facility notified if a group with an exclusive contract decides to terminate its relationship with one of its physicians?

Knowing the answers to these questions will enable the MSO to inform applicants that particular privileges are not available—if, for example, a radiologist seeks privileges that are exclusively granted to a group of which he or she is not a member. On the other hand, if the radiologist seeks privileges for a procedure that is not part of the exclusive agreement with the radiology group, the MSO will know this and may process the application. When a physician leaves a group or a group's contract ends, the MSO will know whether the termination affects privileges and whether due process rights apply.

Having all of this information available can help ensure the smooth and efficient functioning of the MSO.

There is a potential for conflict in cases wherein the group wants one individual to act as director or representative, and the facility prefers another individual. Facilities often will insist on retaining the right to choose the medical director or representative, but again, this is a provision that can be subject to negotiation. The contract between the facility and the group should address this issue, Callahan says.

Third, the medical staff bylaws must recognize exclusive contracts and any modifications to individual fair hearing rights that the exclusive contracts include, Indest notes. Conflict between the rights bestowed by the medical staff bylaws and the rights provided under an exclusive agreement can lead to litigation if a physician's privileges are terminated under a clean-sweep clause without the fair hearing called for in the bylaws.

If your facility has exclusive agreements with clean-sweep clauses and/or modified fair hearing rights, review the bylaws to ensure that there is a provision for such agreements. If there is not, the bylaws should be amended accordingly, Indest advises.

The contract should address how to handle situations in which the facility does not want a certain physician to practice there. The contract should allow the facility the right to exclude a physician who is unreliable, incompetent, or has demeanor problems, Indest says, and the group must have a mechanism to handle these types of issues. Callahan notes that this, too, is a topic for negotiation between the parties.

Finally, the facility should ensure that it retains sufficient control over the quality of services provided under an exclusive agreement, Callahan cautions. There may be situations in which a group is aware that a member has competence or behavior issues (e.g., substance abuse problems).

However, the group may cover for the affected physician, and hospital administration may not be informed of the problem in a timely manner.

To ensure that every member of the group provides appropriate, quality services, Callahan recommends that the facility periodically perform chart reviews using third-party reviewers. ■

Avoid risk in credentialing telemedicine providers

Telemedicine—the exchange of medical information from one site to another via electronic communications for the health and education of the patient or healthcare provider and for the purpose of improving patient care, treatment, and services—is rapidly expanding. For example, the use of radiologists at a remote location to provide initial reads of films is now commonplace, as are specialist consults conducted remotely. Telepsychiatry, too, is widely practiced. Some facilities even have the capability to perform robotic surgery remotely via a mechanism wherein the patient is in an operating theater in one location, and the surgeon controls the robotic arm that performs the procedure from miles away.

One of the great benefits of telemedicine is its convenience. Patients need not travel to get the benefit of specialist input, and specialists are able to provide services to

a wider spectrum of patients. A physician responsible for a patient's care has the security of oversight by a physician who specializes in the patient's particular condition, but the primary physician is still able to retain responsibility for the patient.

However, telemedicine is not necessarily convenient for medical staff offices. Although The Joint Commission attempted to make credentialing telemedicine providers simpler when it revised standard MS 4.120 in 2003, obstacles to efficient credentialing of telemedicine providers remain.

Joint Commission allows credentialing options

In the past, providers of medical services via a telemedicine link were subject to the credentialing and privileg-

< *continued on p. 6*