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COMMON RISKS IN CONTRACTS FOR MEDICAL PRACTICE OWNERS

Recently news.com.au ran a story titled *Worst contracts in sports history*, which detailed how Ricky Williams, a former NFL star, signed a contract without reading the fine print, resulting in a significant portion of the \$68 million contract value being unobtainable due to almost impossible performance hurdles. This is a common occurrence in business as well, where the 'fine print' goes unread.

Almost daily we see medical practice owners also enter into sub-optimal contracts, or even worse in some cases - no written contract at all. Some would earn the title of *Worst contract in medical history*. The common theme in these circumstances is the practice owner failing to seek appropriate professional advice.

While risks apply in every contract, three of the largest and most frequent areas where we see 'fine print' issues are:

1. 'Independent practitioner agreements'
2. Lease agreements
3. IT service/product provider contracts

This article focuses on the first contract type, but the concept of seeking appropriate advice applies equally to all contracts you may enter into.

What's an independent practitioner agreement?

Also often called a facility agreement, room rental or sessional agreement, this type of contract generally has the following features:

- ▶ The doctor wishing to work from the practice is running their own medical business (usually as a sole trader structure).
- ▶ The doctor pays the practice a service fee to use the rooms, admin and support staff (usually a percentage of their billings or a flat sessional fee)
- ▶ The doctor is free to use their own clinical judgement, but is usually required to adhere to the practice policies and procedures.

The above structure is commonly used and attempts to deal with issue such as GST (e.g. GST

is payable by the doctor to the practice on the service fee) and secondly attempts to reduce the risk of the relationship being deemed to be an employer/employee relationship.

Often, we find practice owners have used a free template available from various sources, or have 'borrowed' a template from another practice, without seeking advice on whether the contract is suitable for their circumstances. This exposes the practice owner in particular to a contract which may not reflect their needs - and often the inadequacy of the contract is not discovered until the contract is challenged or there is a significant issue.

What are some common issues that arise from an independent practitioner agreement?

There are simply too many risks to list. We have seen practice owners tens or hundreds of thousands of dollars out-of-pocket or suffer significant reputational damage when things go wrong. Real-life examples of such situations we have witnessed includes:

- ▶ Practice A's contract was poorly drafted and they became the 'deemed employer' after the practitioner made a complaint to the Fair Work Commission. This resulted in the practice having to pay employee entitlements such as superannuation, leave and other costs.
- ▶ Practice B failed to have a written agreement and rented out sessional space to a practitioner, whose conduct will likely result in a significant claim against the practice. The practitioner fled the country following the incident and appears they were not registered or insured.
- ▶ Practice C, whose contract did not allow for immediate termination, even though the practitioner was removing medical records from the practice and contacting patients from home.

There are many other potential risks that a poorly drafted contract exposes the practice owner to. Compounding the risk is the fact many of these are considered commercial issues and outside the bounds of available insurance cover (e.g. having to pay employee entitlements because you have become the deemed employer). It is extremely important the practice seeks advice

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and puts in place a contract which protects it as much as possible. It should be noted that having a 'perfect contract' still exposes a practice to potential legal fees and costs to enforce the contract.

As a practice owner, how do I protect myself?

See the contract as your first line of defence. Seek out expert advice – this may need to include accountants, lawyers, insurance brokers and others. Give your advisers a clear brief of your circumstances and make sure they are experts in their field. From an insurance perspective, many of the risks in contracts are not insurable so make sure you understand what risks you can and cannot insure.

Develop a brief as a starting point to frame the discussion, particularly for your lawyers who will draft the contract. Your accountant will also need to ensure the money flow deals with GST and taxation.

Once you have a draft contract you should also provide this to your insurance adviser to see how the contract might impact on your insurances, what extra insurances you should consider and what risks are not insurable.

You should ensure all of your advisers have expertise in the medical area, as these contracts require specific knowledge and expertise. If they can't demonstrate this, find someone who can.

What should I include in my brief/discussion with my advisers?

Whilst your adviser will have specific areas to discuss with you, you and your adviser will find it helpful if you have thought through what you require from the contract:



ITEM	DISCUSSION/INSTRUCTION WITH YOUR ADVISERS
Relationship	<p>How do I avoid/reduce the risk of being the deemed employer if the contract is challenged. Be clear of what the relationship is between you as practice owner and the practitioner.</p> <p>Consider highlighting that the practitioner is running their own medical business and as such is exposed to a range of risks. They need to decide on their own insurances, risk management strategies etc. i.e. they are not covered by the practice insurances as they are not your employee.</p>
Scope of the services, duration, use of facility, etc	<p>Define the services you wish to provide (rooms, billings, nursing support). Equally list what is excluded.</p> <p>Define the contract length, agreed hours or days of work, can they access premises after hours, is there a list of services they can do (i.e. can they start doing major cosmetic procedures in the chair etc).</p> <p>Define what policies and procedures the practitioner must abide by.</p>
Termination	<p>Draft the right termination clauses so you can terminate the contract for a range of real life risks (such as de-registration, misconduct, the practitioner taking medical records or intellectual property out of the practice, etc.) What events can trigger immediate termination and what require a notice period?</p>
Restraint	<p>Consider restraint clauses to protect you from the practitioner taking patients, intellectual property and employees. Reasonable restraints may be enforceable and importantly they can also act as a 'big stick' to deter the practitioner from stealing your patients and employees.</p>

ITEM	DISCUSSION/INSTRUCTION WITH YOUR ADVISERS
Dispute	<p>What dispute process should we have such as mediation required before legal action.</p>
Medical Records	<p>Who owns the medical records? Who has a right of access in the event needed to defend a legal or disciplinary action?</p>
Privacy Legislation	<p>Does the practitioner fall under your privacy policy? Are they required to attend your privacy training and follow your processes and controls?</p>
Accessing you IT	<p>Make your expectations clear. Can they log in remotely into your network from a personal PC which has no virus protection? What if their negligent act causes you to suffer a loss (e.g. a hacker gains entry due to their lax controls)</p>
Indemnity	<p>What indemnity clauses should you consider to protect the practice? Use the example of your nurse contributing to an error, or where they file away test results which results in the patient recall not occurring.</p>
Money flow	<p>Detail how the money flows and what to be aware of from an accounting, tax, GST, employment law perspective. Who provides the Tax Invoices, reporting? What auditing process is required?</p>
Insurances, AHPRA registration	<p>Make it a requirement the practitioner holds their own insurances and are required to show proof of these policies prior to commencing and on renewal. This to include medical/professional indemnity, public liability and any other insurance required by law such as workers compensation (as applicable).</p>
Force Majeure	<p>What happens if the practice cannot provide the services such as the building burns down (e.g. should there be a Force Majeure clause).</p>