AMERICAN MEDICAL ASSOCIATION ORGANIZED MEDICAL STAFF SECTION

Resolution: 6
(A-25)

Introduced by: Nancy Fan, MD

Subject: Addressing Anti-Physician Contractual Provisions

Referred to: OMSS Reference Committee
(xxxx, MD, Chair)

Whereas, over three-quarters of physicians are under employment contracts with hospitals, hospital systems, and other corporate entities[1]; and

Whereas, our AMA has opposed anti-physician labor practices such as restrictive non-compete clauses on the grounds that they limit the career advancement of young physicians and unduly restrict competition[2]; and

Whereas, "tail insurance" must be secured to ensure continued liability coverage when a physician unenrolls from a claims-made malpractice policy, as such policies do not cover any claims made after unenrollment[3]; and

Whereas, physician contracts typically do not specify which party is responsible for paying for tail insurance with that responsibility frequently falling to physicians[4-6]; and

Whereas, tail insurance, similar to non-compete clauses, can be used as leverage to prevent physicians from leaving a practice and thereby limit the career advancement of young physicians and restrict competition[7-10]; and

Whereas, indemnification clauses are a feature of many physician contracts which render the physician financially liable for all damages incurred by an employer as part of a malpractice lawsuit, even when another practitioner or the employer were negligent[11]; and

Whereas, the financial damages created by indemnification clauses are frequently not covered by malpractice policies, leaving physicians personally liable for these damages[12]; and

Whereas, indemnification clauses have become a routine part of physician contracts over the last 20 years[11,12]; and

Whereas, the American College of Emergency Physicians has identified such clauses as "not appropriate in medical contracts" as they "unnecessarily complicate medical malpractice litigation and may result in additional liability," and has advised physicians to decline contracts containing such clauses[13]; and

Whereas, legal experts and practice groups routinely advise physicians to challenge or eliminate indemnification clauses in their contracts[14-16]; therefore be it

RESOLVED, that our American Medical Association advocate for legislation to prohibit the inclusion of clauses indemnifying employers in physician contracts (Directive to Take Action); and be it further

RESOLVED, that our AMA study the prevalence and impact of contractual provisions which require physicians to (i) pay for tail insurance or (ii) indemnify their employers, and return further recommendations for policy relating to these practices (Directive to Take Action); and be it further

RESOLVED, that our AMA will actively work to increase the education and awareness of physicians on the advisability of rejecting employment contracts which require physicians to (i) pay for tail insurance, or (ii) indemnify their employers (Directive to Take Action).

Fiscal Note: (Assigned by HOD)

Received: 3/18/2025

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RELEVANT AMA POLICY

Support Before, During, and After Hospital Closure or Reduction in Services D-215.980

1. Our American Medical Association will work with appropriate federal and state bodies to assure that whenever there is a threatened, or actual, hospital closure a process be instituted to safeguard the continuity of patient care and preserve the physician-patient relationship. Such a process should:
    a. assure adequate capacity exists in the immediate service area surrounding the hospital closure, including independent health resources, physicians, and support personnel to provide for the citizens of that area;
    b. allow that in said circumstances, restrictive covenants, records access, and financial barriers which prevent the movement of physicians and their patients to surrounding hospitals should be waived for an appropriate period of time; and
    c. ensure financial reserves exist, and are sufficient to cover any previous contractual obligations to physicians, e.g., medical liability tail coverage.
2. Our AMA will proactively offer support to physicians, residents and fellows, patients, and civic leaders affected by threatened or actual healthcare facility closures, change in ownership, or significant reductions in services via provision of information, resources, and effective, actionable advocacy.

Citation: Res. 719, A-24

Loss of Medical Staff Privileges for Lack of "Tail Coverage" D-435.978

1. Our American Medical Association advocates for better disclosures by professional medical liability insurance carriers to their policyholders about the continuing financial health of the carrier; and advocate that carriers create and maintain a listing of alternate professional liability insurance carriers in good financial health which can provide physicians replacement tail or other coverage if the carrier becomes insolvent.
2. Our AMA supports model medical staff bylaw language stating: "Where continuous professional liability insurance coverage is a condition of medical staff membership, a temporary loss of professional liability insurance coverage (whether or not limited to "tail" coverage) is not grounds for immediate termination of medical staff membership. The Medical Executive Committee shall determine the length and other conditions of an individual waiver of the coverage requirement."

Citation: Issued: BOT Action in response to referred for decision Res. 537, A-04; Modified: CMS Rep. 1, A-14; Reaffirmed: BOT Rep. 09, A-24

Physicians' Freedom to Establish Their Fees H-380.994

Our AMA (1) affirms that it is a basic right and privilege of each physician to set fees for service that are reasonable and appropriate, while always remaining sensitive to the varying resources of patients and retaining the freedom to choose instances where courtesy or charity could be extended in a dignified and ethical manner; (2) supports the concept that health insurance should be treated like any other insurance (i.e., a contract between a patient and a third party for indemnification for expense or loss incurred by virtue of obtaining medical or other health care services); and (3) believes that the contract for care and payment is between the physician and patient.

Citation: BOT Rep. JJ, I-83; Reaffirmed; CLRPD Rep. 1, I-93; Reaffirmed: Sub. Res. 704 and Reaffirmed: A-01; Reaffirmed: A-09; Reaffirmed in lieu of Res. 213, I-17

Organized Medical Staffs in Medical Delivery Systems H-285.983

The AMA supports expanding the concept of physician governance of medical delivery systems by recommending that: (1) Medical delivery systems establish self-governing medical staffs similar, if not identical, to those in hospitals; (2) The principles of self-governance should include, but not be limited to: (a) the development of medical staff bylaws which cannot be unilaterally changed by the governing board of a medical delivery system; (b) physician election of representatives to the governing board and other appropriate committees of medical delivery systems including credentialing, privileging, quality assurance and utilization review committees; (c) due process protections for physicians credentialed by a medical delivery system; and (d) full indemnification by medical delivery systems of physicians who, in good faith, serve as members of credentialing, quality assurance and utilization review committees of medical delivery systems; and (3) Policy of the AMA is that the establishment of guidelines, review of decisions, and the adjudication of patient care quality issues in managed care plans must be performed by participating practicing physicians.
Citation: Res. 706, A-94; CMS Rep. 4, I-95; Amended: BOT Rep. 14, I-96; Reaffirmed: CMS Rep. 8, A-06; Reaffirmed: CMS Rep. 01, A-16

HIPAA Business Associate Contracting, Domestic and Foreign, and Foreign Outsourcing H-315.972

1. Our AMA encourages physicians who have entered or who are considering entering a business associate agreement (BAA) to undertake careful due diligence regarding the business associate and to consider with legal counsel the inclusion of contractual provisions such as:
a. strong confidentiality clauses;
b. required steps to mitigate any harmful effects of wrongful use or disclosure of protected health information (PHI);
c. assurance that, upon the contract's termination, all PHI is returned to the covered entity, and no copies are retained by the business associate, except as required for legal or audit purposes;
d. indemnification of the covered entity against any losses caused by a business associate;
e. the business associate's procurement of specified types of liability insurance which may either protect the covered entity or enable the business associate to meet its indemnity;
f. posting a surety bond (a.k.a. performance bond) to ensure faithful performance of the BAA by the business associate; or
g. physicians should take care that the original contract should contain provisions addressing the costs involved with the return and maintenance of the PHI at or after the end of the contract term.

2. Our AMA supports legislation and/or regulation requiring all third parties who receive and maintain clinical information from a clinician to make those data available to the clinician in usable form at the end of the business relationship.

Citation: BOT Rep. 17, I-06; Reaffirmed: CMS Rep. 01, A-16