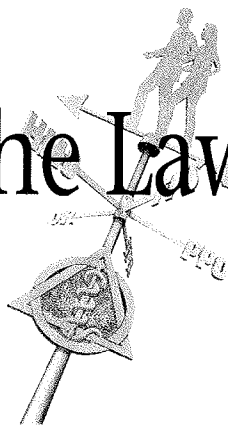


# The Law and Managed Care Plans



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**A**ll contracts are negotiable; an effective strategy for contract negotiation involves having the choice not to enter into it. For example, it is difficult to negotiate a facility lease for a renewal period(s) in the same building or location, as a practice owner has an investment in the facility and probably does not desire to relocate. Alternatively, it is relatively easy to negotiate favorable terms in a lease for a practice facility when the dentist is deciding upon one of several locations. Similarly, with respect to managed care plans, the dentist is in the most favorable position to negotiate the contract's provisions when he or she has the ability to 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 the dentist will be, as significant economic and legal issues can be thoroughly analyzed, negotiated and agreed upon by the parties to the managed care contract prior to its execution. Rushing into a managed care plan without seriously considering the ramifications of doing so may cause problems at a later date because important issues may be overlooked.

Generally, managed care organizations do accept revisions to contracts that are unacceptable to the dentist or the dentist's attorney. Unfortunately, only a small percentage of dentists who participate in managed care plans effectively negotiate the contracts that they are asked to sign or seek legal counsel to assist in the negotiation process.

This paper provides dentists with background information regarding standard contract provisions and their potential impact on the dental practice.

## ADA Contract Analysis Service

ADA, through its Contract Analysis Service, provides managed care contract review service to its members. According to Attorney Michele Thorne<sup>1</sup>, director of the service, dentists should contact their state dental associations to determine whether a particular contract already has been reviewed. If it has, the analysis on file will be sent to the requesting member/dentist through his or her state dental association. If the contract is not on file, it will be submitted to the ADA Contract Analysis Service through the state dental association.<sup>2</sup> Thereafter, an analysis is completed at an extremely low cost to the member/dentist. However, according to Thorne, the Contract Analysis Service provides only a legal analysis of the provisions contained in a particular contract. The service does not negotiate provisions of the contract with the managed care organization on behalf of the dentist.

According to Ms. Sallye Errecart,<sup>3</sup> coordinator of the CDA Council on Dental Care, it takes approximately two weeks to provide an analysis when a particular contract is currently on file. When a contract is not on file, it takes a period of one to two months for the analysis to be completed. However, as the Contract Analysis Service becomes busier, it may take longer to review a particular contract in the future.

Dentists also should remember that the version of a contract that is on file

in a given state may not be the same version provided to the dentist by the managed care organization at a later date.

## Contract Provisions

Addressed below are twenty-three legal issues with which the dentist should be familiar prior to participating in a contract dental care plan.

### 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>4</sup> Failure to review such documents could result in an incomplete analysis and could subject the dentist 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 contract, binding the dentist 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 the dentist or practice entity executes 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 cor-

poration, the corporation should be a party to the contract as the dentist would be an employee of the 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 the dentist understand how and when the practice will be compensated under the contract. Unless the dentist understands the compensation provisions, the dentist, and the dentist's advisors, cannot effectively analyze whether it would be worthwhile to proceed with a particular contract.

These provisions often include sections relating to withheld or pooled funds. These 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 the dentist/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>5</sup>

### Modifications to the Agreement

The dentist 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 the dentist to immediately terminate the agreement if he or she so chooses.

### Liability Insurance

The managed care organization will require the dentist 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 the dentist to retain control over the selection of the liability carrier.

### Patient Acceptance

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

### Most-Favored Nation

Under a most-favored nation provision, the dentist is 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>6</sup> Such provisions may be present when member co-payments are allowable.<sup>6</sup> However, these provisions have been attacked recently by the Department of Justice and Federal Trade Commission under antitrust laws. Two recent cases brought against most-favored nation policies were settled by consent decrees.

### Referral Restrictions

Some contracts limit specialist referrals. The dentist should always remember that it is his or her duty to never compromise patient treatment. If a patient receives unacceptable treatment by a specialist, the referring dentist could be liable.<sup>7</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, the dentist should understand both the legal and economic significance of referring patients to specialists who are not contract providers.<sup>4</sup>

### Emergency Care

Contracts typically require the dentist 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 the dentist is 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, the dentist may not be paid. The dentist 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>4</sup> Obviously, the utilization review process should never compromise the dentist's standard of care with respect to treatment. However, the managed care plan may have implemented certain policies that are inconsistent with the dentist's philosophy regarding standard of care. Therefore, the dentist should not become a provider for a managed care plan that has implemented policies inconsistent with the dentist's treatment philosophy.

### License to Practice Dentistry

The dentist must represent and warrant that the dentist is licensed to practice dentistry within a particular state. If the license is terminated or suspended, the dentist generally is required to provide notice to the managed care organization within a specified time period. Further, loss or suspension of

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the dentist's license usually triggers termination of the contract by the managed care organization.

### Peer Review

If peer review provisions are included in the contract, the dentist 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>4</sup> Similarly, if the dentist is 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.

### Grievance System

A grievance procedure is similar to an internal arbitration committee. Depending upon the circumstances, such systems effectively assist in resolv-

ing disputes inexpensively and quickly. However, it is important for the dentist to understand: (i) his or her 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>4</sup>

### Independent Contractor

Most managed care contracts provide for the dentist 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, the dentist should understand that if he or she operates 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 the dentist

belong to the professional corporation, not the dentist; the dentist is an employee of the entity.

### Hold Harmless/Indemnification

Hold harmless provisions provide that the dentist 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 the dentist, the practice or its employees.<sup>8</sup> This potential additional liability is shifted from the managed care organization to the dentist and/or the practice.

Indemnification provisions provide that the dentist 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 the dentist and/or the practice.<sup>9</sup>

Liability carriers do not always cover

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the dentist or the practice for this additional liability. Therefore, the dentist's attorney should always provide a copy of the managed care contract to the liability carrier for review to determine whether the additional liability coverage is available. To the extent that the additional coverage is unavailable, the dentist 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>10</sup> However, if the dentist is required to litigate to determine whether the provisions will be upheld, he/she has already lost due to high 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 the dentist still desires to proceed with the contract, two additional issues should be considered. First, the provisions can be made mutual. The dentist agrees 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 the dentist from potential liability. Second, the dollar amount and category, or character, of the damage and/or loss for which the dentist agrees to hold harmless and/or indemnify the managed care organization can and should be subject to negotiation. For example, the dentist may not agree to hold harmless and/or indemnify the managed care organization for attorneys' fees.<sup>10</sup>

### Non-Competition

Certain managed care organizations attempt to prohibit the dentist from participating in other plans during and even after termination of the contract. Such organizations want the dentist to render managed care services exclusively for them in an effort to reduce their

own competition. The dentist should review non-competition clauses to determine if compliance with the terms would be difficult or impossible. Written consent to such terms should not be given. Irrespective of whether a particular non-competition provision is enforceable, the dentist could find it very expensive to defend actual or threatened litigation.

### Liquidated Damages

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

As a general proposition, the dentist should not agree to liquidated damages provisions.<sup>4</sup> If they are agreed to, the dentist or the dentist's attorney should secure a written confirmation from the liability carrier that coverage under such circumstances will be provided.

### Assignment/Transfer

The contract may or may not allow the dentist 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, the dentist may find such a transfer unacceptable and may desire to terminate the contract. The result of such actions by either the dentist or the managed care organization should be discussed in the contract.

### 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 many situations, the contract will automatically renew unless it is terminated within a specified time period (eg, 30 or 60 days) prior to the renewal date. The dentist should understand the circumstances under which the contract may be terminated by either the dentist or the managed care organization. For example, if a certain number of patients are not provided to the dentist under a

particular managed care plan, the dentist 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 the dentist 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 the dentist to understand all of his or her 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 the dentist from filing a future lawsuit and leave no right of appeal. Such a provision may or may not be in the dentist's 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 the dentist into accepting their decision or facing arbitration.<sup>11</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 the dentist rather than face expensive litigation in which both parties lose.

### Venue and Jurisdiction

The contract generally should include venue 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, the dentist should designate the state in which the prac-

tice is located as having jurisdiction over the parties to the contract. In the event of litigation, it could be costly for a dentist to submit to jurisdiction 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 a managed care plan(s), the practice owner should consider four frequently overlooked issues.

First, because managed care patients cannot be easily transferred from a practice owner to a buyer when a practice is ultimately sold, the intangible value of a practice would be reduced by the percentage that the managed care revenues relate to total practice revenues. If a practice would typically sell for approximately 50 percent to 80 percent of one year's gross revenues<sup>12</sup>, and if the intangible portion of the practice were valued at \$.36 on the dollar, or 36 percent<sup>13</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.

Second, if a dentist works as an employee for a practice, non-dentist owned or otherwise, that dentist's ability to significantly fund a retirement plan is severely limited. One important advantage of owning a practice is the ability to earn a level of compensation

sufficient to live comfortably and to fund a retirement plan to the limits allowed under the law. Consequently, the dentist is not required to practice until he or she is no longer physically able, but is able to retire at a much chronologically younger age.<sup>14</sup> Early retirement is difficult to achieve if the dentist works in, but does not own, a practice.

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>15</sup> If so, it follows that the quality of work from even the most talented practitioners would decline in a managed care environment. When quality of work declines, a trend of increased professional and other liability actions undoubtedly follows.

Finally, prior to a decision to participate in a managed care plan(s), the practice owner should have completed an economic analysis, unique to the partic-

ular practice, addressing all financial and economic factors associated with the decision. In reviewing a properly prepared analysis, however, the dentist may question the decision to participate in managed care, as it is generally inadvisable to assume longer working hours for less compensation. An alternative strategy would be for the practice owner to make the commitment to educate himself or herself and staff members on successfully remaining in and/or developing a private practice.

#### CONCLUSION

This paper has discussed the parts of a managed care contract with which dentists considering participating in such a contract should be familiar. Lack of understanding of these key points could lead to unwelcome surprises once a contract has been signed. **CDA**

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