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NEGOTIATION OF A HOSPITAL-BASED PHYSICIAN EXCLUSIVE CONTRACT

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I. OVERVIEW OF EXCLUSIVE CONTRACTING FOR PHYSICIANS AND HOSPITALS

A. Benefits of Exclusive Contracting for Hospitals and Physicians

- (i) enhances patient care;
- (ii) the assumption by Group of responsibility for effective administration, supervision and coverage;
- (iii) the development of necessary working relationships between the Group and other hospital personnel and departments;
- (iv) aids in obtaining continuous supervision, training, administration, scheduling and coverage;
- (v) increases Hospital's control over operation of the department;
- (vi) assures full-time availability of services;
- (vii) lowers costs through standardization of procedures and centralized administration of the departments;
- (viii) allows better scheduling of the use of the facilities;
- (ix) facilitates maintenance of equipment;
- (x) improves supervision of the support staff and working relations between staff and physicians;
- (xi) assures that physicians perform sufficient procedures to maintain and upgrade their skills and maintain high standards of professional quality of care;
- (xii) assures the most effective and efficient teaching services for the benefit of the patients, medical staff and other appropriate personnel;
- (xiii) assures compliance with the accreditation and licensing requirements.

B. Trends in Exclusive Contracting

- (i) Exclusive arrangements are common place among the traditional hospital- based specialties. Examples of traditional hospital-based physicians that enter into exclusive arrangements with Hospitals include anesthesiologists, radiologists, emergency room physicians and pathologists.
- (ii) According to an American Society of Anesthesiologists survey, 87% of anesthesia groups responding to the survey work in an exclusive arrangement with their hospitals, usually in the form of a written contract. However, the survey revealed that de facto exclusive arrangements also exist.^[1]

- (iii) Specialists such as neonatologists, surgeons and neurosurgeons are increasing entering into exclusive arrangements with hospitals.
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II. CRITICAL LEGAL ISSUES TO BE CONSIDERED IN ALL EXCLUSIVE HOSPITAL CONTRACTS

A. State Law, Anti-Trust and Other Legal Challenges to Exclusive Contracting

1. Are exclusive contracts permitted? Check state law to see if exclusive contracts are permitted.
 - (i) Many states permit exclusive contracts. For example, New Jersey: See, e.g., Belmar v. Cipolla, 475 A.2d 533, 535 (N.J. 1984). In Ohio, exclusive contracts have been upheld as a reasonable exercise of a hospital's board of trustees' power to provide for proper management of a hospital. Williams v. Hobbs (Franklin Cty. App. 1983), 9 Ohio App. 3d 331; Holt v. Good Samaritan Hospital and Health Center (Montgomery App. 1990), 69 Ohio App. 3d 439.
 - (ii) State law may prohibit exclusive contracts. For example, California prohibits hospitals participating in the Medi-Cal Selective Provider Contracting Program from operating most clinical services under an exclusive contract.
2. Are exclusive privileges prohibited by the Hospital Bylaws? What happens to Physicians who are on staff?
 - (i) Check Hospital Bylaws to see if there is a provision on point.
 - (a) If there is a provision on point, check state law to see if the Bylaws are enforceable.
 - State law may hold that Bylaws are enforceable as a contract. See, e.g., Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986).
 - State law may recognize that Bylaws are not enforceable as a contract per se, they are judicially enforceable. See, e.g., Robles v. Humana Hosp. Cartersville, 785 F.Supp. 989, 1000 (N.D. Ga. 1992).
 - (b) If the Bylaws are silent, also check state law.
3. What causes of action may a Physician assert who is excluded from the Hospital staff after the granting of an exclusive contract?
 - (i) That the exclusive contract violates federal antitrust laws.

These causes of action have almost always failed. The preeminent case is Jefferson Parish Hosp., Dist. No. 2 v. Hyde, 466 U.S.2 (1984).

- (ii) That the exclusive contract violates applicable state antitrust laws.

These causes of action are usually not successful. See, e.g., Martin v. Mem'l Hosp. at Gulfport, 130 F.3d 1143, 1151 (5 th Cir. 1997) (exclusive contract between hospital and physician does not

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violate Mississippi's antitrust laws), and Belmar v. Cipolla, 475 A.2d 533, 535 (N.J. 1984) (exclusive contract between hospital and physician does not violate New Jersey's antitrust law).

- (iii) That the exclusive contract violates constitutional due process protections.

These causes of action have usually failed. See, e.g., Hutton v. Mem'l Hosp., 824 P.2d 61, 64 (Col. Ct. App. 1991).

- (iv) That the exclusive contract constitutes the prohibited corporate practice of medicine.

Many states have recognized the exception to the prohibition to the corporate practice of medicine that allows hospitals to employ physicians. See, e.g., Berlin v. Sarah Bush Lincoln Health Center, 688 N.E.2d 106, 111 (Ill. 1997).

- (v) An excluded physician may have a cause of action against the physician group that has entered into the exclusive contract.

B. Considerations for Tax-Exempt Hospitals

The impact of an exclusive contract on a hospital's tax-exempt status must be considered. Under the Internal Revenue Code and IRS regulations, a tax-exempt hospital must be organized and operated exclusively for an exempt purpose. This will be particularly relevant if physicians are entitled to a portion of the hospital's revenues, a significant stipend or a recruitment incentive.

1. Private Inurement

- (i) No part of the hospital's net earnings may inure to the benefit of private individuals (so called "insiders"). In most contexts, whether a person is an insider depends upon the control or influence the person can exercise over the exempt organization. In the hospital-physician context, insiders may include physicians on a hospital's medical staff if the facts and circumstances tend to show substantial influence by the physician over the tax-exempt hospital.
- (ii) If any compensation is given under the exclusive contract, to avoid private inurement concerns, it cannot merely be a device to distribute profits to the physicians and any compensation paid to the physicians or the Physician Group must be reasonable and the result of arms-length bargaining.

2. Private Benefit

- (i) The hospital must be operated for public benefit, rather than for the benefit of any private interest.
- (ii) Private benefit is permissible only if it is incidental to effecting an exempt purpose. The private benefit cannot be substantial in comparison to the exempt benefit resulting therefrom and must be necessary to achieve that benefit.
- (iii) When a Hospital pays a physician group for its services under an

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exclusive contract, that payment actually benefits private individuals, but if the services are necessary for the Hospital to pursue its charitable activities (qualitatively incidental) and the amount paid is reasonable in amount for the services actually rendered (quantitatively incidental), there would be no violation of the private benefit prohibition.

3. Excess Benefit Transaction/Intermediate Sanctions

- (i) Intermediate sanctions may be imposed for transactions between a tax-exempt organization and persons who can exert substantial influence over the organization (a “disqualified person”) in situations where the transaction results in excess benefit. These sanctions are deemed intermediate because they lie between taking no action and revoking an organization's tax-exempt status.
- (ii) If an excess benefit transaction is found to have occurred, the IRS may impose upon the disqualified person a tax equal to 25% of the excess benefit paid to such disqualified person by the tax exempt organization. Any trustees and/or officers of the tax-exempt organization, who acted knowing that the transaction was an excess benefit transaction, will be subject to an excise tax penalty of 10% of the amount of the excess benefit. If a disqualified person does not correct any excess benefit transaction within a specified time period, then a tax in the amount of 200% of the excess benefit will be imposed on such disqualified person.
- (iii) A “disqualified person” is any person who was at any time during the five year period ending on the date of the transaction in a position to exercise substantial influence over the affairs of the organization, the person's family members, and corporations, partnerships, and trusts over which the person or family member has at least 35% of the voting power, profits interest, or beneficial interest.
- (iv) Some medical staff physicians may meet the definition of “disqualified person” for purposes of the intermediate sanction rules.
- (v) Any “excess benefit” given to such disqualified physicians by the Hospital could be viewed as an “excess benefit” subjecting the disqualified person and possibly other Hospital decision makers to excise taxes on the excess benefit transaction.
- (vi) Whether an excess benefit is provided turns on whether the value of the economic benefit provided by the hospital exceeds the value of the consideration (including performance of services) received by the Hospital in return for providing the benefit.
- (vii) All compensation and other benefits provided to Group Physicians should be reasonable.

4. Private Use Considerations

- (i) In addition to the other exempt organization issues discussed above, the private use of property financed with tax-exempt bonds may result in private business use which implicates certain requirements for contractual relationships between the private interest using or benefiting by use of the property and the owner of the bond-financed property.

- (ii) In determining whether an exclusive contract could raise private business use concerns, follow Internal Revenue guidance (Rev. Proc. 97-13; Rev. Proc. 2001-39).

For example, the compensation under the contract must be reasonable for the services provided and no compensation may be based, in whole or in part, on a share of net profits from the operation of the facility under management.

C. Federal Fraud and Abuse Concerns

1. Anti-Kickback Law

- (i) 42 U.S.C. § 1320A-7b(b) prohibits the payment of an “inducement” (anything of value) for the referral of Medicare and Medicaid business. This prohibits both the solicitation or receipt of the inducement, as well as the offer or payment.
- (ii) One of the purposes in entering into an exclusive contract can not be to induce referrals of patients. Particular concerns arise over related payments by the physicians to the hospital (such as rent for space, fees for services, and the like).
- (iii) Any compensation paid by the Hospital to the physician group under the contract (e.g. medical director fees) can not be intended as an inducement for the physician members of the physician group to refer patients to the Hospital. This is a particular concern where the physician group includes a specialist who admits patients to the hospital (such as pain management).
- (iv) If feasible, structure the exclusive contract to comply with the personal services safe harbor.
- (v) Be sure to check state anti-kickback laws.

2. Stark Law

- (i) The Federal physician self-referral law (the “Stark Law”) prohibits a physician from referring patients to entities with which he/she has a financial relationship for the provision of designated health services (“DHS”) reimbursable by a federal health care program, unless an exception to the Stark Law applies. This is a particular concern where the physician group includes a specialist who admits patients to the hospital (such as pain management).
- (ii) Because an exclusive contract would be with a physician group rather than with its physician members, the Stark Law requires a determination whether the direct financial relationship created between Hospital and physician group by the exclusive contract would result in an indirect financial relationship between the physician members of Group and Hospital.
- (iii) If such an indirect financial relationship is present, a determination must then be made whether the exclusive contract satisfies the requirements of an exception to the Stark Law for indirect compensation arrangements.
- (iv) Be sure to check state physician self-referral laws.

D. Careful Drafting of Exclusive Contracts is Important

Common drafting errors:

1. Proper legal name for both parties is not included.
2. Defined contract terms are used consistently.
3. Section numbers referred to incorrectly.
4. Remember which side you represent.
5. Don't rely on exhibits and schedules prepared by your client.

III. FACTUAL BACKGROUND AND FORMAT FOR NEGOTIATION OF EXCLUSIVE RADIOLOGY SERVICES AGREEMENT

A. Factual Background to Contract Negotiation

Memorial Hospital (the "Hospital") and Radiology Associates, P.C. (the "Group") have entered into contract negotiations to make the Group the exclusive provider of radiology services at the Hospital and its various outpatient facilities in Central City. The Hospital is a 250 bed community hospital that aspires to become a leading tertiary care provider in its service area. The Hospital competes directly with University Medical Center, a prestigious teaching hospital associated with the Medical School, and St. Jude's Hospital, a religiously affiliated hospital which is viewed as the leading heart hospital in the area.

The Group has been the sole provider of radiology services at the Hospital for the past 15 years, but has never had a contract with the Hospital. Recently, 3 radiologists on the faculty of Medical School have approached Gordon Green, the CEO of the Hospital, about joining Hospital's medical staff. One of these radiologists is considered a national expert in teleradiology. Mr. Green has not formally responded to these physicians, but he is concerned that the Group has not hired a new doctor in over 8 years and several of its members are approaching retirement age.

The Group currently uses space at the Hospital for office use and anticipates that this arrangement with the Hospital will continue after execution of an exclusive contract. In addition to providing services at the Hospital, the Group practices at an MRI Center located 9 miles from the Hospital in which it has a 1/3 ownership interest. The Group also performs reads for several multi-specialty groups that operate their own x-ray, CT scan and mammography facilities. The President of the Group, Dr. Marcia May, began a one year term as president of the Hospital's medical staff on January 1, 2004. The Group has traditionally been among the most profitable radiology practices in the region, but it is currently experiencing difficulty obtaining adequate medical malpractice insurance coverage. Premium increases are expected to sharply reduce the radiologists' net income.

The Hospital wants to expand its radiology service line to strengthen and support its cardiology program. Consequently, cardiologists at the Hospital have become concerned about the impact of the proposed exclusive contract with the Group on the services cardiologists expect to perform in the future, such as nuclear imaging. In preliminary

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discussions between Mr. Green and Dr. May about expanding the Hospital's radiology department, the Hospital agreed to take reasonable measures to upgrade its technological capabilities to meet the needs of the Group. However, the Hospital has also made it clear that the grant of exclusivity to the Group will not include MRI reads/interpretations because the Hospital intends on having such services performed by a nationally recognized radiology group through the use of teleradiology. The Group has also expressed an interest in having its employed support personnel (e.g. radiology technicians) work at the Hospital and assist the Group in providing radiology services. However, the Hospital is concerned that if the Group's employed support personnel work at the Hospital, this could raise billing issues; therefore, the Hospital is requiring that all ancillary personnel be employed directly by the Hospital.

The Group currently handles its own billing and collecting, but the Hospital has requested that this responsibility be transferred to the Hospital's billing company on financially attractive terms. Dr. May doesn't think that the Hospital does a very good job of medical billing. The Hospital is willing to drop this request if the new contract requires the Group to have one radiologist at the Hospital 24 hours a day/365 days a year. None of the Group's members has current teleradiology skills; however, Dr. May thinks advances in teleradiology make round-the-clock on-site coverage unnecessary.

B. Format of the Contract Negotiation

1. Negotiation Issues . The following issues will be negotiated:
 - (i) scope of services;
 - (ii) expansion of services;
 - (iii) coverage requirements;
 - (iv) ancillary personnel;
 - (v) Department Director;
 - (vi) loss of medical staff appointment/clinical privileges;
 - (vii) malpractice insurance;
 - (viii) term;
 - (ix) termination;
 - (x) compensation;
 - (xi) billing;
 - (xii) office space rental; and
 - (xiii) restrictive covenants.
2. Negotiation Format . For each contract issue
 - (i) The Hospital will first present a contract provision(s) to address the issue being negotiated;
 - (ii) The Group will then present its concerns/comments to the Hospital's proposed provision; and
 - (iii) After the Hospital has a chance to respond to the Group's concerns/comments, any compromise contract provision(s) will be

discussed.

C. How to Respond to a Hospital's Exclusive Contract Proposal (Practice Pointers)

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IV. NEGOTIATION OF AN EXCLUSIVE RADIOLOGY SERVICES AGREEMENT

A. Scope of Services

1. Hospital's proposed contract provision:

Radiology Services . Hospital hereby engages Group to perform all professional radiology services (collectively the “Group Services”), as such term is further defined in Exhibit A, attached hereto and incorporated by reference herein, at the Hospital locations listed on Exhibit B, attached hereto and made a part hereof. Notwithstanding the foregoing, Group acknowledges and agrees that certain professional radiology services designated on Exhibit A, are excluded from the definition of Group Services and may be provided by physicians or other qualified personnel who are not Group Physicians, as determined by Hospital in its sole discretion. The Group Services to be rendered by Group pursuant to this Agreement shall include all services required for purposes of organizing, supervising, and operating the Radiology Service at the Hospital. During the Initial Term and any Renewal Term (as such terms are defined in Section _____ of this Agreement), Hospital grants to Group the exclusive right to provide the Group Services for Hospital inpatients and outpatients.

2. Group's Comments/Concerns :

- (i) I have reviewed the definition of Group Services with my client. We do not believe the MRI exclusion should be included. We recognize that it is your desire to have such services performed by a nationally recognized radiology group, however, we believe the Group is fully qualified and capable of reading MRIs. Additionally, a Group physician will need to supervise the MRI technicians and, thus, it makes sense for Group provide all MRI services.
- (ii) The Group is concerned that there are certain services which can be provided by other physicians who have privileges at Hospital, such as certain services performed by cardiologists. To that end, we would like to restrict such other physicians from performing the Group Services. Kindly insert language so other physicians who have privileges at Hospital cannot perform Group Services even if permitted through such physician's department.
- (iii) The term “Radiology Service” should be changed to “Group Services” in the second to last sentence.
- (iv) The Group expects to perform Groups Services on behalf of the Hospital at all of the Hospital's locations, not just at the Hospital's main

campus. Accordingly, please revise Exhibit B to that effect.

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B. Expansion of Services

1. Hospital's proposed contract provision:

Right of Consideration . Group shall have the right to be considered first whenever Hospital requires radiology services at any future facilities owned or controlled by Hospital, including, but not limited to, hospitals, ambulatory care centers, outreach facilities, and other locations. This right of consideration shall require the parties to negotiate in good faith for a reasonable period of time the terms and conditions of any expansion of the scope of services in Exhibit A. If the parties are unable to reach agreement after a reasonable period of time on the terms and conditions of any expansion of the scope of services as provided herein, Hospital reserves the right to terminate this Agreement in its sole discretion upon sixty (60) days prior notice to Group.

2. Group's Comments/Concerns:

- (i) The right of consideration should be changed to a right of first refusal, such that, Group shall have the first right to contract with Hospital at any future facilities owned or controlled by Hospital and with respect to the expensed services.
- (ii) So that Group shall have sufficient time to hire new physicians and acquire equipment and other items necessary to provide the expanded services should it elect to perform such expanded services, it should be clarified that such services do not begin until the later of the date which is ninety (90) days from such election (or later if Group must recruit specialist(s)) or the date which Hospital actually requires such services.

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C. Coverage Requirements

1. Hospital's proposed contract provision:

Coverage . Group through the Group Physicians shall be available to and shall provide Group Services for Hospital and Hospital's patients and consult with members of Hospital's Medical Staff and employees of Hospital regarding the provision of Group Services twenty-four (24) hours a day, seven (7) days a week, fifty-two (52) weeks a year. Group shall make available on-site, and on-call a sufficient number of Physicians to provide all Group Services required by Hospital and its patients in accordance with the schedules developed by Hospital, in its sole discretion but in consultation with Group, for operation of the Radiology Service. At a minimum, at least one Group Physician shall be on-site at the Hospital at all time during

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the term of this Agreement. The schedule developed by Hospital for operation of the Radiology Service may be modified by Hospital at any time to insure adequate coverage to meet the radiology services requirements of Hospital and its patients. Any Physician on-call pursuant to the schedules developed by Hospital shall be immediately available via telephone or pager and able to arrive at Hospital and be ready to provide Group Services within thirty (30) minutes.

2. Group's Comments/Concerns :

- (i) It is not necessary to have a physician on site 24 hours a day, 7 days a week, 52 weeks per year; it is only necessary to have a physician on site during peak hours. Accordingly, Group shall have a physician on site Monday through Friday, 8 a.m. to 5 p.m., and Saturday, 8 a.m. to 12 p.m. At all other times, Group shall have a doctor on call.
- (ii) I suggest that we discuss and set forth in the Agreement the coverage schedule at this time so that we may avoid any miscommunications. The Agreement should require that any change to such coverage schedule be as mutually agreed upon.
- (iii) Please define "immediately available."
- (iv) Given that it is not economical or necessary to have a physician on site 24 hours a day, 7 days a week, in the event Hospital insists on such on-site coverage, it is reasonable that Hospital pay to Group a stipend for such extended coverage. Additionally, in the event it is possible that physician extenders can be utilized, for example, radiology technicians, such physician extenders should be permitted pursuant to the Agreement.

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D. Ancillary Personnel

1. Hospital's proposed contract provision:

Ancillary Personnel . Hospital shall employ qualified ancillary personnel, including, but not limited to, technicians, nurses and clerical personnel for the proper performance of procedures in the Radiology Service. Hospital, in its sole discretion, shall make all decisions regarding appropriate staffing of ancillary personnel for the Radiology Service.

2. Group's Comments and Concerns :

- (i) It should be clarified that Hospital shall be responsible for all salaries and expenses with respect to the ancillary personnel since Hospital will be billing for the technical component.
- (ii) The Agreement must specify as to when additional ancillary personnel are necessary so that there are no misunderstandings between Hospital and Group as to whether same is necessary. In the event Group believes that additional ancillary personnel are necessary, a procedure should be specified to address the foregoing. This must be discussed further.

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- (iii) Hospital should not have the right “in its sole discretion” to make all decisions regarding staffing of ancillary personnel; such decisions should be made after consultation with, and with the consent of, Group. Additionally, Group should have the right to terminate any of such personnel for any reason.

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E. Department Director

1. Hospital's proposed contract provision:

Department Director . Hospital shall designate an individual to serve as the director of the Radiology Service (the “Director”), and such Director shall perform the duties set forth in Exhibit C, attached hereto and incorporated herein by this reference. Dr. Marcia May shall initially discharge the duties of Director as described in Exhibit C. It is agreed by the parties hereto that in the event the Director so appointed shall resign, be removed by Hospital, cease to be employed by or under contract with Group, or cease to be a member of the Medical Staff, Hospital, with Group's input, shall designate a new Director. Even if the Director is a Group Physician, the Group shall not receive any compensation from Hospital for the duties performed by the Director pursuant to this Agreement.

2. Group's Comments and Concerns :

- (i) Since Group is the exclusive provider of the Group Services, the Director should always be a physician of Group and appointed by Group. The Agreement should be revised to reflect the foregoing.
- (ii) Hospital should not have the right to remove the Director without cause. A provision should be inserted that Group may remove the Director at any time, and that Hospital may remove the Director only for “cause”. Further, so there is no miscommunication, “cause” should be defined in the Agreement and should include appropriate notice and cure provisions.
- (iii) As the Director will be performing services regarding the running of the department on behalf of Hospital, the Director should be compensated for such services.
- (iv) With respect to Exhibit C, please make the following revisions:
- (a) “Reasonable” should be inserted before “the policies and procedures of Hospital” in Section II(A)(1).
- (b) The scheduling referred to in Section II(A)(3) should be determined by Hospital with the consent of the Director.
- (c) Insert “which are reasonably established by Hospital” at the end of Section II(A)(5).
- (d) Delete Section II(A)(9).
- (e) With respect to Section II(B)(2), the continuing education and training program should be organized by Hospital.

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- (f) The safety precautions set forth in Section II(B)(4) should be determined by Hospital.
- (g) The standards of radiology services set forth in Section II(B)(6) should be established by Hospital.

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F. Loss of Medical Staff Appointment/Clinical Privileges

- 1. Hospital's proposed contract provision:

Medical Staff Appointment and Clinical Privileges . At all times during the term of this Agreement, Group will require each Physician providing services on its behalf to be a member of Hospital's Medical Staff. Termination of this Agreement or termination of a Physician's right to provide Group Services pursuant to this Agreement for any reason or no reason shall be treated by Hospital as a voluntary resignation of the Physician's staff appointment and clinical privileges at Hospital and the Physician's staff appointment and clinical privileges at Hospital shall thereupon terminate without recourse to the hearing and appeal procedures set forth in the Bylaws. This Section shall survive termination of this Agreement.

- 2. Group's Comments/Concerns:

- (i) You have proposed that the termination of the Agreement or the termination of a physician's right to provide Group Services will terminate a physician's privileges. This provision is unfair to the existing physicians as they currently possess due process rights pursuant to the Bylaws. Accordingly, the foregoing provision should be deleted and such physicians should continue to possess the due process rights afforded to them pursuant to the Bylaws.

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G. Malpractice Insurance

- 1. Hospital's proposed contract provision:

Professional Liability Insurance. Group shall at its own expense, secure and maintain professional liability insurance for Group and for each employee of Group providing services pursuant to this Agreement in the amount of Three Million Dollars (\$3,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate. If Group and/or its subcontractors do not secure and maintain a policy on an occurrence basis, then they shall secure and maintain a policy in the above amounts on a claims-made basis and in the event of the termination of Group's relationship with any Group Physician or termination of such policy, Group shall purchase or require the applicable Group Physician to purchase a so-called tail policy insuring against professional liability in the same amounts to insure against

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claims arising prior to any such termination. Group agrees to provide thirty (30) days notice to Hospital of cancellation or termination of any such insurance. Group shall provide Hospital a certificate of insurance evidencing said coverage upon request.

2. Group's Comments/Concerns :

- (i) The professional liability insurance in an amount of \$3,000,000 per occurrence and \$5,000,000 in the aggregate is excessive and should be reduced to \$1,000,000 per occurrence and \$3,000,000 in the aggregate.
- (ii) In the event Hospital requires the \$3,000,000/\$5,000,000 policy amounts, Hospital should pay for the excess malpractice insurance premiums.
- (iii) In the event a physician or Group no longer provides radiology services on behalf of Hospital, Hospital should pay for the tail insurance relating to such malpractice insurance, if tail insurance is necessary.

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H. Term

1. Hospital's proposed contract provision:

Term . The initial term of this Agreement shall commence on the Effective Date and continue until one (1) year after the Effective Date (the "Initial Term"). At the end of the Initial Term and any Renewal Term (as hereinafter defined), the term of this Agreement shall automatically renew for successive one (1) year terms (each a "Renewal Term") unless written notice of non-renewal is given by either party to the other party at least sixty (60) days prior to the date of termination of the then current term.

2. Group's Comments/Concerns :

- (i) Given the extent of resources which Group will devote with respect to performing the Group Services, an Initial Term of one year and successive Renewal Terms of one year are too short. Accordingly, the Initial Term and each Renewal Term shall be for a period of three years.
- (ii) As Group desires a long term relationship with Hospital, a notice of non-renewal of 60 days is too short. The notice of non-renewal must be upon at least 365 days prior to the termination of the then current term.

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I. Termination

1. Hospital's proposed contract provision:

[In addition to containing a provision allowing either party to terminate the Agreement on 30 days notice due to breach of the

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Agreement by the other party, the Agreement also contains the following provisions.]

Without Cause Termination by Hospital . Hospital may terminate this Agreement at anytime without cause upon ninety (90) days prior written notice to Group.

Other Termination by Hospital . Hospital may immediately terminate this Agreement upon the occurrence of any one of the following events or at any time thereafter:

- (a) Acts of drunkenness, controlled substance abuse, immoral conduct, violation of any law other than minor traffic offenses, willful insubordination, conflict of interest, or neglect of duty by any Physician;
- (b) Failure by Group to satisfactorily maintain and operate the Radiology Service in a manner consistent with the highest standards established for the operation of similar services in comparable hospitals;
- (c) Failure of Group to remove any Physician that the Hospital deems unacceptable;
- (d) Group and/or the Physicians, in Hospital's sole determination, are disruptive or fail to work cooperatively with other physicians, Hospital staff, Hospital administration, or Hospital management; or Hospital in good faith determines that the health, safety, or welfare of patients would be jeopardized by Group's continued performance of its duties under this Agreement;
- (e) Group fails to maintain malpractice insurance required by Article _ of this Agreement;
- (f) Group files a petition under a bankruptcy act, has a receiver appointed for its business or makes an assignment for the benefit of creditors;
- (g) Group is liquidated or dissolved, or initiates proceedings to liquidate or dissolve; or
- (h) Any Physician fail to meet the requirements of this Agreement and Group fails to remove such Physician from all duties pursuant to this Agreement and to adequately cover such individual's duties without interruption; or

2. **Groups Comments/Concerns :**

- (i) As Group and the physicians are devoting significant resources to the exclusive relationship, Hospital should not have the right to terminate the Agreement without cause. Accordingly, delete the Hospital's right to terminate the Agreement without cause.
- (ii) As Group and the physicians are devoting significant resources to the exclusive relationship, Hospital should not have the right to terminate a physician without cause. Accordingly, delete the Hospital's right to terminate a physician without cause.
- (iii) In Paragraph (b), the term "highest standards" is too subjective and should be replaced with "community standard."
- (iv) In Paragraph (d), the reference to Group should be deleted.
- (v) In Paragraph (d), the reference to Hospital's sole determination should

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be replaced with reasonable determination, so "Hospital's good faith" should be more of a standard.

- (vi) Kindly insert a notice provision with a reasonable opportunity to cure with respect to Paragraphs (b), (c), (d), (e), and (h).
- (vii) With respect to involuntary bankruptcy or insolvency, the Group should have a period of ninety (90) days to get it set aside.

NOTES: _____

J. Compensation

- 1. Hospital's proposed contract provision:

Compensation of Physicians . Group's separate billings shall constitute the sole compensation for all professional services rendered hereunder, including services rendered by the Group Physicians and the Director. The Hospital shall not pay, nor shall the Group be entitled to any payment (including any stipends, director fees, etc.) related to its provision of the services under this Agreement. Group shall have the sole responsibility to compensate the Physicians. Group reserves the right to determine the compensation payable to each Physician providing Group Services hereunder.

- 2. Group's Comments/Concerns :

- (i) As noted above, it is costly and not economically viable for Group to maintain a physician on site 24 hours a day, 7 days a week, 52 weeks a year. However, if Hospital is willing to bear the additional cost and provide Group with a stipend, Group shall provide such on site coverage. This should be discussed.
- (ii) As previously noted, Hospital should provide the Director reasonable compensation for the services provided in such capacity at fair market value. This should be discussed.
- (iii) As noted above, Hospital should provide a stipend with respect to the required malpractice insurance. This should be discussed.

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K. Billing

- 1. Hospital's proposed contract provision:

Billing and Collection . Hospital shall be responsible for billing for all technical fees related to the provision of the Group Services, and Hospital shall have the exclusive right to retain the collections from such billings. Hospital, on Group's behalf, shall separately bill patients for professional Group Services rendered by the Physicians pursuant to this Agreement in accordance with Group's fee schedule. All such patient billings shall require payment to be made directly to Group and Group shall have the exclusive right to retain the

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collections from such billings. Group's fee schedule shall be reasonable and competitive with the prevailing charges in Hospital's service area and shall not exceed any limitation imposed by any statute, rule, regulation, ordinance or administrative or judicial decision. During the Initial Term and any Renewal Term of this Agreement, Group agrees to pay Hospital \$ _____ on a monthly basis for the billing services provided by Hospital as described herein. Notwithstanding the foregoing, such fee is subject to increase by Hospital at anytime, in its sole discretion, upon thirty (30) days prior written notice to Group. Group shall not bill for any technical fees associated with the provision of Group Services.

If Hospital enters into an agreement with a third party payor or managed care program under which an all inclusive rate will be paid for both the Hospital component and the Group's fee for physician services, Group agrees that the global fee shall, with respect to each separate contract, be apportioned between Hospital and Group as Hospital determines appropriate in its sole discretion. If Hospital enters into an agreement with a third party payor or managed care program, Group must enter into an agreement with such payor or program to participate therein.

Write-Offs . Group agrees that, when Hospital deems it necessary, within reason, as a matter of goodwill to reduce or write-off entirely charges for services the Hospital renders to a given patient or patients, Group will likewise reduce or write-off, in direct proportion to the Hospital's reduction or write-off, its charges to the same patient or patients.

2. Groups Comments/Concerns :

- (i) Group has performed its billing and collection services since the formation of the Group and has created and maintains a separate billing department within Group. The requirement that Group must retain Hospital to provide billing and collection services will significantly disrupt Group's practice and will create employment issues. In this regard, Group prefers to continue to perform the billing and collection services.
- (ii) In the event that Group and Hospital agree that Hospital will perform the billing and collection services, such new relationship with Hospital should be memorialized in a separate agreement outside this Agreement.
- (iii) In the event a billing relationship is entered into, Group would like to make sure that Hospital has a vested interest in maximizing the collections. Accordingly, the billing and collection fee should be based upon a percentage of the collections instead of equal to a flat fee. In no event shall Hospital be entitled to increase such fees during the term of the billing relationship; any such increase should be as mutually agreed upon by Group and Hospital. A unilateral increase by Hospital may violate the applicable kick-back regulations.
- (iv) Group should not be required to write-off charges for services in the event Hospital does so. In addition to economic issues with respect thereto, I have a concern that such a requirement will violate the

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applicable kick-back regulations.

- (v) Please advise if Hospital is currently in negotiations with third parties with respect to global fees. In the event Hospital enters into a global fee arrangement, any apportionment between Hospital and Group must be reasonably determined and agreed to by Hospital and Group. Further as any such global fee arrangement could significantly affect Group's business, Group should be entitled to participate in, and consent to, such global fee negotiations.
- (vi) Please advise if Hospital is currently in negotiations with third parties. In the event Hospital enters into an agreement with third parties, Group should not be required to enter into an agreement with such third party as the financial terms offered by such third party may be economically disadvantageous to Group.

NOTES: _____

L. Office Space Rental

- 1. Hospital's proposed contract provision:

Office Space Rental . Pursuant to the applicable terms and conditions contained herein and during the term of this Agreement, Hospital agrees to provide Group with exclusive use of the Leased Space (as defined herein) for use as medical offices from 8:00 a.m. to 5:00 p.m. Monday–Friday of each week (excluding Hospital recognized holidays) (the “Leased Time”). The Leased Space shall consist of approximately 200 square feet of office space in Suite 300 on the 5th floor of the Hospital's main building (the “Leased Space”). Group shall pay Hospital rent in an amount equal to \$600 per month for use of the Leased Space **[NOTE: \$600 per month represents fair market value for the Leased Space]** Group shall pay the rent due to Hospital for each month by the fifteenth (15th) day of the following month.

- 2. Groups Comments/Concerns :
 - (i) Group should not have to pay rent for office space that it currently and in the past used at no charge.
 - (ii) If the Hospital insists that the terms under which the Group uses the space be set forth in writing, then a separate office lease should be executed by the Hospital and the Group.
 - (iii) The office is not used solely by Group, it is a department office.
 - (iv) As Group is performing services 24 hours a day, seven days a week, its permitted usage of the office should similarly be 24 hours a day, seven days a week.

NOTES: _____

M. Restrictive Covenants

- 1. Hospital's proposed contract provision:

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Non Solicitation . During the Initial Term of this Agreement, any Renewal Term of this Agreement and for a period of two (2) years after the expiration or termination of this Agreement for any reason or no reason, Group and the Physicians shall not, directly or indirectly, individually or in concert with any other person or entity, or through a corporation, partnership, limited liability company, proprietorship or other business enterprise, induce or attempt to induce any employee or agent of Hospital to leave Hospital's employ or employ (or engage to act, directly or indirectly, as an independent contractor or agent) any employee, contractor or agent of Hospital within one (1) year following termination of the employment or agency of such employee or agent with Hospital.

Non-Compete Covenant . During the Initial Term of this Agreement, any Renewal Term of this Agreement and for a period of two (2) years after the expiration or termination of this Agreement for any reason or no reason, neither Group nor any Group Physician providing services under this Agreement may conduct a private practice on premises of the Hospitals, and shall not see any patients on such premises without prior approval by or Hospital. During the Initial Term of this Agreement, any Renewal Term of this Agreement and for a period of two (2) years after the expiration or termination of this Agreement for any reason or no reason, Group and Group Physicians further agree not to directly or indirectly render any of the Group Services in any setting (including but not limited to, any physician office or imaging center) within ten (10) miles of the Hospital. Group agrees that it shall have in force and effect an agreement by and between it and each Group Physician agreeing to comply with the terms of this Section and that all future Group Physicians shall, upon commencing their relationship with Group, be made to execute such an agreement. Group agrees to assign any right of action for a violation or alleged violation of this provision to Hospital. This provision shall survive termination of this Agreement.

2. Group's Comments/Concerns :

- (i) The non-compete covenant is excessive and may violate applicable law as against public policy, and accordingly, it should be deleted.
- (ii) In the event Hospital insists upon a non-compete covenant, the term thereof should be for the lesser of one year or the term of the Agreement. Additionally, a ten mile radius is excessive as most of Hospital's patients live well within such radius. Accordingly, such mileage restriction should be reduced.
- (iii) The non-solicitation covenant is excessive and also should be for the lesser of one year or the term of the Agreement. Additionally, Hospital must agree to a non-solicitation covenant similar to that required of Group with respect to Group's physicians, employees and agents.
- (iv) The MRI center which is located nine miles from Hospital in which Group has a one-third ownership interest should be excluded from such restrictions. Group has operated such MRI center for a long period of

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time and has dedicated significant resources to such center and requiring Group to close such center and/or sell its ownership interest is unreasonable. In the event Hospital insists on the foregoing, Hospital should buy such ownership interest at fair market value terms.

- (v) Group should also be permitted to continue to perform reads for the multi-specialty groups which it provides services for as of the date of the Agreement.

NOTES: _____

Attachments: Exhibit A

Exhibit B

Exhibit C

EXHIBIT A

Group Services

Group through the Physicians shall perform the following at Hospital which shall be collectively defined as the Group Services:

- (1) Subject to the exceptions identified below, Group shall have the exclusive right to provide all professional radiology services required for the Hospital's inpatients and outpatients. For the purposes of this Agreement, "radiology services" shall include, but not be limited to, diagnostic radiology, diagnostic ultrasound, nuclear medicine, interventional radiology, computerized axial tomography procedures, and the reading and interpretations of medical images and of any other medical imaging services and procedures not specifically excluded by this Agreement.

Notwithstanding any other provision of this Agreement or this Exhibit, the following radiology services are excluded from the definition of Group Services and shall not be provided by Group and its Physicians pursuant to this Agreement:

- Magnetic resonance imaging procedures, readings and interpretations
- (2) Provide radiology services as assigned by the Director or his/her designee;
- (3) Document the radiology services provided to Hospital patients in accordance with applicable Hospital, legal, accreditation, and third-party reimbursement program standards;
- (4) Be available as a consultant to members of Hospital's Medical Staff;
- (5) When requested, review, recommend and implement, subject to the approval of the Hospital, new services and technologies. In this regard, the Group shall keep the Hospital informed of all procedures, techniques and medications that are or may be employed in the provision of radiology services at the Hospital;
- (6) Create a complete, accurate and permanent record of all radiology services provided;
- (7) Report to the attending physicians and/or to the directing or

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supervising radiologist any unusual or unexpected findings regarding a patient, either before, during or after the performance of any radiology procedure;

- (8) Provide the appropriate person at Hospital with all pertinent information regarding the results of any radiology services performed;
 - (9) Seek consultation and advice from other physicians as necessary whenever the patient presents any problem that in the professional opinion of the Physician requires such consultation;
 - (10) In conjunction with Hospital, establish radiology protocols and processes. Through this process, work with Hospital to ensure a highly effective Radiology Service;
 - (11) Play an active role with physician, nursing, radiology technicians and paramedic training and education programs;
 - (12) Serve on committees as requested;
 - (13) Participate in Hospital's radiology educational programs as requested;
 - (14) Report to Hospital on radiology equipment that is identified as not functioning properly or not clean; and
 - (15) Perform such other duties, responsibilities, and services as may be requested by Hospital from time to time regarding the provision of radiology services to Hospital inpatients and outpatients.
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EXHIBIT B

Service Locations

Group shall perform the Group Services at Hospital's main Hospital campus located at 145 West Main Street, Plain City, USA.

EXHIBIT C

Director Duties and Responsibilities

Job Title: Director of Radiology Services

I. General Purpose

The Director of Radiology Services shall be administratively responsible for radiology services at Hospital. The Director shall coordinate all activities relating to radiology services, assign all cases or direct their assignment, resolve scheduling problems, and monitor safety and the quality of service. The Director shall prepare regular reports for Hospital's review on radiology services at Hospital.

II. Specific Duties and Responsibilities

The Director shall perform the following duties and responsibilities:

- A. Clinical and managerial responsibility for the Radiology Service including, without limitation:
 - (1) Maintaining organization and operation of the Radiology Service within the guidelines established by the Joint Commission on the

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Accreditation of Healthcare Organizations (JCAHO), the Bylaws, Rules and Regulations of the Medical Staff, and the policies and procedures of Hospital;

- (2) Adhering to applicable standards of care within guidelines of regulatory agencies and accrediting organizations (e.g., Occupational Safety and Health Administration, Nuclear Regulatory Commission, Peer Review Organization, etc.);
 - (3) Scheduling adequate numbers of qualified clinical personnel to perform the volume and diversity of radiology services at Hospital; such activities will include recruitment, orientation, scheduling of work and vacation, performance evaluation, and disciplinary action;
 - (4) Coordinating or assigning delegates to coordinate radiology services schedules without interruption of services;
 - (5) In conjunction with Hospital, approving policies and procedures for the delivery of radiology services at Hospital;
 - (6) Recommending to administration and Medical Staff of Hospital the type and amount of equipment and supplies necessary for performing radiology services;
 - (7) Participating in the development of, and enforcing, policies and procedures relating to the functioning of radiologic personnel and equipment, the performance of radiology services, and replacement of radiology equipment at Hospital;
 - (8) Coordinating clear interdepartmental policies and procedures;
 - (9) Fostering attitudes and behaviors of customer service and cooperation toward patients and other members of the Medical Staff; and
 - (10) Supervising the work of Hospital employees in the Radiology Service consistent with Hospital's personnel policies and assisting Hospital in the training and selection of personnel to work in the Radiology Service.
- B. Oversight and supervision of provision of quality radiology services at Hospital, including without limitation:
- (1) Developing guidelines to be used regarding the provision of radiology services at Hospital, and the techniques employed;
 - (2) Organizing orientation and continuing education and training program at Hospital to be based in part on the results of evaluation of radiology services;
 - (3) Conducting regular meetings at Hospital so that policies, procedures and guidelines may be discussed and problems of patient care and radiology services may be reviewed and studied;
 - (4) Monitoring the implementation of safety precautions in the radiology area;
 - (5) Concurrent and/or retrospective evaluation of radiology services and JCAHO-acceptable quality assurance/continuous quality improvement programs;
 - (6) Establishing, implementing, and maintaining standards of radiology services via credentialing processes and quality improvement

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processes; and

- (7) Coordinating periodic surveys of patients' perceptions regarding radiology services rendered.
- C. Assisting Hospital in the development, implementation, and maintenance of policies regarding provision of radiology services.
- D. Collaborating with Hospital with respect to fiscal integrity and joint development of marketing strategies.
- E. Performing such other activities as may be reasonably requested by Hospital from time to time.

These responsibilities may be periodically reviewed and revised by Hospital in its sole discretion.

[1] Based on article authored by Karin Bierstein, Assistant Director of Governmental Affairs (Regulatory) entitled "Hospital Contracts, Four Years Later" and appearing in the August 2001/Volume 65 newsletter of the American Society of Anesthesiologists. A copy of the full text can be obtained from ASA, 520 N. Northwest Highway, Park Ridge, Illinois, 60068-2573.
