HOOPER LUNDY & BOOKMAN, INC.
HEALTH LAW PERSPECTIVES

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Blue Cross Proposes Onerous Confidentiality Agreement

HLB attorneys have learned that Blue Cross of California intends to require providers to sign a Confidentiality Agreement prior to any negotiation with Blue Cross. The form of the agreement we have reviewed would also require a consultant to the provider to sign the agreement with Blue Cross. We understand that Blue Cross intends to interpret the agreement so that the provider's attorneys will be included in the category of "consultants", and thus would be required to sign the agreement.

We strongly recommend that you not sign any such agreement for the reasons noted below. We have requested that the Department of Managed Health Care review the agreement to determine whether the attempt by Blue Cross to insist upon it constitutes an unfair business practice. Our objections to the agreement are as follows:

- The agreement purports to require the provider and the consultant to agree in advance that the plan, "in its sole and absolute discretion, may decide not to negotiate with consultant, but to negotiate only with provider, or require provider to be present whenever consultant engages in discussions with Plan." This provision creates an inherent conflict of interest for the consultant/attorney, and may prevent them from zealously and effectively representing their clients. The clear message from this provision is that attorneys and consultants must be careful not to negotiate or counsel too aggressively, or they will be excluded from the negotiations. We do not believe that any attorney or consultant could in good conscience sign such an agreement.
- The agreement attempts to require the consultant to disclose both to the providers and the plan any actual or potential conflicts of interest, and to respond fully to any inquiries regarding "possible" conflicts of interest. This agreement would create a contractual duty by the consultant to the plan regarding its relationship with its client, the provider, and would obligate it to disclose details of such matters to the plan. This provision would interfere with the relationship between the consultant and the provider, and intrude on the attorney-client privilege. It inserts the plan into issues that do not relate to it.
- The agreement attempts to shift to the provider and the consultant a responsibility to pursue legal actions against others to enforce the agreement.
- The definition of "Confidential Information" in the agreement is extremely broad and ambiguous, and will tend to create disputes between the parties. For example, the agreement, which attempts to prohibit the consultant from disclosing at any time any confidential

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information, prohibits the consultant from even disclosing the fact of its representation of the provider to others, or the fact that it has negotiated previously with Blue Cross. We believe that this provision unnecessarily and improperly interferes with the rights of the consultant to engage in free speech, and to inform the public regarding its services and level of experience, and deprives providers of the ability to identify those consultants and attorneys who are most experienced in dealing with Blue Cross.

"Our review finds the proposed Confidentiality agreement to be completely one-sided and imposing no duties whatsoever on Blue Cross. For these reasons, we recommend that providers and consultants not sign the agreement," said HLB Attorney Jay Hartz. "You may wish to share this letter with your consultants to alert them to the issues as well. The proposed agreement will tend to destroy any semblance of a fair playing field between the plan and providers, which certainly is not in the best interest of providers."

For additional information, please contact Mr. Hartz at 310.551.8164.

DMHC Launches Pilot IDRP Process

The Department of Managed Health Care (DMHC) has instituted a voluntary pilot independent dispute resolution process (IDRP) available to payers and non-contracted providers of EMTALA-required emergency hospital and physician services.

The program became effective February 1 and will run for 6 months. According to DMHC Director Cindy Ehnes, "the concept of implementing an IDRP is to avoid placing enrollees in the middle of payment disputes between health plans and providers, and to ensure that non-contracted providers who deliver critical services without regard to a patient's financial ability to pay are paid the reasonable and customary value for their services."

Specifically the IDRP tests a 60-day, cost-effective process for resolving payment disputes. Features of the pilot program include:

- Voluntary participation by physicians, hospitals, health plans and delegated medical groups.
- The number of claims submitted for IDRP determines the processing fee. "Substantially similar" claims can be aggregated up to 50 in a single filing. Fees range from $100 for a single claim to $600 for 50 claims for hospitals. For other providers, fees range from $25 to $600, depending on whether they first attempt resolution through the health plan's process.
- A "baseball arbitration" model will be used, requiring the arbitrator to choose between the paid and billed amount. In her/his decision the arbitrator must show that the *Gould* criteria in the AB 1455 regulations were used for determining "reasonable and customary" payment.
- Parties do not waive their rights to contest the arbitration decision. However, providers must agree not to balance bill the enrollee in any case submitted to the IDRP.
- Hospitals must first participate in the health plan's internal dispute resolution process before entering the IDRP. Other providers are encouraged to do so, but not required.
- The IDRP must be completed within 60 days if the provider first participates in the health plan's internal process. If non-hospital providers choose to go straight to IDRP, the process could take up to 120 days.
- DMHC has retained Maximus as the pilot independent review organization that will review disputes filed through the pilot IDRP.
- An HLB review of the new IDRP has raised issues providers should consider prior to participating.
- My concern is that health plans will use the IDRP procedure to further delay resolving claims disputes by requiring providers to exhaust the health plans' internal appeal process, then meet and confer about denied appeals, and then go through the IDRP process before pursing recovery through arbitration," said HLB Attorney Daron Tooch. "Many claims may be barred by statutes of limitations if providers do not take steps to preserve their rights."

Additional details regarding the pilot IDRP are available at the DMHC website at www.dmhc.ca.gov/providers/clm/clm_idrp.asp.

For additional information, please contact Daron Tooch at 310.551.8192.

Draft Self-Regulatory Principles for Charitable Organizations Released

By Leon Altman

An advisory committee of the Panel on the Nonprofit Sector has

released for comment, revised draft principles for self regulation of charitable organizations.

The panel (www.nonprofitpanel.org) was created in 2004 at the request of the U.S. Senate Finance Committee. The panel is a 24-member body comprised of leaders of charitable organizations and philanthropic foundations of diverse sizes, locations, missions and scope of charitable work. It also an advisory arm of Independent Sector (www.independentsector.org), a national coalition of nonprofits, foundations and corporations.

The panel's mission is to advise Congress on a variety of issues related to oversight and governance of charitable organizations. Congress, in its efforts to conduct broad nonprofit reforms has historically placed significant reliance on the Panel's recommendations and guidance. Undoubtedly, it will continue doing so in the future.

Based on comments received on its first draft, the panel's Advisory Committee on Self-Regulation of the Charitable Sector recently prepared a revised draft of standards and principles of effective self-governance devised to provide guidance to all charitable organizations. The second draft is available for public view and comment at http://www.nonprofitpanel.org/selfreg/All_Principles_Revised.pdf

This revised draft of the self-governance principles consists of 29 principles, grouped in the following four categories:

1) Principles for Facilitating Legal Compliance and Public Disclosure. The principles in this category address best practices and responsibilities of charitable organizations in complying with their legal obligations and improving transparency of their operations.

2) Principles for Effective Governance. These principles deal with the effective implementation of oversight and governance responsibilities of nonprofit entities' boards.

3) Principles for Strong Financial Oversight. In this category, the Committee recommends policies and procedures ensuring proper management of charitable organizations' finances and resources.

4) Principles for Responsible Fundraising Practices. These principles are designed to improve fundraising activities' regulatory compliance and achieve stronger donor support and confidence.

The second draft also included two more principles, which have not yet been reviewed and approved by the Committee. These added principles deal with (a) recommended adoption of a code of ethics by charitable organizations, and (b) adherence of their operations to a properly structured risk management plan.

Public comments will be accepted through March 30, 2007. After review of the comments, the committee will submit its final recommendations to the panel, which is expected to release its final recommendations by late Spring of this year.

We strongly encourage all of our nonprofit clients to carefully review the second draft available on the panel's website, and take advantage of the public comment period. The self-governance principles promulgated by the panel will likely shape future actions of Congress in the area of charitable reform.

For additional information or assistance with your comments, please contact Leon Altman at 310.551.8111.

HLB Attorneys Honored

Five HLB attorneys have been honored as 2007 Southern California Super Lawyers in the latest edition of *LA Magazine*. Attorneys are selected through a polling process conducted by *Law & Politics*. This year's honorees include Robert Lundy, Patric Hooper, Lloyd Bookman, Bradley Tully, and Linda Kollar.

What to Know Before Negotiating Your Next Software Purchase

By Steve Phillips & Leon Altman

Almost every health care provider has been a licensee - in other words, has obtained a license to use computer software from the owner of such software. Software licenses may be exclusive or non-exclusive, perpetual or finite, fully paid or subject to periodic payment, and cover just software or also include hardware, maintenance, support or training. "Shrinkwrap" or "clickwrap" licenses, often used with over-the-counter or ready-made products, are non-negotiable. Others can and should be negotiated, especially where the software represents a major acquisition for the provider, or would play a significant part in its operations.

Careful negotiating of software licenses is crucial for providers because of the sensitivity of health care services and additional regulatory requirements that need to be addressed in such agreements. This is an often daunting task for providers, who are not in the IT business and must negotiate with software companies who are. This article attempts to help even the scales by outlining the most important issues to negotiate in software licenses.

- Scope of License. Providers should try to get the broadest possible license. If the licensee has different locations, or has affiliates that would use such software, the license needs to cover all such locations and affiliates. The licensee should also be able to change or add the locations where the software will be used, preferably upon a mere notice to the licensor. The license should cover all anticipated users and address the licensee's operational needs. The licensee should be able to transfer, assign and sublicense its rights to affiliates or successors and use the software products with a broad range of hardware.
- Modifications. Software often must be modified by customizing for maximum functionality. First, make sure the software is interoperable with the hardware and other key software systems you use. Then, make sure that modified software will be compatible with future upgrades and releases of the software, covered by warranty and eligible for support and training services. Determine whether warranty coverage requires the vendor to perform the modifications. Beware of hidden problems with integrating other software, such as "black box" software that requires the vendor to perform the integration and charge excessively for such work, or terms that void maintenance warranties if the software is integrated with other software systems.
- License Term and Termination. Most licenses are perpetual and irrevocable, unless the licensee breaches the agreement. Sometimes, however, the license may have a fixed term and is renewable only if the licensee pays additional license fees. Other times, the license is a subscription - perpetual as long as you are making periodic payments, and terminable as soon as the payments stop. Finally, the parties need to agree on what happens after termination. Must the licensee return the software? If so, will it be practicable to disentangle it out of the licensee's system, or should the licensee negotiate instead to destroy it or stop using it and certify to such cessation? Similarly, the parties need to address the issues of remaining payments or refunds upon the termination.
- Warranties and Identities. Licensors will often attempt to disclaim all warranties and liabilities, and provide software "as is." Licensees, however, should insist on having at least some warranties - obviously, the broader, the better. Providers should incorporate promises made during the sales cycle into the contract product description, including performance standards and other material statements describing functionality, especially if these representations were considered in making the purchase decision. At the very least, licensees should request warranties that the software will (1) operate in accordance with the specifications and documentation, (2) not infringe on other parties' intellectual property rights, (3) be free of bugs and malicious code (such as viruses, "trojan horses," trapdoor routines, disabling devices, "time bombs," etc.), (4) be free of materials and workmanship defects, (5) be adequately documented, and (6) comply with applicable laws and regulatory requirements. Licensees should also request that licensors indemnify licensees for breach of warranties, though licensors loathe such indemnification provisions and will likely fight to reject or significantly narrow them.
- Remedies. Remedies beyond indemnification should also be considered, such as the right to uninstall the system and obtain a refund. However, such remedy may not always be practicable or easy to achieve, as the software may become too entangled in the user's system. Another alternative is to provide for liquidated damages. Yet another possibility is to provide for specific performance - in other words, require the licensor to fix the problems so that the software functions properly. Finally, the licensee may consider replacing the defective

product with other vendor's comparable software, and ideally the licensor should be responsible for the difference in price. However, the last remedy would likely meet significant resistance from the licensor, as comparable products may be significantly costlier or altogether unavailable.

- Confidentiality; Privacy; Publicity. Licensors will in most cases require licensees to keep the information related to the software and the license agreement confidential. Although such a requirement is probably understandable from the licensor's perspective, licensees should have a right to make appropriate disclosures to their employees or outside consultants on as-needed basis (if necessary, licensee's confidentiality obligations may be passed to such third parties). In health care, moreover, federal and state patient privacy regulations (such as, e.g., HIPAA), impose confidentiality obligations on licensors. If the licensor has access to patients' health information during installation or maintenance of the software, the licensor is likely a "business associate" of the health care provider and will need to enter into a business associate agreement. Licensors may also be subject to record-keeping requirements imposed by the Social Security Act. Many licensors, especially those who do not specialize solely in health care-related software, need to be educated on these issues.
- Title; Source Code. In most cases, licensors will require that they retain title to the software, and only license a right to use the software to their licensees. However, where the software is custom-made for a particular licensee, such licensee may want title to the software transferred over to it. Another related question is who is entitled to the source code of the software (*i.e.*, the code written in human-readable programming language). Often, the source code to a particular software is the most valuable asset of a vendor, and, naturally, licensors will be reluctant to give away such a valuable asset. Typically, the licensee receives the executable version of the software in the form of an object code (which is just a series of symbols and computer commands and is generally extremely difficult or impossible to convert back to the source code), and the licensor retains the source code. However, if the software is very expensive, critical to the licensee's operations, or the licensee needs further future modifications to it, the licensee should negotiate to receive the source code. Licensors rarely agree to such a request; however, an alternative is to escrow the source code, with clearly defined events triggering its release to the licensee (*e.g.*, licensor's bankruptcy or dissolution, discontinuance of the product, failure to provide the necessary service). Escrow may be costly, however, and its cost is typically borne by licensees. Moreover, access to the source code may be of little or no benefit because the expertise to effectively use it is not available within the provider's organization or from another vendor. Thus, providers should evaluate not only the cost of escrow, but also the utility of access to the source code without the vendor's support.
- Updates and Upgrades. The software license may not include a right to obtain future releases or upgrades to the software, or, if such right is included, future releases may be obtained only at additional cost. Providers should negotiate rights to future releases and upgrades for free or modest cost. At the very least, the licensor should provide future patches for fixing bugs and problems. Also, along with future releases or updates, the licensor should provide updated documentation.
- Training and Professional Services. Professional services are usually required along with software. Avoid being captive to the vendor for all training, support and other professional services. It is wise to outsource part of the implementation services, but not, as discussed above, customization work. A vendor who has a selection of partners for implementation services is preferable (and easily determined by a visit to the vendor's Website). Many vendors offer this choice, so avoid a vendor who insists that it must provide all professional services.
- Support and Maintenance. Providers should make the contract specific about what maintenance, training and support will be available, when and how it will be available, what it will cost and what terms and conditions will apply. The licensor should provide a minimum number of personnel with adequate qualifications and with a right for the licensee to replace a person who is not acceptable to the licensee for legitimate reasons. If the licensee chooses not to obtain a later version of the software, the support and maintenance services should still cover the licensee's version, and there should be no "sunset" of support and maintenance services. Moreover, maintenance and support services should come with a warranty. With respect to software errors, different problems should require different levels of response depending on their severity. A minor problem which does not materially affect the performance of the software should be fixed in several days, or even in the future release of the software. However, a critical issue which may interfere with the entire operation of the health care provider or the delivery of patient care needs to be resolved right away, often in minutes. If a complete fix is unavailable in

that time frame, the licensor should at least provide a workaround to allow the licensee's continued operations pending the resolution of the problem. The agreement should also provide for escalation of the problem if it cannot be fixed within the specific time frames. It is also helpful to designate one or more specific contact persons and individuals in charge of the project, so that a clear chain of authority is established. Finally, the licensee needs to consider how the maintenance and support services are performed - whether on-site, telephonically, remotely, or by other means, and whether they will be available 24/7 or only during the business hours.

- Payment. Obviously, the payment terms are very important from the business standpoint. Is the payment upfront in a lump sum or in stages, as the product gets installed? Does the agreement provide for periodic payments? Are the payments fixed or variable? Are they calculated per user (in which case, a particular consideration needs to be given to the definition of the user)? What is included in the payment - just the software or also the training, maintenance, support, future upgrades, etc.? Are there any additional or "hidden" charges, such as travel or lodging or overtime? Will the vendor agree to caps on maintenance cost increases? Does the licensee have the right to withhold payment if the licensor breaches or the software is not performing as it should? Does the licensee have the "most favored nation" status - *e.g.*, will it get the best price provided to other clients of the licensor? Suppliers, however, have genuine revenue recognition issues that can make some pay for performance provisions deal-breakers.

Of course, other issues may arise in software licensing agreements, and it is critical to consider all of the software license's implications and provisions to be able to assure the best protection for the licensee.

For additional information, please contact Mr. Altman at 310.551.8184 or Mr. Phillips at 415.875.8508.

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