

sions arise when the value systems of family (including religion) mean that sanctity of life prevails and a life must be prolonged regardless of clinical outcome. In most instances, good communication and negotiation between clinicians and families can reduce the possibility of families seeking redress through the courts or tribunals.

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¹ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² See <<http://www.cbc.ca/canada/story/2008/06/18/winnipeg-doctor.html>>.

³ Partner, Gardiner Roberts LLP; and a member of this newsletter's editorial board.

⁴ Comments to a nursing risk management conference presented by Osgoode Hall Law School, June 18, 2008.

• DRAFTING OR REVIEWING A CONTRACT: HOW TO PREPARE FOR A MEETING WITH A LAWYER •

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With the new emphasis on collaboration, we are seeing an increasing number of "networks", preferred referral arrangements, "partnerships", and shared services in the health care sector. These relationships are often initiated and nurtured by front line clinical staff and managers of clinical programs. When it comes to formally documenting the terms of collaboration, many staff members find the idea of having to draft or review a contract intimidating. In some cases, they seek the services of a lawyer to assist them to navigate the waters of the world of contracts.

Meeting with a lawyer can be intimidating too. Many clinical staff and clinical managers do not have experience instructing a lawyer and do not know how to prepare for the initial meeting. As in-house legal counsel at a teaching hospital in Toronto, I worked with many front line staff charged with the daunting task of drafting a new contract. Over time, I started to notice that there was a rhythm to those first meetings to discuss new contracts. I always asked the staff members the same series of questions regardless of the type of contract involved. I found that if the person who came to me did not readily have the answers to these questions, there could be significant delays in negotiating and finalizing the agreements.

If you are going to engage a lawyer to assist you with drafting or reviewing a contract, it will save you time and money to arrive prepared. Preparing answers to the questions posed by the "virtual lawyer" below and taking the action steps suggested will signifi-

cantly reduce the time you have to spend in that initial meeting with your lawyer to discuss your contract. You will be in a much better position to get the advice you need and to expedite the contracting process.

MEETING WITH A VIRTUAL LAWYER

Virtual Lawyer (VL): "*Have you read the contract?*"

Many people assume that because it is a contract, a lawyer is responsible to read and explain the contract to them. Many of my clients arrive having never read the agreement. A contract must be clear and understandable to the people who are going to live by its terms. The key to a good contract is that the person who is going to manage the agreement (and the relationship between the parties) understands it. If it is too long, you should ask your lawyer how it can be shortened or simplified. If there are words or sections that you do not understand, you should ask your lawyer if there are plain language alternatives so that both sides to the agreement understand the terms.

Action Steps:

- Read the contract.
- Highlight all the sections or words that do not make sense to you.

VL: "Tell me in your own words, what are you trying to achieve? What is this agreement about?"

You should be able to describe the relationship or the purpose of the agreement in two or three sentences. A neutral third person should be able to understand what it is you are trying to achieve. This description may be used to fill out the "whereas" or "background" sections of the agreement.

Action Step:

- Write out a two to three-line explanation of the agreement.

VL: "Does the contract reflect the agreement as you understand it?"

The contract should reflect the terms to which the parties have agreed. If there are sections in the agreement that do not reflect what you negotiated — those need to be taken out or changed. If there are certain elements you have negotiated that you do not see in the agreement — those should probably be added.

Action Steps:

- Put a checkmark beside the sections that reflect the agreed terms.
- Make notes in the margins correcting the sections that do not reflect your understanding of the agreement.
- Make a list of the terms that have been negotiated that are not covered in the agreement.

VL: "Is this a renewal of an existing agreement? If yes, do you have a copy of the existing agreement? What is different in this agreement?"

It is important to be able to articulate what has changed from an existing agreement to the new. Many times the changes are not highlighted and you will have to go through and compare each version and highlight those changes for yourself. Subtle word changes can have significant impacts — so it is up to you to identify any changes proposed.

Action Steps:

- Provide your lawyer with a copy of the existing agreement.
- If the other side has given you the new agreement with changes, you can ask them to send

you a "blacklined" version or a version with the changes highlighted or ask them to go over the changes with you in person, or over the phone, or in an e-mail.

- Be prepared to identify the changes for your lawyer.

VL: "Is there any background documentation to this relationship that is important?"

Your lawyer will need to have a copy of any documents that are referenced in the agreement. He or she will also want to review any background documents. If there have been significant negotiations through correspondence or e-mail messages, it is often helpful to make those available to your lawyer as well.

Action Steps:

- Make a copy (hard copy or electronic) of any background materials that the lawyer will need to review.
- Consider whether you think these background materials should be attached to the contract as schedules.

VL: "Who drafted this agreement?"

Contracts are usually interpreted *contra preferendum*, which means that if ambiguity exists, the contract is interpreted **against** the interests of the party that drafted it. It is good for your lawyer to know who wrote the first draft.

VL: "Is the contract between the correct parties?"

This is one of the most important questions to answer. You need to know with whom you are contracting. Contracts must be between legal entities (usually individuals or corporations but sometimes sole proprietorships or partnerships etc.). Make sure you have the correct legal name for your own organization and for the "other side". Avoid contracting with departments or programs or clinics of an organization (as they are usually not separate legal entities). Knowing with whom you are contracting is especially important when dealing with informal "networks", "collaborations" or "partnerships" where a number of organizations want to do something together. If you do not know how to structure a relationship, your lawyer can assist you to figure out the best contracting

arrangement. In these cases, your lawyer may also ask questions like: *Do we know these people? What has the relationship been like to date? Any concerns about this relationship?*

Action Steps:

- Find out the legal name of your own organization.
- Either look up or ask the other side for their legal name (your lawyer can also do a search to determine the correct legal name if there is any confusion).
- If this is an agreement with an informal “network” be prepared to ask your lawyer for advice on how to bind the right parties to the agreement (such as by having all the parties sign the agreement, or identifying a lead agency to assume the responsibility on behalf of all the network).

VL: *“Are there defined terms? Are they used consistently? What do you mean by this word that is capitalized?”*

Lawyers reading a contract will assume that any word that is capitalized is a defined term with a specific meaning within the contract. It is important that key terms in an agreement are used consistently because lawyers will assume that different words have different meanings. For example, if you are expecting a consultant to produce a report, avoid using different terminology when referring to that report in the contract (such as: “memorandum”, “document”, “description”, “list”).

Action Steps:

- Look for capitalized words throughout the contract and make sure they are defined terms.
- Highlight any words that are capitalized that are not defined terms.
- Start to identify if the contract refers to the same idea or product by a variety of names.

VL: *“What are the most important elements of this relationship?”*

A contract should include all the important elements of the agreement. If something is left out of an agreement, the other side might argue it was not important to the relationship or was intentionally excluded. It is also important to include sufficient detail in contracts so that potential issues of disagreement have been clarified up front. For example, a contract should clearly

state each party’s responsibilities, any deliverables, timelines, terms of payment, confidentiality, and which party assumes which risks.

Action Steps:

- Make a list of the most important elements of this relationship and compare the list with what is included in the agreement.
- Make sure there is sufficient detail to describe these key elements. If there is not sufficient detail, make notes about what you would like added.

VL: *“Can we do everything we say we are going to do? Within the timelines set out?”*

Action Steps:

- Review the agreement again to see whether what you have promised to do (or not do) is reasonable from your perspective.
- Make a list of the obligations you have agreed to – and ask your lawyer whether there are additional obligations created in the contract

VL: *“Are you worried about anything in this relationship? What would lead to disappointment or failure in this relationship? What could go horribly wrong?”*

A lawyer is going to try to think about all the potential risks of your relationship with the other side. Is timing important to you? Are you relying on a specific individual to provide the service? Are you concerned that the final product will not reflect your standards? Are you concerned that the service will discontinue? Think about what might keep you up at night. It is important to make sure these risks are appropriately managed in the agreement itself or through insurance or other means.

Action Steps:

- Make a list of your concerns.
- Check the agreement to see how it deals with those risks (which side has accepted responsibility for those risks).

VL: *“How will disputes be managed?”*

Your lawyer will want you to think about how you expect to deal with the other side in the tough

times. It is important to consider what will happen in the event that you have a dispute. Some contracts specify elaborate provisions regarding mediation and/or arbitration which are often preferable to going to court. However, mediation and arbitration can be very expensive and time-consuming and are not appropriate for inclusion in all agreements.

Action Steps:

- Think about how you are going to manage problems between you and the other side.

VL: “How can we get out of this relationship?”

Although you are just embarking on a new contract or renewing an existing contract, your lawyer is going to ask you how you can get out of the contract. Your lawyer will ask questions like: *Is there a term to the contract? Is there a natural way to end the relationship where both parties can walk away without “terminating” the agreement (that is, at the expiry of the term)? What elements of the agreement are so important that if they are not met, the relationship must end? If there is a breakdown in the relationship — how will it end? What needs to be paid out, returned or continued in case the contract expires, is terminated for cause, or is terminated for convenience?*

Action Steps:

- Look for the term of the agreement and decide whether that seems appropriate in the circumstances.
- Read the termination sections and think about how you can end this agreement if you need out for any reason.
- Think about what will happen if the other side wants to terminate early and what impact that would have on you.

VL: “Have you read the Indemnity/Insurance/Limitation of Liability sections? Have you spoken with Risk Management?”

How risk is allocated in an agreement is critical. Unfortunately, these are often difficult sections to read. You should always go over these sections with your lawyer. Basically, “indemnity” refers to one party agreeing to pay damages of the other party in specific situations. Indemnity payments are meant to restore a party to the state they were in before the loss. Indemnity is often subject to a limitation of

liability and is typically supported by insurance so that the party is able to honour the indemnity. The insurance company for your organization likely has standard expectations with respect to indemnity, limitation of liability and insurance coverage. It is critical that you speak with your insurance manager (often a Risk Manager) if the agreement proposes to deviate from these standard provisions.

Action Steps:

- Read the indemnity/insurance/limitation of liability sections.
- Highlight any sections you do not understand.
- Find out from your risk manager what the standard insurance/indemnity provisions are and compare those provisions with the agreement.
- Inform your risk manager of the kinds of activities contemplated in the agreement and determine whether you have insurance protection.

VL: “Who is going to sign the agreement?”

You will want to make sure that you identify who has the authority to sign the agreement on behalf of your organization. You will also want to make sure that you appropriately inform that person of any issues or problems during the negotiation period.

Action Steps:

- Review your signing authority policy to determine who has the authority to bind your organization to this agreement.

CONCLUSION

Lawyers and their clients can work together to draft and amend contracts so that they are clear and understandable. If you arrive for your first meeting with your lawyer prepared with answers to the above questions and having taken the recommended action steps, you will be well positioned to develop a contract that meets your needs in order to manage your relationships with your partners and vendors (and your lawyer will be very impressed indeed!).

[Editors’ note: Kate Dewhirst is a lawyer with her own practice in Toronto specializing in health law, policy and administration. She provides practical legal advice and solutions on a wide range of health law dilemmas and in particular on privacy, risk management, contracts, public policy, research and physician management issues.]