

Tips for Hiring Lawyers and Actuaries/Financial Analysts

1. Why do you need help from lawyers and actuaries/financial analysts?

Entering into a payment contract with a health plan or other health care provider can be a high-stakes undertaking for which most providers are not well prepared. The transaction can have long-term consequences and, under certain conditions, can expose the provider to liabilities not foreseeable at inception. Poor performance due to unclear requirements or miscalculations can also damage a provider’s reputation for years to come. Even providers with experience in payment contracting can get tripped up by new payment arrangements or subtle differences in language.

Keep in mind that health plans and health systems often have standard contracts that are designed to protect their interests and shift risk and burden to their vendors and provider partners, and often have sophisticated professionals on staff. It is important that you have appropriate advisors on your side as well.

Be cautious about “saving money” by not working with the right specialists. If your organization has attorneys on retainer, ask for their advice and referrals, and be prepared to pay for the supplemental help you may need to avoid unintended exposure or sub-optimal terms. If you cannot afford these professionals on your own, consider partnering with peer organizations that also need this advice and can share the expense. Ask your trade association if they have experts available or can “broker” multiple members to retain the professional needed. This can also be an appropriate request for a local foundation or donor; they want you to build a successful service.

| Why do you need help from actuaries/financial analysts? | Why do you need help from lawyers? |
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| <p>An actuary calculates anticipated health services utilization and costs for populations and sub-populations, and thus quantifies financial risk. A qualified actuary/financial analyst will help you to analyze the payment terms that are offered and to forecast the prospects for gain or loss in a way that an accountant cannot. The analyst may project alternative scenarios: expected case, optimistic case and pessimistic case. They may also identify features of the proposed deal that are most volatile and then suggest ways to mitigate the risk, including how to define the target population.</p> <p>While most people are familiar with the protective role an attorney plays in a payment contract, the role of an actuary/financial analyst is equally protective. The expertise in forecasting and planning goes hand-in-hand</p> | <p>A qualified attorney will help you to truly understand all the obligations and operational consequences of the contract presented by the partner. The attorney will point out risks that go beyond the risks associated with costs of rendering health care, such as professional liability or data security breaches. The attorney will also aid you in finalizing an agreement with your partner that reflects the conclusion of any negotiations, including language to protect you from unnecessary risk and undue burden.</p> <p>If a partner makes demands that are unreasonable for your program and is inflexible on terms, the attorney may counsel against signing at all. Both the attorney and the financial advisor can help you recognize and avoid such situations.</p> |

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| with the protections that an attorney crafts for the contract. | |
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| 2. What expertise will you need from each type of advisor? | |
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| <p>Payment contracting between payers and providers – as well as sub-contracting between providers – happens on a large enough scale nationally that there are specialty professionals who have very precise expertise, such as those that specialize in episodic payment arrangements, dual-eligible populations, or local utilization patterns and laws. Their hourly fees may be somewhat higher than generalists’ but they will give crucial advice and ought to require less hours than a generalist to perform their specific function.</p> | |
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| What expertise will you need from actuary/financial analysts? | What expertise will you need from lawyers? |
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| <p>The actuary/financial analyst must be a specialist in health care, ideally with experience with programs that care for the seriously ill, with an understanding of a palliative care provider’s point of view. Ability to “crunch the numbers” is crucial, not solely to project income and expenses, but also to assess the probabilities and consequences of outlier events. These assessments will also take into consideration the provider’s ability to spread or pool financial risk, as well as consider the appetite for risk, thus helping predict levels of spending necessary for sustainability. Specific knowledge of your state is not essential, although it is definitely helpful if the advisor has, or has access to, utilization data on comparable local populations and transactions that can be used to model the new business arrangement.</p> | <p>It is important to look for an attorney who is not only a health care specialist, but who also has experience in the type of payment contracting you are seeking (e.g., upside risk, bundled payment, capitation). Ideally, the attorney that you choose will have represented many providers in situations similar to yours – preferably even with the payer(s) with whom you intend to engage. The attorney must be well-versed in the health care and health insurance and managed care laws of your state because each state has its own rules governing payer-provider relationships. The attorney also should have experience addressing disputes between providers and payers, since once the contract is executed and the business relationship is under way, any disagreements that arise need to be settled within the terms of that contract.</p> |
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3. How do you go about engaging the professional services provider?

Referrals from Trusted Sources: When searching for attorneys and actuaries/financial analysts, it is best to seek referrals from trusted sources. The first place to start when seeking a professional is within your own organization. Your organization may have a general counsel and a chief financial officer, and these individuals (or key staff in their departments) can not only help you further define what additional expertise is needed, but often have existing relationships with the right professionals.

If an internal legal and financial team does not exist or has little experience in payment contracting, you can consult colleagues. Contact your local trade association and describe the type of professional help you are seeking; they may have some expertise to get you started, and here too they often have existing relationships with law firms and actuaries. Another option is to reach out to contacts at peer organizations.

Once you have a referral – and perhaps you have gathered more than one – you should call or email with a brief description of the payment partnership you are trying to achieve, and ask for the process they suggest you follow. You should also ask them to describe their relevant experience and qualifications. Any reputable advisor must be willing to present credentials, explain fee arrangements, and give references.

Professional Associations: If you do not receive a strong recommendation from a trusted source, it may be worthwhile to solicit proposals from multiple professional service providers to ensure that you get the most qualified resource at a fair price. Associations that represent the professional services providers themselves – for instance, the American Health Lawyers Association, the Society of Actuaries or the Healthcare Financial Management Association – can provide referrals. Keep in mind that if the engagement you are contemplating is not a large one, some well qualified advisors who are in high demand may choose not to participate in an open competition, such as an RFP process with an unknown client.

Professional Services Agreement: Once you have selected the advisor with whom you want to work, you should memorialize an agreement for their services in writing (see sample on the following page). A typical professional services agreement will have the following elements:

- **Objectives:** Having the objectives in writing ensures that both the professional and the client are “on the same page,” and is also a mechanism to confirm that the statement of work will meet the client’s goals.
- **Statement of work:** A description of the services to be performed, including any formal deliverables and deadlines. It may also specify what is not included in the engagement. Not all engagements will warrant a definitive work plan. Instead, they will specify an ongoing advisory relationship that is essentially ad hoc in nature.
- **Personnel on project:** Identities of the key personnel who will perform the assignment, including the designation of the person in charge of the engagement.
- **Fee arrangements:** Information on the amounts of fees and payment terms. Hourly billing is normal for an engagement that has an uncertain set of deliverables and end points. A fixed project fee may be appropriate if those elements can be defined in advance. The agreement should also specify the timing of billing and payments, as well as the nature of any out-of-pocket expenses that will be added to invoices and limitations thereon.
- **Other terms and conditions:** Provisions for confidentiality of information exchanged,

resolution of disputes, parties' liability for adverse outcomes, and termination.

4. How should you work with the advisors?

Finally, when working with your chosen advisors, there are things you can do to make it go well:

- Assign a lead person to represent your organization in the relationship – someone who has the requisite knowledge and the time to give to enable the advisor to perform effectively. This person will supply data and materials requested by the advisor, answer questions, make connections to others if needed, and make sure that work stays on task and on schedule.
- Give the advisor all the information and documentation you have about your own organization and the proposed partner relationship that may be relevant to the assignment. Be prepared to ask your proposed partner for additional information and documentation that the advisor may seek.
- Engage in frequent and substantive communication, to ensure that your expectations are being met and there will be no surprises.
- Give feedback; in particular, express any lack of understanding or dissatisfaction promptly and plainly and expect a constructive response.

SAMPLE PROFESSIONAL SERVICES AGREEMENT

This Agreement ("Agreement") is made this ____ day of ____ 20__, by and between _____ ("Consultant"), and _____ ("Client"). Client requires Consultant's services to aid Client in establishing business relationships with one or more health care payers that may entail the assumption of risk.

Services to Be Performed. Consultant shall assist Client in evaluating and negotiating one or more contracts with health plans/insurers. *[Add description of specific tasks, deliverables and time frames.]*

Payment. (a) Professional Fees. Consultant's hourly billing rate is \$NNN.¹ Consultant will submit invoices monthly. Each invoice will display the hours of services performed on Client's behalf, by day, along with concise explanation of each service. Consultant's aggregate fees under this engagement will not exceed \$X,XXX without the prior approval of Client. (b) Expenses. Consultant will be entitled to reimbursement of reasonable out-of-pocket expenses directly incurred while performing services on behalf of Client. Mileage will be reimbursed at the current IRS allowable rate. No markups or administrative fees will be paid on expenses. (c) Payment. Client will pay Consultant's undisputed invoices within thirty (30) days of the date of receipt.

Confidentiality. In connection with services performed pursuant to this Agreement, Consultant will be supplied or review confidential and proprietary information concerning Client and third parties. Consultant shall not at any time during or subsequent to the term of this Agreement, directly or indirectly, disclose any such proprietary or confidential information of Client or of third parties.

Assignment. Consultant may not, in whole or in part, assign, subcontract or otherwise transfer its interests and/or obligations under this Agreement, to any person, firm, partnership, corporation or other entity (including by operation of law, judicial process, or otherwise) without the prior written consent of Client.

Liability; Indemnification. Consultant agrees to indemnify and hold harmless Client and its directors, officers and employees from and against all taxes, losses, damages, liabilities, costs, and expenses including attorneys' fees and other legal expenses, arising directly or indirectly from or in connection with: (i) any negligent, reckless, or intentionally wrongful act of Consultant; (ii) any breach by Consultant of any of the covenants contained in this Agreement; (iii) any failure of Consultant to perform the Services in accordance with all applicable laws and regulations; or (iv) any violation or claimed violation of a third party's rights resulting in whole or in part from Client's use of the work product of Consultant under this Agreement.

Work for Hire. All works of authorship that Consultant prepares under this Agreement shall be considered "work for hire" as that term is defined and interpreted under the United States Copyright Act of 1976 (and any amendment thereto) and shall belong exclusively to Client.

Relationship of the Parties. This Agreement does not create any employer-employee, agency or partnership relationship. As an independent contractor, Consultant fees and expenses shall be limited to those expressly stated in this Agreement. Consultant shall have no authority to bind Client or act as its representative in any manner not expressly set forth in this Agreement. Consultant is not eligible for employee benefits from Client. Consultant understands that no deduction or withholding for taxes or contributions of any kind shall be made by Client. Consultant is responsible for the payment of all taxes or contributions for unemployment insurance or pensions or annuities or social security payments which are measured by the remuneration paid to Consultant.

¹ Insert rate card if multiple Consultant personnel will be deployed. Or, specify a fixed project fee if that is what the parties agree upon. In case of a fixed fee, the provision requiring submission of time records can be deleted.

Jurisdiction. The laws of the State of _____, without reference to its choice of law rules, shall govern this Agreement.

Termination. Either party may terminate this Agreement at any time for any reason by giving the other party thirty (30) days' written notice of termination, provided that any payments already earned will continue to be payable as if the Agreement were still in force.

Entire Agreement. This Agreement is the entire agreement between the parties, and supersedes all previous correspondence, promises, representations, and agreements, if any, either written or oral. No provision of this Agreement may be modified except by mutual written agreement. If any provision of this Agreement is invalid or unenforceable under any statute or rule of law, the provision is to that extent to be deemed omitted, and the remaining provisions shall not be affected in any way.