

# MANAGED CARE

## Contracting & Reimbursement

# ADVISOR

APRIL 2005

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- Plans may require you to give up legal rights with respect to class-action law suits against them
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## Continuous discount agreements: Consider these three areas before signing on

If you treat plan members out of network, a repricer (or other agent of a payer) may have already asked you to sign an agreement that gives the repricer a set discount off of your billed charges on an ongoing basis.

Although repricers have typically asked for a one-time discount for a plan member treated out of network, more repricers are offering an ongoing discount agreement, which is called a continuous discount agreement (CDA).

If signed by the provider, the CDA creates an ongoing contractual relationship between the provider and repricer and saves them from negotiating a discount each time the provider sees a plan member out of network.

If you're unsure about what to do if you're approached by a repricer to sign a CDA, remember that you

- currently have no contractual obligation to provide a discount on out-of-network services to a plan member
- don't have to agree to provide a discount on future business from that repricer. However, giving a discount may be financially worthwhile for you and may help you avoid the administrative hassle of regularly negotiating discounts with the repricer for plan members who you treat out-of-network.

To help you prepare for dealing with a request to sign a CDA, below are some of the issues you need to review. We'll also tell you how to protect yourself if you're considering signing one.

### Defining CDA

A CDA sounds like a plan contract, but it isn't—it's not made with a plan and doesn't involve the typical contract requirements, says **Tina Ellex**, an executive with Coalition America, Inc. (CAI), a repricer that uses CDAs. "There's no quality assurance, credentialing, or similar obligation, and we're not creating a PPO network. The relationship is strictly financial," she says.

According to Ellex, more than 35,000 providers have signed CDAs with CAI, up from 4,000 just four years ago.

Most CDAs are short documents. In some cases, they consist of just a sentence or two added to the form that is typically used to seal a one-shot discount deal between the repricer and provider. The sentences ask the provider to sign in a designated space if it wants the same discount applied to future deals. "These aren't complicated contracts," says New Jersey reimbursement consultant **Gregg Leff**.

The CDA generally doesn't promise prompt payment. But it often leads to

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faster payment to providers because the discount no longer must be negotiated. CAI instituted CDAs as a way to distinguish itself from other repricers and improve its relationship with providers, says Ellex.

CDAs reduce a repricer's dependency for discounts on others' contracts, such as between a PPO and payer or PPO and repricer, says Leff.

"If there's a direct contract between a repricer and a provider, it's harder for a provider to challenge the discount because the provider authorized it in writing," he explains. "It also shows that the repricer wasn't trying to engage in silent PPO activity against the provider."

### To sign or not to sign

The following are three questions to ask yourself when deciding whether to sign a CDA:

**1: Will a CDA increase my business?** Sometimes you know that the repricer's request for a discount is only a one-shot deal for a particular member and that signing a CDA holds no benefit for you. Also, a repricer typically won't or can't guarantee that signing a CDA will increase the volume of your business. But a CDA could, in some circumstances, potentially increase your business.

For example, a provider that signs a CDA with a repricer may get increased visibility within that company and a reputation for working with payers, says Ellex. So the repricer may steer more future business to that provider.

"CAI occasionally sends letters to its employer clients about the negotiation-friendly providers who have signed CDAs," she says.

If you don't agree to any discount, the repricer may just send future business to your competitor. If you agree to a one-shot deal but not to a CDA, the repricer may or may not contact you again.

**Tip:** You don't have to give a discount, let alone sign a CDA. Some providers have a policy of never agreeing to a discount through a repricer when providing services out of network. Others may not have to agree to a discount to get the business. And others would rather deal with discount requests from a repricer on a case-by-case basis, rather than sign a CDA.

**2: Would a CDA reduce my administrative burden?** Some providers sign CDAs because they reduce demands on staff time and administrative hassles. "The discount becomes automatic with a CDA. You don't have to negotiate each discount and then bill separately," says managed care analyst **Jeffrey Bowden**.

It's easier to keep track of the discount in one CDA than 10 different discounts at different rates with the same repricer, notes Ellex. Also, your staff will no longer be deluged with faxes that each set out a proposed discount for a different member, says Bowden.

**3: Will it improve my collections?** If you agree to sign a CDA, it may

affect the way you collect payment for your services—and how successful your collections are.

For example, if you don't agree to a discount, you'll probably bill the patient directly. So payment may be harder to collect.

Yet signing a CDA may also help you get paid faster because there's no negotiation to get through and the discount is already in the repricer's computer system. ■

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## Six ways to protect yourself if you're considering a CDA

If you decide that signing a continuous discount agreement (CDA) may be worthwhile for you, take the following steps:

### 1. Check for discount double dipping.

By definition, CDAs are for situations in which the provider is out-of-network. But occasionally a repricer will offer a CDA when the member or members are already entitled to a discount through a PPO, for example.

In one case, a hospital signed a CDA and later discovered that the member was part of a network to which the hospital belonged. The hospital's claim was ultimately reduced by both the PPO and the CDA discount.

That means you must review a proposed CDA agreement carefully to make sure it applies only to services you provide out of network. If the CDA doesn't address this situation, get the repricer to agree in writing that the CDA discount won't apply to any member who was already entitled to a discount. Use the following language:

#### Model language



*In the event that it is determined at any time that a patient is covered by and entitled to a discount from [Provider] through some other contract or other arrangement, then only such discount shall apply, and the discount agreed to herein shall not apply.*

### 2. Designate one person to be in charge of out-of-network discounts.

Allow only one person to have the authority to negotiate out-of-network discounts and decide whether to

sign CDAs, recommends North Carolina consultant **Adel Miles**. "You want only one person to coordinate these discounts," she suggests.

Miles recounted a situation in which a provider unexpectedly found itself obligated to give several side discounts on services because an unauthorized employee had signed CDAs that came in by fax or agreed over the phone.

"You might be able to argue that the unauthorized employee didn't have the authority to agree the discount, but that would be difficult to prove in court," says Miles.

Also, if only one person handles CDA requests, that person will know whether you get repeat business from a particular payer through a repricer. With that information, the person can better assess whether a CDA would be worthwhile or whether you should contact that payer about direct contracting, Miles notes.

**3. Negotiate the discount.** Repricers typically ask for a discount of 10% to 30% off of the provider's billed charges in a CDA. But you don't have to accept that amount, says Bowden. "Providers should always negotiate only acceptable discounts. Repricers are flexible and sometimes will agree to accept a discount of just 5% to 8% off billed charges," he says.

### 4. Know how to terminate the CDA.

Because CDAs are short, simple contracts, they may not have certain clauses vital to a contract—such as one that lets you terminate it. So when you review a CDA, make sure it says how you can get out of it. If not, add language that does so. For example, simply state that either party can

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## PROTECT YOURSELF FROM CDA (CONTINUED FROM P. 3)

terminate the CDA upon written notice to the other party.

Use the following sentence:

**Model language** 

*Either party may terminate this CDA at any time upon written notice to the other party.*

*If you prefer, you can indicate that a party must give a certain amount of notice (e.g., 30 days) before it's effective.*

**5. Know what the CDA covers and who will pay you.** Confirm how broad the CDA's coverage is. For example, if you're in a medical group, does the CDA cover only the physician treating the member that prompted the CDA offer or every physician in the medical group? Also, does the CDA cover just this member, all members from this payer, or all members from this repricer, regardless of the payer?

You also need to know who will pay you—the repricer or the payer—and whether the member will owe deductibles. If it's the payer, obtain contact names

and phone numbers in case a problem arises with the payment, suggests Miles. And find out the deadline for getting paid, including the penalties, if any, for late payment. If there's a copayment involved, determine how much you should collect from the member.

**6. Make sure the CDA doesn't set unacceptable obligations for you.** Although most CDAs we've seen are brief and simple, some CDAs impose obligations on providers. For example, a CDA may bar you from balance billing the member. If you would otherwise be able to balance bill the member, you may not want to give up that right. If you can't live with the obligations in the CDA, don't sign it. ■

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**MANAGED CARE IN COURT****Breach-of-contract suit to proceed against PacifiCare**

A man whose diagnosis and treatment for Lyme disease was delayed for months can sue his HMO for breach of contract and bad faith, according to a California appellate court in Los Angeles, *Business Insurance* reported February 21.

According to the February 10 decision, Howard Wynne, MD, of the Cedars-Sinai Medical Group in Los Angeles, was Steven Kotler's primary care physician (PCP) under PacifiCare's subscriber agreement. In December 2000, Kotler made an appointment with Wynne complaining about flu-like symptoms.

Tests administered by Wynne, which did not include one for Lyme disease, were negative.

Kotler asked for a referral to an infectious disease specialist but was told he could not have an appointment until six weeks later, in part because the specialist saw PacifiCare patients only one day per week.

Kotler then obtained the name of an infectious disease specialist not associated with PacifiCare, whom he saw on March 14, the decision says. Five days later, after a test determined Kotler had Lyme disease, he began his successful treatment of the disease.

After PacifiCare refused to pay his specialist's charges,

he sued the insurer for breach of contract and breach of the covenant of good faith and fair dealing.

The specialist's charges are not reimbursable under the PacifiCare agreement because Kotler did not have an emergency medical condition, according to the decision.

However, Kotler still has grounds to sue. "The obligations of a contract here, to provide the plaintiff with medically necessary services of specialists, as authorized by the PCP, must be performed either at a time the contract specifies, or within a reasonable time," states the decision. "What constitutes such a reasonable time ordinarily presents a question of fact, dependent upon the circumstances of the case."

"Given the history of the plaintiff's illness, his condition, and the palliative failure of the care already provided under PacifiCare's aegis, a six-week wait for an appointment following Dr. Wynne's referral could well be found unreasonable," the court ruled. ■

*Steven Kotler v. PacifiCare of California et al.; Court of Appeal of the State of California, Second District, Division Eight, No. B171654.*

## Assess risks before letting your contract negotiator work for another provider

### Four tips to protect yourself and your facility from violations

Providers that employ savvy, experienced managed-care-contract negotiators often want to let them work for other providers. For example, a hospital may want to help its in-house contracted radiologists obtain higher reimbursement, so it has its managed care department review a few plan contracts for the radiologists.

It's also possible a local health system may want to agree to a physician specialty practice's request to help it obtain better plan deals so it doesn't have to leave the community. Or another example is a home health company that doesn't believe it can financially justify having a full-time contract negotiator may consider "renting" its negotiator out to other providers for a few hours per week to defray the costs of the negotiator's salary.

But there are hidden risks in letting your employees negotiate plan contracts for others, whether you're doing it for altruistic, goodwill, or financial reasons. Providing this help could cause you to violate your plan contracts—or federal law—unless you proceed with caution, experts say.

#### What are the risks?

➤ **Contract confidentiality violations.** The negotiators you share with others are your employees, not independent consultants, and they know the details of your contracts. Plans could accuse you of violating the confidentiality clause in your contracts with them, says Ohio attorney **John M. Kirsner**.

"If the negotiator uses her knowledge of a plan, gleaned from her negotiations on your behalf, when negotiating a contract for another provider, the plan could accuse you of violating your contract's confidentiality clause," he explains. "You're then at risk that the plan will terminate your contract or sue you.

And this certainly won't help the other provider in its dealings with the plan." In fact, the plan may also sue the other provider on an "interference with contract" theory.

**Tip:** There are times when this problem doesn't arise, such as when different providers use the same independent consultant to negotiate contracts with a plan. Independent consultants may not be as privy to inside information as employees, and they aren't normally bound by the provider's and plan's contract to keep the information confidential.

Some consultants may also be bound to ethical or legal duties to maintain client confidentiality. And a savvy provider may have the consultant sign a separate confidentiality agreement.

➤ **Anti-kickback violations.** Sharing your negotiator could also violate the federal anti-kickback law, warns Kentucky attorney **Jim Dietz**. This law bans providers from making any kind of payment in exchange for the referral of patients to them.

So if you provide negotiation services either at no cost or for less than what the other provider would have to pay on the open market, and that provider is in the position of sending you patients, you can both be found guilty of violating the law.

"If a hospital is helping out its radiology department physicians, that's less risky because those physicians typically don't refer patients back to the hospital. But if the hospital is doing it for any other nonhospital-based physician or referral source, the activity could be seen as an inducement to get patients in violation of the law unless it's structured to fit within one of the law's safe harbors," Dietz says.

"Furthermore, there may be anti-kickback risk if the particular facts indicate that a certain provider is targeted for assistance," Dietz says.

For example, if a hospital on its own accord offers its negotiator to a cardiology group in order to gain the group's favor and, therefore, referrals, there may be a problem even if the arrangement otherwise complies with a safe harbor.

"This is because the OIG has indicated, in certain cases, that merely granting an opportunity may constitute prohibited remuneration," he says.

**Tip:** The law doesn't apply only to hospitals; many providers are referral sources for each other. The penalties for violating the anti-kickback law are severe, including fines, exclusion from the Medicare and Medicaid programs, or even jail.

➤ **Antitrust violations.** Letting your employee negotiate on behalf of another provider can put you at risk of violating antitrust laws. If you and the other provider are in different

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**ASSESS RISKS (CONTINUED FROM P. 5)**

fields and the negotiator links your deals in some way, it could be seen as an illegal “tying arrangement.”

If you provide negotiations for providers in your specialty and apply your knowledge of reimbursement rates, you can be accused of illegal price fixing, warns Kirsner. “And in today’s environment of heightened antitrust scrutiny, plans are quick to report to the Federal Trade Commission any provider it thinks may be violating the antitrust laws,” he says.

**How to protect yourself**

Many experts discourage providers from letting their managed care negotiators work for other providers because the risks can outweigh the benefits. But if you want to consider it, take these steps to protect yourself:

**1. Get an attorney’s opinion.** Check with your attorney and get his or her opinion about the legal risks involved. Be specific and candid when describing the proposed arrangement, or the advice won’t be worth much. For example, if you tell your attorney that you just want to help your anesthesiologists on a one-time basis, but instead intend to offer your negotiating expertise to everyone on your medical staff, you’ll obtain a legal opinion that won’t apply—and won’t protect you much, warns Kirsner.

“It’s much less risky to negotiate on behalf of your in-house physicians or in a one-shot unusual situation, because there’s less of an antikickback threat,” he says.

**2. Ask your compliance officer for approval.** Make sure your compliance officer knows what you’re considering and is okay with it. “You want to enlist your compliance officer. You may even want him [or her] to attend meetings and training sessions with the other provider or at minimum be aware of negotiations,” says Kirsner.

**3. Review plan contracts.** Check your plan contracts to see whether they help or hurt in any way. For instance, some contracts require or encourage a provider to help a plan negotiate with affiliated providers so the plan can create a gapless network. If a plan contract contains that type of language, the plan will have a harder time accusing you later of doing something wrong by helping other providers with negotiations, says Kirsner.

On the other hand, if a plan contract has a strong confidentiality or gag clause, the plan may be more apt to

accuse you of violating it if you go forward.

**4. Charge fair market value and sign a services agreement.** If you decide to go forward, you must comply with the anti-kickback law. In most cases, that means you must charge the other provider the fair market value of your negotiating services. To set the fair market value, have your financial staff determine an hourly rate for negotiating services, including costs of employing the negotiators and some profit, and keep track of the hours spent, says Dietz.

In order to fall within the anti-kickback law’s safe harbor and avoid penalties—specify the services and fees in a written personal services agreement with the other provider. “This can be part of an overall agreement the providers have with each other or a separate agreement, but it needs to be in writing,” Dietz says. ■

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## NEGOTIATION TIPS

### Use your own form contract for successful negotiations

Plans typically use their form contract as the starting point for negotiations with providers. But you're at a disadvantage from the start of negotiations because most of these contracts are biased in the plan's favor. It will be virtually impossible for you to get rid of every burdensome clause, and you likely will have to give up provisions if you want to get any compromises.

To even the playing field during the negotiation and final contract process, bring your own form contract to the negotiations, say experts. You won't get the plan to take its form off the table, but you'll be in a stronger position to get the plan to compromise.

#### How strategy helps

Using your own contract during negotiations helps you because it encourages the plan to compromise more, says **Robert Barber**, head of managed care contract compliance for a North Carolina health system. "When there are two contracts on the table, the plan is more likely to consider what you have to say because you can offer alternative language," he explains.

Rather than making changes to one form contract, he says, you and the plan reconcile differences between the two form contracts.

Surprisingly, many plans are willing to work with two contracts to hash out the final deal. Barber says his system routinely gets plans to negotiate, using both the health system's form contract and the plan's form contract. And because his system's form contract is reasonably balanced, on several occasions the plan has used that form alone as the basis for negotiations. Only one plan refused to even look at the form contract Barber was offering.

Don't assume that you have to be a large provider to use this tactic. Even a small provider has some leverage and should offer a form contract, says Barber. "You may not get as many concessions as a large provider would, but you won't get much of anything if you don't put a contract on the table. At least it opens the discussion," he says.

**Tip:** Start the negotiations by reading the two contracts to identify the language that is agreeable to both parties. This starts the negotiations with a positive rather than controversial tone.

#### Creating your own form contract

Finding or creating a form contract isn't as hard as it may seem. Here are four steps to help make it happen:

**1. Look at other contracts.** Even a small provider is likely to have several contracts on file to use as a starting point, says South Carolina attorney **Lawrence Laddaga**. For example, you may have attended a seminar that included a form contract in the seminar materials. Also ask your attorney or consultant, who may have put together a form contract or have some samples.

**Tip:** The American Medical Association (AMA) and the American College of Emergency Physicians (ACEP) have model form contracts on their Web sites. For the AMA's form, go to [www.ama-assn.org](http://www.ama-assn.org). In the search box, type in "AMA model managed care contract," and click "enter". Scroll down to the contract.

**2. Be reasonable.** You need to be clear about what you want, but don't push the pendulum too far in your favor. If your form contract is more favorable to you than to the plan, the plan may agree to additional concessions just to reach a compromise. But if your form contract is unreasonable, a plan may not take it seriously, warns Barber. Although his health system's form contract includes several clauses that plans want, it's more conducive to your needs than the typical plan contract.

**3. Get an attorney to review the form.** To be safe, ask your attorney to review your draft form contract to make sure it has all of the provisions required by your state and all of the protections you may want. Also, if you use a form contract from another source, such as ACEP, make sure you drop clauses that don't relate to you.

**4. Consider state approval.** To give your form contract more credibility, see if your state insurance department will review and approve it.

Barber was able to get the North Carolina Department of Insurance to sign off on his health system's contract, only because the system had an HMO license at the time. Your state's department may have different rules. "State approval makes our form contract more an equal to the plan's form contract," he says. ■

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## Internet forums: Three rules to reduce your online risk

Part one of a two-part series.

The Internet provides valuable resources for providers to seek advice from colleagues and find out how they handle negotiation, coding, and reimbursement problems. There's no reason to stop using these resources, as long as you're careful to reduce the risk of how you participate in online forums. Neil B. Caesar, Esq., president of the Health Law Center, offers three rules to help you do that:

**Rule #1: Use discretion.** Be careful about what you post online. For example, don't reveal how you code specific services—if you do and you're wrong, you've drawn attention to the fact that you bill improperly. If you post a question or answer, post it in general or hypothetical terms. Don't say, "We always use this code and always get paid." Instead say, "Try using this code," or "This code may apply," suggests Caesar.

Some listservs let participants post legally sensitive questions anonymously through the listserv moderator. The moderator then asks responders to post directly to the listserv so the questioner can see the responses. Also consider using that approach.

And don't assume that a private response is safe. People with the right software can intercept Internet transmissions. Or someone else may have access to your computer. Also, you could inadvertently hit "forward" or "reply all" and send a message to hundreds of unintended recipients. So limit what you write about to what anyone could read.

**Rule #2: Watch your wording.** It's not just what you say that matters but also how you say it. Careful wording is essential. For example, you can be truthful about your frustra-


tion with a plan without resorting to name-calling, says Caesar. Or suggest that everyone talk to your trade association about a plan's low offer, but don't demand that everyone reject the offer.

Above all, don't share your unfiltered thoughts online as though no one could be offended. "Pretend that a plan representative is in the room with you watching what you post. If you would be uncomfortable or ashamed saying what you're saying face-to-face to that person, don't type it and send it out," Caesar says.

**Rule #3: Don't use the Internet for sensitive issues.** If you're dealing with an issue that hinges on specific circumstances or is legally problematic, don't ask for advice online—even hypothetically. Instead, consult your attorney, and obtain your advice privately. If you/your attorney want to seek others' advice online, your attorney can do that by posting the question on an Internet forum using his or her name and e-mail address to protect your anonymity, says Caesar. ■

**Coming next month:** Assess your risk with six common situations that could get you into hot water when posting comments online.

**Don't assume that a private response is safe. People with the right software can intercept Internet transmissions. Or someone else may have access to your computer.**

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