

Contracts:

The Good, the Bad, the Ugly

By Pam Fitch

There was a time not so long ago, when Massage Therapists joined existing massage therapy practices with a nod and a handshake. Rarely was there a written agreement, just a verbal acceptance of the "split" and an indication of what equipment the therapist needed to bring to the treatment room.

For better or worse, those cavalier days have gone as the numbers of Therapists has increased exponentially. More often than not, Therapists now sign detailed contracts and they are binding – unless what is being asked is so outrageous as to be unenforceable. Frequently, the contracts are written in "legalese", which may confound and confuse those with little experience in interpreting legal clauses. Consequently, Massage Therapists may discover upon leaving a clinic that, what they thought constituted their working agreement, is not reflected in the actual contract they signed. This can jeopardize client relations and future business prospects.

This brief article is designed to help you achieve a contract that is in your best interests.

But before we examine some typically problematic areas, here are the basics on contracts.

There are two main areas that need discussion and agreement before you sign your contract. One deals with the disposition of files or how the files will be stored after you leave. The other depends on how and where you are able to re-establish yourself after you leave a clinic. When considering these issues, pay attention to the concerns of the clinic owner. If you demonstrate that you appreciate and understand their concerns, you may pave the way to a healthier appreciation of your professional issues.

Disposition of Files:

"...7.2 The Associate is hereby prohibited from contacting any clients through any means of communication outside treatment time. All communication with the clients shall be done from the Clinic and shall relate strictly to appointment times and re-scheduling..."

"...7.3 The Associate promises not to keep any secondary personal or contact information in their possession related to any client..."

"...7.7 The Associate understands and agrees that upon termination of this contract with the Clinic, they are not entitled to carry with them any copy or copies of the clients' files, nor are they allowed to ask for a copy..."

Elements of a Contract

In order for a contract to be binding, three elements must be present.

1. Offer
2. Acceptance
3. Consideration

If these three elements exist, then either verbal or written contracts are acceptable.

Verbal agreements may occur with face to face or phone contact.

Written contracts may take the form of emails, memos, letters of agreement or formal contracts.

The disposition of client files is often a contentious and little understood issue. Many Therapists believe that if **they** are the treating professional, then the files should go with them when they leave a clinic. This is not necessarily true.²

The files are always the property of the client. Ideally, the client should be informed of the Therapist's move and asked how s/he would like to store the files. Unfortunately, this does not always happen and clients are

Many therapists believe that if they are the treating a professional, then their file should go with them when they leave a clinic. This is not necessarily true.

In one recently reported case, a Therapist who gave the 2 weeks notice required by her contract, was immediately asked for her key to the clinic and shown the door. She had no access to client files and was told not to come back. Subsequent telephone inquiries to the clinic were met with vague comments that she had "moved" but the receptionist was unsure where. The only person who loses in this circumstance is the client – who cannot depend on the Therapist to be available when needed.

When these scenarios play out, it becomes obvious that the clinic owner is concerned that the therapist may take away business from the clinic. But when the clinic withholds client contact information from the Massage Therapist, it puts the Therapist at risk of professional misconduct because these actions would be deemed abandonment of the client.³

This is one of the most essential issues to iron out before signing a contract. Much like a marriage contract, it is easier to leave a clinic when the means for separating are well understood at the outset of a contract. How you decide on disposing of files may tell you a lot about what you can expect from this working relationship between clinic owner and therapist.

"The disposition of client files is often a contentious and little understood issue. Many therapists believe that if they are treating a professional, then the files should go with them when they leave the clinic. This is not necessarily true."

all too often left in the dark if a Therapist's contract is terminated. If a clinic owner is responsible for a referral of a client to a therapist, then the owner may feel that s/he should keep the files and may not pass on the forwarding contact information for the departing therapist. This can potentially explode into a battle royale between the contractor and the massage therapist who wants the clients to know where s/he is moving in order to fulfill the policy requirements of the CMTA.

The disposition of client files is often a contentious and little understood issue.

A compromise that many Therapists suggest when negotiating this part of their contract is to suggest that the clinic retain all the files but that the Therapist be given **full** access to the files upon request, in order to fulfill med-legal requirements and to contact former clients should the need arise. If the contract is accepted in good faith and the contractor trusts that you will not try to take business away from him/her, then this is often acceptable to both parties.

Leaving a Clinic

"...8.3 The protective zone of non-com-

petition is set at 12 kilometers radius from Main Road to Modelbrook...”⁴

Another way that clinic owners may attempt to protect themselves from future competition with a Massage Therapist who has left a clinic is to stipulate a “protective zone of non-competition” within which the therapist is forbidden to work. If the zone is reasonable (1-3 km radius), then it is expected that the Therapist will not work within close proximity and become a competitor to the original clinic. If the zone is greater than 5 km, then this aspect of the contract may become problematic when the Therapist leaves. Many municipalities are less than 5 square kilometers. If a clinic in a small town set 5 km as the zone, the Therapist would be accepting not to work in the municipality at all. A therapist might choose to sign a contract with a large zone of non-competition set at more than 10 km – but if the contract were to go to a court challenge, then the judge could rule that this is an unreasonable distance and throw out the case.

Generally, courts are loathe to become involved in contract disputes unless it is clear that one of the parties did not have the capacity to make a decision or if the contract was accepted under duress. The courts might take exception if it appeared that “undue influence” was put to someone to get them to sign a contract or if there appeared to be fraudulent or unconscionable terms. But in the end, the likelihood of you taking a clinic owner to court may depend on how much such a settlement is worth. Often, parties to bad contracts are forced to simply walk away because the legal costs are prohibitive.

Exclusivity and Other Pesky Clauses

“...8.1 The Associate’s services are exclusive and the Associate shall not be entitled to enter into contracts for service with other proprietors without the written consent of the Clinic.”

You should not confuse your career with your life.

— *Dave Barry*

“...8.2 In the event that the Associate desires to provide any services at any office, clinic, barbershop, beauty salon, hairstylist, nail salon, chiropractor, medical centre, or hospital or physiotherapy outlet or franchise, garage or bakeshop or any place of activity for profit or non-profit, the associate shall be banned and prohibited by this contract from doing so for a period of one year from the date of release of this contract...”

Exclusivity draws into question one’s status as an independent contractor.⁵ If one signs a contract as an independent contractor, this should not preclude a Therapist from working in another location. Requirements for exclusivity are not necessarily wrong but there should be significant reason or compensation for such a clause.

It is also important that Therapists determine whether the contract is one of an employer/employee relationship or one of hirer/independent contractor. If the contract sets out employee expectations such as designated hours for lunch or breaks and limits vacation time, as well as requiring exclusivity and adherence to an employer code, it may well be in the Therapist’s best interest to

become an employee. In that case, the employer is responsible for legislated employment standards that require EI, CPP and Income Tax deductions. The employer must give reasonable notice for termination and may expect loyalty and fidelity from the employee. At the same time, the employee loses the right to claim independent contractor status so there will be fewer tax deductions unless you are self-employed elsewhere.

¹ Excerpted from an actual massage therapist’s contract putting the therapist at considerable risk of professional misconduct.

² CMTO Policy #23 on Record Retention, established 1996, revised 2000. Also refer to The Massage Therapy Act, Ontario Regulation 544/94, Part III, Records for legislative guidelines

³ CMTO Policy on Record Retention, established 1996 and revised 2000

⁴ See Footnote 1

⁵ See Footnote 1

⁶ Amanda Baskwill, “Independent Contractor or Employee: Understanding the Difference”. *The Body Politic*, Dec. 2004, p.11

⁷ Power Point Presentation by Don Burke, partner and specialist in business law in Kelly, Howard and Santini, Ottawa, November 2004.

Remember! Before you sign on the dotted line...

If you want a contract that’s in your best interests, and one that reflects your professional values, ethics, and standards, make sure you consider each these points carefully.

- Seek independent legal advice
- Be aware of common practices in clinic/spa contracts
- Read the entire contract before signing
- Be familiar with legislation and CMTO policies
- Ask questions and seek clarification⁶

Common Misconceptions about Contracts

1. **If a contract isn’t fair, then it isn’t legal.** Not true. Unless a contractor asks you to do something illegal, or to go against your professional obligations and standards of practice, the contract is considered binding.
2. **If I didn’t understand the contract, then I can break it.** Can you? If you signed the contract, then you are bound to it. Take any offer you get to another, more experienced professional such as a lawyer or an accountant for their opinion. If you have questions, the time to ask them is before you sign.
3. **If a contractor asks you to do something that you believe goes against your Standards of Practice, then the contractor should be reported to his/her professional college.** Not necessarily. If the contractor asks you to do something and you are not comfortable complying, then it may be as a result of the contractor not appreciating your professional obligations.

Do not assume that a bad contract equals a bad contractor. Just make sure you clarify your mutual understanding of the agreement before you sign.

4. **If you get an offer to work, you must sign the contract immediately.** Wrong. Reputable clinics will likely expect that you will take a day or two to consider their offer. On the other hand, some clinics may offer you a job and expect that you will sign the contract on the spot. They may even tell you that you cannot take a copy of the contract away from their office. If that is the case, then it’s important to insist on having 24 hours to think about it. If the clinic owner won’t give you a copy to take away, think long and hard about the clinic’s apparent level of trust. If there is suspicion or wariness at the outset, it will likely not improve the longer you work there.