Rx FOR RISK
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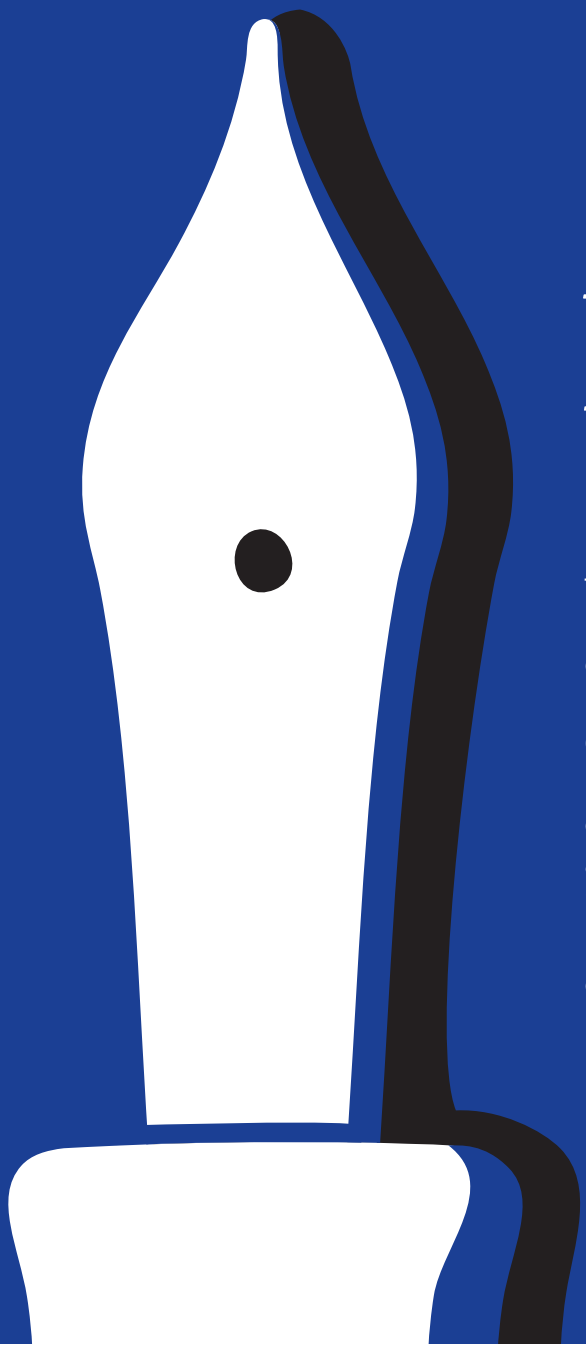
Rx FOR RISK

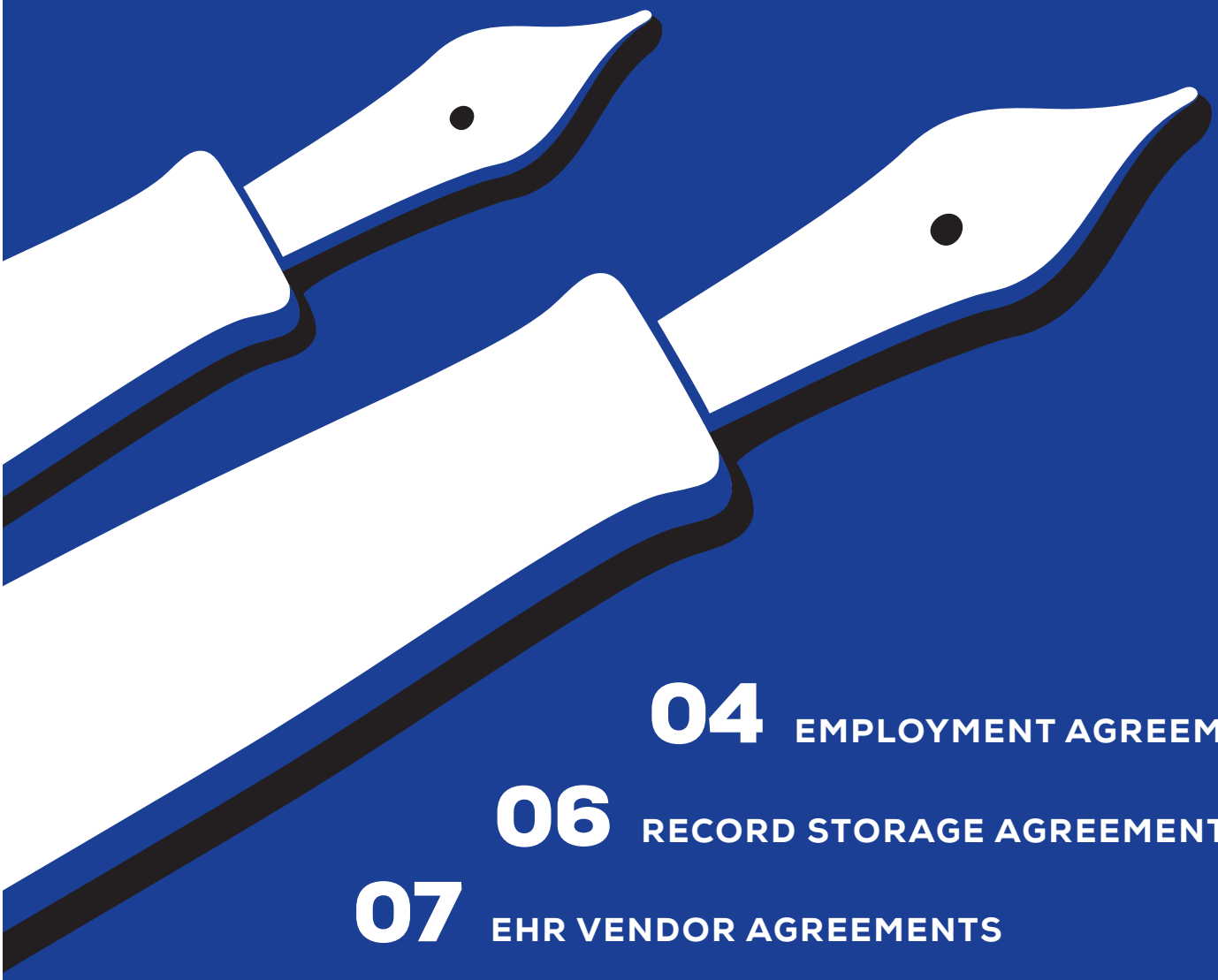
Addressing risk management issues and concerns in the field of psychiatry



Liability Exposure From Contracts

In this issue of Rx for RISK, we venture off the beaten path and take a look at the topic of contracts. While not a traditional risk management topic, contracts often contain provisions that can increase a physician's liability exposure or otherwise negatively impact his or her practice.

On the other hand, certain agreements – such as those used with patients and other treaters – may be used to enhance communication and understanding and thus, actually lower a physician's liability exposure. With this in mind, we offer information on various agreements psychiatrists routinely enter into and ways in which to ensure that their interests are protected.



EMPLOYMENT AGREEMENTS

As young psychiatrists leave their residency and fellowship programs and experienced psychiatrists consider becoming employed by others, all must contemplate signing an employment contract. Certainly salary is a primary concern but there are other components that are equally important and often overlooked. The following is a non-exclusive/non-exhaustive list of things to keep in mind before you sign on the dotted line.

Have a written agreement. While those who are becoming full-time employees typically have a formal contract, those who are independent contractors often do not. This can be especially problematic when the relationship ends.

Have a clear understanding of your duties. Duties "as assigned" or "practice of psychiatry" leaves a lot of room for interpretation and for an employer to take advantage of you. Are you going to be expected to supervise others? What are your responsibilities for taking call? Will malpractice insurance cover these duties? (You would be surprised how often people engage in an activity that is not technically covered under their insurance policies.) Does your contract allow you to engage in outside activities that you may be interested in pursuing such as teaching or volunteering your services?

Avoid indemnification/hold harmless clauses. Typically these clauses will look something like this:

> ***"Each party agrees to indemnify and hold harmless the other party from any claims, liabilities, losses, damages and expenses asserted against the other party and arising out of the indemnifying party's negligence, willful, misconduct, and negligent performance of or failure to perform, any of its duties or obligations under this agreement."***

What this means in plain English is that in the event any of your actions – or inactions – cause the entity/individual for whom you are working to be sued, you will be obligated to pay any settlements or verdicts rendered against them. And even if they prevail, you will be required to pay their attorneys' fees. This sort of provision is far more likely to appear in an independent contractor agreement than a regular employment contract. They are problematic because malpractice insurance typically won't cover liability assumed under a contract with another and thus, any monies owed must come out of the physician's own pocket. It is recommended that you have these provisions stricken from the agreement. Do not be fooled into thinking that you are in any way protected by a mutual indemnification clause whereby the other party agrees to indemnify you under the same circumstances. If you carry malpractice insurance, you are already protected.

Know the term of the agreement. How long is the agreement for? How does it renew? Is renewal automatic? Do you have the ability to renegotiate after a certain period of time? You don't want to find yourself a few years down the road seeing the bulk of the practice's patients and still receiving a starting salary.

Understand how the contract can be terminated. What notice must you give before leaving the practice? If you have a lengthy notice period, you may find it difficult to actually leave as your future employer may not be able to hold your position open for more than 60 days. Under what circumstances can your employer terminate the agreement?

In many instances a contract will allow for immediate termination by your employer if you lose your license to practice medicine, your DEA certificate, or if you become permanently disabled. Can your employer terminate your employment without cause? If your employer can terminate your employment without cause upon 30, 60 or 90 days' notice, you do not have the one or two year contract you think you have. Your contract is merely as long as the length of the notice provision. What about termination for breach? Can each party terminate if the other fails to meet its obligations under the contract? Are there cure provisions – in other words, does each party have an opportunity to fix the problem once it has been identified to the other?

Understand what type of medical malpractice insurance you have. If the practice covers you with a claims-made medical malpractice insurance policy (or switches to that type of policy in the future), tail coverage will need to be purchased. As this can be a fairly large expense, it is important that it be discussed and agreed to and documented in the contract.

Plan for continuity of care after treatment. The general rule is that when a psychiatrist is employed by a practice, even though he or she may be the only one seeing a particular patient, the patient is deemed to be a patient of the practice as opposed to the individual psychiatrist's patient. Even so, there are often issues regarding continuity of care when a psychiatrist leaves a practice. For example, whose obligation is it to notify patients of the psychiatrist's departure and what will the patients be told? This can be a huge point of contention if the psychiatrist's departure from the practice is contentious.

Ideally, it is the practice that should be required to send notice but the departing psychiatrist should have input into the content of that notice. What about patients who wish to follow you to your new location? Will the practice allow you to have copies of their charts? Who will pay for the copies? Is there a non-compete clause that precludes you from seeing former patients at your new location? Non-compete clauses are often upheld by courts so long as they protect the employer's business interests, are not too broad in terms of time and geography, and are not harmful to the public.

Avoid leaving anything to chance. Ask for clarification of vague or ambiguous language and ask that it be clarified within the agreement. If your employer has agreed to terms that are not part of the contract, insist that they be written in. Somewhere within the agreement there will likely be a provision stating that the written contract represents the entire agreement between the parties which means that if it's not in the contract, it's not enforceable. Do not begin work, until your contract is signed by all parties.

Hire an attorney. Your prospective employer will not be offended by this. But do involve the attorney early in the negotiation process rather than agreeing to terms and then having the attorney make changes. Just as physicians specialize, so do attorneys so it is important that you hire an attorney with a background in physician contracts. Even if you completely understand the terms of the agreement, unless you have experience with employment contracts you may not recognize what language should be in the contract but is not. Remember, an employment contract can affect your professional and personal life for many years to come. You owe it to yourself, to make certain you have the best agreement possible.

MEDICAL RECORD STORAGE COMPANY AGREEMENTS

If you are a psychiatrist who maintains paper records, at some point you will likely find that you no longer have sufficient space within your office to store all of your inactive patient files. Fortunately, in many locations, there are secure facilities dedicated to business record storage. As you consider your various options, carefully review the companies' proposed agreements and watch for the following:

Access: How easily can you access your records? Is the facility open 24/7? If you cannot go to your assigned space and retrieve records directly, what is the time frame in which records can be retrieved? Remember, if you are provided with a valid record request, you will only have so much time in which to respond so you must ensure that records can be obtained in a timely manner.

Business Associate/Confidentiality Agreement: If you are a covered entity under HIPAA, and the storage facility will have access to patient information, you must ensure that the facility is willing to enter into a Business Associate Agreement. Under this agreement, the storage facility agrees to maintain the confidentiality, security, and integrity of your patients' records. Also included are provisions requiring notification to you in the event of a breach involving your patients' information. If you are not a covered entity, you should still require that the facility agree to maintain the confidentiality of your information if such an obligation is not already laid out in your contract.

Non-Payment Provisions: Pay close attention to provisions in the agreement that outline the facility's remedies in the event of your non-payment of storage fees. Some contracts provide that the facility retains the right to destroy the contents or even to sell the contents. Although it may seem unlikely that this would ever occur, consider the consequences in the event that something happened to you or a change in your office staffing caused payment to be overlooked.

EHR VENDOR AGREEMENTS

Many psychiatrists are making the decision to use electronic health records. For some, it's a continuation of the way they learned to practice in residency. For others, the decision is based upon a desire to enhance their practice with newer technology.

A well-chosen system once implemented and fully operational can provide many benefits to your practice. In addition to maintaining treatment records, many have the functionality to allow for e-prescribing, billing, scheduling, and other practice management activities.

There are a number of factors to consider in making your decision as to which system to choose. By now we are all too familiar with horror stories regarding problems with certain EHR system features that have led to patient safety issues as a result of a malfunction or poor design. What is less often discussed are the risks to the physician himself as a result of provisions contained within the vendor's contract.

In selecting a system the vendor contract or user agreement is often overlooked. This is particularly true when the system is one that is obtained at very little or no cost. Let's face it. We've all done it. In our eagerness to access an Internet program, we've readily agreed to terms we haven't read by checking the "agree" box and continuing on to the information we desire. Most of the time, this may be a low risk but that is not necessarily the case with an EHR contract.

TWO IMPORTANT FACTS:

1) **these sorts of agreements are enforceable (regardless of whether they have been read) and**
2) **they often contain pages and pages of provisions that not only disclaim the vendor's obligations but also expose the physicians themselves to liability in the event of problems with the system.**

This should not be construed to suggest that you should not use electronic records. But it is imperative that before doing so, you take steps to minimize your own exposure by reviewing – or better yet having an attorney review – the contract. EHR vendors want to do business with you but they also want to protect their own interests and their lawyers have obliged them by drafting contracts in the most favorable terms possible.

Set forth below are provisions typically found in EHR vendor agreements along with sections that may not be in the agreement but need to be addressed. This list is by no means exhaustive but is intended to make you aware of the hidden dangers and hopefully to encourage you to seek legal counsel before entering into an agreement.

Definitions: If included, the definition section will typically be one of the first – if not the first – provisions in the agreement. The importance of the definition section is that it lends explanation to seemingly equivocal terms that may or may not carry the definition commonly associated with them. For example, "User." Does "user" mean an identified, particular person or does it mean a (class) of persons, e.g., physicians or mid-level providers? Or, does it mean anyone accessing the system at a particular time?

Depending upon other sections of the document, for example the "license" section, this distinction may take on greater importance than one would typically expect. What about "access to data?" You would naturally assume that you would have the same access to your data as you do now but that may not be the case. Data access may be limited to certain time periods. Carefully read over the contract definitions, or if the agreement does not contain a specific section, note how terms are defined within other sections. If it is still not clear, ask for clarification in writing. (See "entire agreement" below.)

License: A license in this context means your right to use the vendor's software. You are not buying the actual software, only the right to use it. Once you are granted a license, you will want to know how long that license is good for. Is it ongoing for as long as you have the contract?
A perpetual license is preferable to that of a fixed term. If it is for a fixed term, make certain that you know up front what the fees will be to renew the license. What about updates? Are updates included or will there be an additional cost? What is that cost? What about additional users? What if additional users are needed in the future – will they tell you what those additional fees will be now?

Fees: If you have opted for a fee-based system, you may notice that it is difficult to ascertain a bottom line price as there are typically a number of variables that affect the final cost. Many of these are discussed in other sections of this article. Make certain that you understand the various fees and how and to what extent they may increase over time.

Another option is to go with a system that is available free of charge. Providers of free software utilize different business models in order to generate revenue. Some sell your de-identified data (your personal as well as that of your patients) to drug companies and researchers. While they may not come right out and tell you this in the vendor agreement, if they don't expressly state that they will not do it, you must assume that it is a possibility. Other vendors utilize advertisements within the EHR.

You may have the option of viewing the system and may determine that advertisements won't be a problem for you. But remember, things can change. The vendor can decide to increase the number of advertisements which may move you to opt for an ad-free system at a fee. Even if you are going with the free system now, take the time to learn what the service fees are for an ad-free system and learn whether those are subject to change, how often, and how much. You do not want to find yourself hooked into a system that becomes obnoxious to use and then have to pay unanticipated fees to convert to a usable system. Bear in mind also that certain features such as tech support, 24/7 access to records, and additional storage space may not be free and may in fact be quite expensive.

Contained within these provisions, will also be a discussion of payment – when and how it is to be made. Recognize that the penalties for late payment (even by as much as a few days) may entitle the vendor to block your access to your medical records. In this instance, they may also charge a hefty reconnection fee as well as late charges and interest.

Warranties: As defined by *Black's Law Dictionary*, a warranty is "an assurance or guaranty, either express if in the form of a statement by a seller of goods, or implied by law, having reference to and ensuring the character, quality, or fitness of purpose of the goods."

When you purchase or subscribe to an EHR service you undoubtedly have certain expectations – for example you expect that the system will perform as advertised, that it will generate accurate information, that it will not lose your data, that it will protect your data from security breaches, just to name a few. You would probably be quite surprised to learn then that the vendor may have provisions in the contract whereby it specifically states that none of these things are warrantied unless they are expressly stated in the contract.

Commercial transactions are governed by the Uniform Commercial Code (UCC) which is a set of uniform laws that has been adopted in whole or substantial part by all states. While it is clear that the UCC applies to the sale of goods (such as a computer system) there is a question as to whether the UCC actually applies to the provision software or software as a service (SaaS) which is what cloud-based EHR systems are. Despite this, in drafting their contracts, most EHR vendors will follow the UCC rule that "the exclusion or modification of implied warranties of merchantability must be conspicuous." (UCC § 2-316(2).) That is why half of your contract may be written in capital letters. It is in these sections that the vendor will attempt to limit or deny most if not all implied warranties.

Entire Agreement: An important provision that is typically relegated to the back of the agreement – typically mixed in with all of the language that appears just to be the superfluous stuff that is at the end of most contracts – will be a provision labeled "entire agreement." It will state something to the effect that the document (and other documents attached or hyperlinked) represents the entire agreement between the parties. In other words, if you don't see it there, it cannot be enforced.

That verbal promise the vendor made and confirmed in an email? If it's not in the final agreement, it is not enforceable. What this means is that if there is a provision in the contract that you are unhappy with that the vendor agrees to amend or if the vendor provides a clarification for a cryptic provision, the contract needs to reflect those changes or explanations for them to be enforceable.

As side note, if you do (and we really hope you do) have an attorney review your contract, remember that he or she will likely not have been privy to your discussions with your vendor representative and thus it may be difficult to ascertain whether the written contract does in fact reflect the entire agreement as you yourself understood it to be. To aid your attorney in this process, keep notes of what was discussed and or promised.

Choice of Law: Choice of law refers to what state's laws will govern the contract in the event of a dispute. You're probably thinking, "This doesn't sound like a big deal. We're all in the U.S., how different can the laws be?" And you're right, this isn't a huge issue until there is a dispute. That's when you realize that you're sitting in Virginia and the contract in question is governed by the laws of another state several hundred miles away. This then forces you to try to find an attorney in the other state and possibly even travel there yourself. Ideally, the contract will state that the contract will be governed by the laws of your own state.

Confidentiality, Privacy, Security: While one would understandably think this section sets forth the vendor's obligation to maintain the confidentiality, privacy, and security of your patient records, in fact, this section often deals primary with your obligations with regard to the vendor's information. Here you typically agree not to disclose any of the vendor's intellectual property, copy software, etc. Some may even go so far as to include a gag clause – a clause prohibiting you from disclosing to others problems with the EHR system.

Breach: A breach is a failure to perform under the terms of the contract. A breach may be material, i.e., so significant that it excuses the other party from their obligations, or it may be partial. A breach may occur as a result of one party's failure to do something it had contracted to do (for example, provide a service) or as a result of the party's performing an act it agreed not to do (for example, disclose confidential information).

In some instances, a contract will clearly set forth what constitutes a breach of the agreement. In others, one has to glean what constitutes a breach - often by reading through many pages of obscure language. Most EHR contracts will clearly elucidate what activities you must and may not perform; however, it may be quite difficult to ascertain what activities on the part of the vendor may be deemed to be a breach of the agreement. If you look closely at the disclaimers in the warranties section, you will likely note that the vendor typically doesn't claim that their product is fit for any particular purpose or that you can rely upon it in any way. Your data might be lost or disclosed inappropriately and still, this is not a breach of the agreement because they never promised this wouldn't happen.

If one party is deemed by the other to be in breach of the agreement, there is typically a procedure by which the aggrieved party must notify the other of their failure to perform under the terms of the contract. Unless it is a material breach which justifies immediate termination, the offending party will have a period of time in which to cure its breach. Make certain that there is no provision in the contract that allows the vendor to deny you access to your records in the event of a breach on your part.

Termination: The termination section of your contract is possibly the single most important thing to know about and also a section many give little thought to. Your contract may specify a contract term, how it may be renewed, and how notice of termination must be given. At first glance, that might appear sufficient, but is it? You know that you can get out of the agreement, but what about your data? What happens to it? Will you get it back? In a usable form? Without paying additional fees? Will the vendor keep a copy?

Terminating an EHR contract can be something akin to a divorce where there is a custody battle only rather than fighting over children, the dispute is about your patient records. This was a hard lesson learned by Milwaukee Health Services (MHS) in the summer of 2013. MHS decided to end its long relationship with Business Computer Applications (BCA) at the end of the contract period per the terms of their agreement. What the agreement apparently did not address was the disposition of the medical records. At the end of the contract term, BCA refused to give MHS access to their data saying that MHS owed them for past due amounts and required an additional sum to convert the data to a usable format. MHS tried to file an injunction against the retention of their information but the court was not sympathetic. It stated that MHS had literally years to resolve the issue of what would become of data after the contract was terminated and failed to plan appropriately.

Inability to access patient information not only subjects you to liability exposure if errors are made but also exposes you to the possibility of a licensure action for failing to maintain medical records per the laws of your state. Thus in addition to a clear understanding of how a contract may be terminated, you will ideally also have what amounts to a “prenuptial” agreement in place to deal with what happens to your records when the relationship ends. One suggestion is that you look for a disentanglement clause – a provision that requires the vendor to use reasonable efforts to assist you in migrating your data to another vendor.

Make certain also that you know what happens to your data in the event the vendor goes broke or has to shut down. Yes, you’ve chosen a reputable company and it seems highly unlikely today that this would happen, but can you say “Gateway computer?”

Limitation of Liability: Because the vendor has likely excluded all warranties, it will have substantially already limited its liability exposure. But just to be on the safe side, in this section the vendor will make certain that it has further exculpated itself from any possible liability. Just to be certain that all bases are covered, the vendor may add in a provision limiting your allowable damages. For example, on free cloud-based system vendor limits their liability to the actual fees paid by the user in the previous six months. As it’s a free system and the user pays nothing, that means he is entitled to absolutely nothing – no matter what.

Hold Harmless and Indemnification Clauses: Many psychiatrists are familiar with hold harmless and indemnification provisions having seen them in contracts with third-party payers or in certain employment agreements. For those who are not familiar with them, indemnification clauses transfer liability from one party (in this case, the vendor) to the other (the physician) essentially requiring them to cover their losses as the result of third party claims – even if the cause of loss was the vendor's faulty system. In addition, they may preclude one party (typically the physician) from seeking damages against the other party.

To illustrate how an indemnification agreement might come into play, consider the following scenario. A patient receives inappropriate care during a hospitalization. In an effort to explain the error, the hospital indicates that the harm to the patient is due to a problem with the EHR system. In any resulting litigation, by placing blame on the EHR system, the hospital may also have caused the EHR vender to be sued. If an indemnification agreement is in place, any monies owed by the vendor as a result of a verdict or settlement, and any associated attorney's fees, would be the responsibility of the hospital. And while the hospital is undoubtedly well-insured for its own liability, it is unlikely that that insurance would cover the liability of the EHR vendor.

Amendments to the Agreement: As stated previously, the contract itself contains the entire agreement between the parties but there is often another provision that states that the agreement can be amended. Familiarize yourself with this section to determine whether you are allowed to ask for modifications once the contract takes effect and whether you can terminate the agreement if your requested modifications are not made. While there may not be an opportunity for you to make contract modifications, there will undoubtedly be a provision in the contract stating that the vendor retains the right to make modifications to the agreement from time to time. Know how this will be done, i.e., what type of notice you will receive. Will it be sent to you or will they simply update the contract from time to time requiring you to reread it on regular basis? If you don't object with in a specific amount of time, it is usually stated that you by default will have agreed to the terms.

ADDITIONAL TOPICS TO BE ADDRESSED

Training: It happens to the best of us. We buy the new computer or phone or download the app that can do so many wonderful things – or at least it would if we could figure out/had the time to learn how to use it. Yes, there are instructions but that can be time-consuming and frankly tedious. And the instructions may not be clear. In order to get the most out of your system, in all likelihood you will need some type of training. Perhaps it's a tutorial or perhaps someone will come to your office. Will a user manual be provided? Whichever way, you want to make sure that it's spelled out in the contract. Otherwise, it's not necessarily part of the deal. And what about later? If you hire another provider, will training be available to him/her or will you just have to pass on what you've learned? Is training of additional individuals included in the initial price or will there be an additional cost? Do you know what that cost is now or is it a sum that will be determined at a later date? What about system upgrades? Will training be required?

Tech Support: The system was working fine yesterday but now suddenly the system keeps freezing up or the cloud went down and you can't gain access. What in the heck are you supposed to do? Does the vendor have someone who can assist you? Is this person only available during normal business hours or 24/7? Is there an extra fee for this? How much is it? Is it by the hour? Does it matter whether the problem stems from something you may have done or something that occurred on the vendor's end? Will it be available as long as you have the system or only for an initial period? Can you extend availability by paying an additional fee? If so, how much? Who provides tech support?

If it is outsourced to another country, there may be a language barrier that makes communication difficult. Do you know how to access tech support? Can they be reached by phone? Email? Live chat? How quickly can you expect a response from the vendor? What if the vendor uses a subcontractor for data storage and you're having access issues? Does the contract state that it is the vendor who is responsible for ensuring uptime and access to data or must you deal with the subcontractor?

Disaster Recovery: How is data backed up? How often? Where is the backup server located in relation to the main server? Does the possibility exist that the same disaster could impact both? What is the vendor promising with regard to disaster recovery? Sadly, if you read the contract closely, you may find that the vendor has declared that it is not responsible for any loss of data.

Business Associate Agreement: Without going too far afield, it probably makes sense to spend a moment here on the topic of HIPAA. Under HIPAA, if you are a covered entity, you must ensure that there is a Business Associate Agreement in place with the EHR vendor who will have access to your patient information. Under this agreement, the vendor agrees to maintain the confidentiality, security, and integrity of your patients' records. Also included are provisions requiring notification to you in the event of a breach involving your patients' information.

While all psychiatrists are required to maintain the confidentiality of patient information, not all psychiatrists are actually covered entities. If you are not technically a covered entity under HIPAA, you need your EHR vendor's written agreement to protect your patient information, and it can be in the form of a Business Associate Agreement.

Much of what is contained in a business associate agreement is language that is required under the HIPAA regulations. Sometimes, vendors will make a business associate agreement a separate document that contains purely the material required by regulation. Other times they will use the business associate agreement as a vehicle in which to hide other provisions that are absolutely NOT required under federal law such as indemnification provisions.

KEY TAKEAWAY

Obviously vendors will have greater impetus to negotiate if you are actually paying for the system and may be unwilling to make any changes to a free system. In that case, you need to make certain that you are comfortable with the contract "as is" and are ready to assume the risks it presents. You may then decide that even if there is cost involved, a paid vendor's willingness to negotiate the contract may make it worth that cost.

FOR FURTHER READING

Contracting Guidelines and Checklist for Electronic Health Record (EHR) Vendor Selection. The National Learning Consortium. March 31, 2012. **Available at healthit.gov**

EHR Contracts: Key Terms for Users to Understand. Westat. June 25, 2013. **Available at healthit.gov**

HIT/EHR Vendor Contracting Checklist. Michigan State Medical Society. **Available at msms.org**

Contracting Guidelines with EHR Vendors. Medical Society State of New York. **Available at mssny.org**

15 Questions to Ask Before Signing an EMR/EHR Agreement. American Medical Association. **Available at massmed.org**

E-PRESCRIBING VENDOR AGREEMENTS: WHAT YOU NEED TO KNOW

Psychiatrists who are currently using an electronic health record system, likely already have the capability of e-prescribing. Those who do not want to convert to an EHR system but who want (or are compelled by law) to engage in e-prescribing, may do so through a stand-alone system. As with EHRs, there are many options some of which are accessible free of charge and others of which are provided for a fee.

Of course it's imperative that you find a system that works with the way you practice and has all of the features you need to achieve your desired goals. But as you're reviewing and comparing various systems, don't forget to look beyond all of the bells and whistles. One of the most important things to consider has absolutely nothing to do with the functionality of the system and that's your contract with the vendor, sometimes also referred to as a user agreement.

The first step is locating and reading the contract. At first glance it may not appear that there is a contract. Instead, you may be presented with a box to check indicating that you have read and agree to abide by the terms of the user agreement. There should be a link to the contract and if you click on it, you will likely find numerous pages that not only disclaim the vendor's obligations but also expose the physician themselves to liability in the event of problems with the system.

The following is a discussion of contractual provisions typically found in e-prescribing system vendor agreements – what to look for and what to avoid. This is not intended as legal advice but is intended instead as advice to seek legal advice. While we are attempting to give you a good general overview of some of the most important and/or problematic provisions, we are by no means addressing all of them. Contracts may vary greatly in length and complexity. While you may understand perfectly the contract language you may not recognize the legal impact of specific language or what language should be present but is not. For these reasons, we strongly encourage you to hire an attorney and one who is familiar with healthcare technology vendor contracts.

Warranties: Warranties are contractual promises. They may be express (written into the contract) or implied by such things as representations made by the vendor's salesperson or information provided on the company's website. One example of an implied warranty might be that the system will work as advertised. In reading the vendor's actual contract, however, you will often find that implied warranties are specifically excluded. One vendor has gone so far as to note in its user agreement that it makes no warranties as to its product and services and further advises users that the use of their service is "at their own risk." Thus, unless it is specifically written into the contract, you may not rely on verbal or other representations.

Entire Agreement: Somewhere toward the back of the contract – typically mixed in with all of the language that appears just to be the superfluous stuff that is at the end of most contracts – will be a provision labeled "entire agreement." It will state something to the effect that the document (and other documents attached or hyperlinked) represents the entire agreement between the parties. This further emphasizes the need that any promises made by the vendor be made a part of the agreement in order to be enforceable.

As a side note, if you do (and we really hope you do) have an attorney review your contract, remember that he or she will likely not have been privy to your discussions with your vendor rep and thus it may be difficult to ascertain whether the written contract does in fact reflect the entire agreement. To aid your attorney in this process, keep notes of what was discussed and or promised.

Indemnification Clauses: Many psychiatrists are familiar with indemnification provisions having seen them in contracts with third-party payers or in certain employment agreements. For those who are not familiar with them, indemnification clauses transfer liability from one party (in this case, the vendor) to the other (the psychiatrist) essentially requiring them to cover their losses as the result of third party claims – even if the cause of loss was the vendor's faulty system. In addition, they may preclude one party (again typically the physician) from seeking damages against the other party.

Let's say there's a problem with the e-prescribing system and it generates erroneous information regarding the patient thus causing you to write a prescription that is contraindicated which causes harm to the patient and leads to a lawsuit. Let's further assume that the patient learns of the system error and decides to include the e-prescribing vendor in its suit. Under the terms of the agreement with indemnification, you will have agreed to not only pay any verdict or settlement against the vendor but also their attorneys' fees (even if they prevailed). And, as contractual liability is typically excluded from your malpractice coverage, any amounts paid will be out of your own pocket.

Limitation of Liability: Because the vendor has likely excluded all warranties, and required you to indemnify it, it will have substantially limited its liability exposure. But just in case any remains, in this section, the vendor will try to limit it even further. Here you may be asked to waive any claims that you many ever have against the vendor or anyone having anything to do with the vendor to the extent that this is allowed by law. If not, you may be asked to agree to limiting the sums they are required to pay you to a nominal amount. In the case of one vendor, this was $100.00.

Fees: When selecting a system, you will have the option of a system that is for a fee or a free system. While the decision may seem like a no-brainer, it behooves you to inquire further into whether the free system allows you the access and features that you need. For example, can it be used 24/7? Can you add additional prescribers? What about training? If you are using a practice management system (PMS) can you integrate that information or will you have to go back in and enter patient data? If you can integrate data, can it be done on an ongoing basis or just initially? What about system upgrades? With a fee-based system, you will want to get a feel for whether costs will increase over time and if so, to what extent. What services are included with for the fee you're paying?

Again consider costs of PMS system integration, training and system upgrades. If you are paying a monthly access fee, how long will the fee you're paying stay the same? Can you get the vendor to commit to a maximum percentage increase?

Training: Speaking of training, in order to get your system up and running, in all likelihood you will need some type of training. Perhaps it's a tutorial or perhaps someone will come to your office. Will a user manual be provided? Whichever way, you want to make sure that it's spelled out in the contract. Otherwise, it's not necessarily part of the deal.

And what about later? If you hire another provider, will training be available to him/her or will you just have to pass on what you've learned? Is training of additional individuals included in the initial price or will there be an additional cost? Do you know what that cost is now or is it a sum that will be determined at a later date? What about system upgrades? Will training be required and provided?

Tech Support: The system was working fine yesterday but now suddenly the system keeps freezing up or the cloud went down and you can't gain access. What in the heck are you supposed to do? Does the vendor have someone who can assist you? Is this person only available during normal business hours or 24/7? Is there an extra fee for this? How much is it? Is it by the hour? Does it matter whether the problem stems from something you may have done or something that occurred on the vendor's end? Will it be available as long as you have the system or only for an initial period? Can you extend availability by paying an additional fee? If so, how much? Who provides tech support? If it is outsourced to another country, there may be a language barrier that makes communication difficult. Do you know how to access tech support? Can they be reached by phone? Email? Live chat? How quickly can you expect a response from the vendor?

Certification: In order to function appropriately and comply with legal requirements, you will need to look for certain certifications. The first is a Surescripts certification. Surescripts is the infrastructure that system vendors, pharmacies and program benefit managers connect through to electronically exchange medication information. Certification is based upon a product's ability to meet current industry standards – specifically the NCPDP (National Council for Prescription Drug Programs). This assures that your system produces a prescription with all of the requisite information and that it can be converted into a format that can be read by the pharmacy's system.

If you are going to be prescribing controlled substances, the second certification you will need is a DEA certification. This establishes that the system allows for the necessary procedures to authenticate the identity of the prescriber and his or her authority to prescribe controlled substances.

Third Party Agreements: As discussed above, in order to communicate with pharmacies, and prescription benefit managers, your e-prescribing system will have to utilize Surescripts. As a result, as part of your user agreement with your chosen vendor, you will also be asked to agree to Surescript's terms and conditions. This may be presented within the pages of your vendor agreement or it may be a separate agreement.

Business Associate Agreements: Those psychiatrists who are covered entities under HIPAA are already familiar with Business Associate Agreements. For those of you who are not, the HIPAA Privacy Rule requires that any third party (in this case an e-prescribing vendor) who performs a function on behalf of, or provides services to, a covered entity that requires the release of protected health information, must sign a business associate agreement that obligates them among other things to maintain the privacy of information.

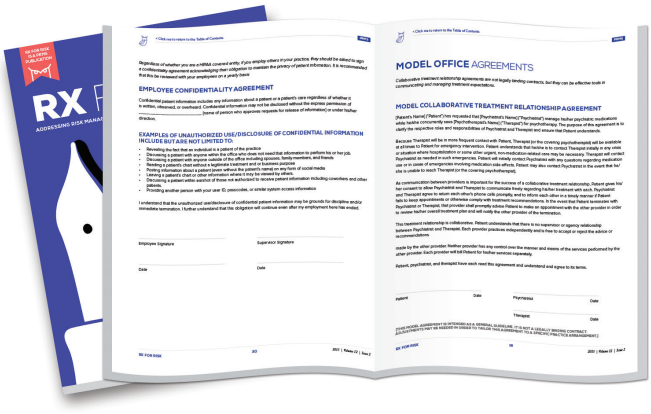
Because most physicians utilizing an e-prescribing system are covered entities, vendors typically include a Business Associate Agreement as a separate document or include provisions outlining their obligations as a Business Associate to the standard contract. Those psychiatrists who are not covered entities will still want some type of assurances that the vendor will maintain confidentiality and thus having these provisions is also beneficial to them. Another option is that the vendor will provide one document labelled Business Associate Agreement.

While much of the language contained therein will be written to comply with federal law, be forewarned that vendors often do add language that is absolutely not required under HIPAA regulations. One example of this is an indemnification clause. Another is a section limiting the vendor's liability. If you are presented with a Business Associate Agreement as opposed to a standard user agreement, pay particularly close attention to any section that does deal with the vendor's obligation to maintain privacy, allowed uses of information, and breach notification.

CONCLUSION

E-prescribing system vendors want to do business with you but they also want to protect their own interests and their lawyers have obliged them by drafting contracts in the most favorable terms possible. While the vendor may initially appear to be intransigent, they may in fact be willing to make some concessions. You may discover that vendors have greater impetus to negotiate if you are actually paying for the system but may be unwilling to make any changes to a free system. In that case, you need to make certain that you are comfortable with the contract "as is" and are ready to assume the risks it presents. You may then decide that even if there is cost involved, a paid vendor's willingness to negotiate the contract may make it worth the cost.

MODEL OFFICE AGREEMENTS



Read on to see:

- Model collaborative treatment relationship agreement
- Sample email consent and guide to email use
- Employee confidentiality agreement

These model agreements are intended as a guidelines only. Adjustments may be needed in order to tailor these agreements to your particular practice.

MODEL OFFICE AGREEMENTS

MODEL COLLABORATIVE TREATMENT RELATIONSHIP AGREEMENT

Collaborative treatment relationship agreements are not legally binding contracts, but they can be effective tools in communicating and managing treatment expectations.

[Patient's Name] ("Patient") has requested that [Psychiatrist's Name] ("Psychiatrist") manage his/her psychiatric medications while he/she concurrently sees [Psychotherapist's Name] ("Therapist") for psychotherapy. The purpose of this agreement is to clarify the respective roles and responsibilities of Psychiatrist and Therapist and ensure that Patient understands.

Because Therapist will be in more frequent contact with Patient, Therapist (or the covering psychotherapist) will be available at all times to Patient for emergency intervention. Patient understands that he/she is to contact Therapist initially in any crisis or situation where hospitalization or some other urgent, non-medication-related care may be necessary. Therapist will contact Psychiatrist as needed in such emergencies. Patient will initially contact Psychiatrist with any questions regarding medication use or in cases of emergencies involving medication side-effects. Patient may also contact Psychiatrist in the event that he/she is unable to reach Therapist (or the covering psychotherapist).

As communication between providers is important for the success of a collaborative treatment relationship, Patient gives his/her consent to allow Psychiatrist and Therapist to communicate freely regarding his/her treatment with each. Psychiatrist and Therapist agree to return each other's phone calls promptly, and to inform each other in a timely manner if Patient fails to keep appointments or otherwise comply with treatment recommendations. In the event that Patient terminates with Psychiatrist or Therapist, that provider shall promptly advise Patient to make an appointment with the other provider in order to review his/her overall treatment plan and will notify the other provider of the termination.

This treatment relationship is collaborative. Patient understands that there is no supervisor or agency relationship between Psychiatrist and Therapist. Each provider practices independently and is free to accept or reject the advice or recommendations

made by the other provider. Neither provider has any control over the manner and means of the services performed by the other provider. Each provider will bill Patient for his/her services separately.

Patient, psychiatrist, and therapist have each read this agreement and understand and agree to its terms.

Patient	Date
Psychiatrist	Date
Therapist	Date

SAMPLE EMAIL CONSENT AND GUIDE TO EMAIL USE

The following is a model form to be used with patients before communicating via email. The form should be modified to accurately reflect your desired uses and office practices. Just as you will want your patient to abide by the terms set forth therein, remember that you and your staff will be responsible for following them as well.

As a supplement to your in-office appointments, I am inviting you to use email to communicate with my practice. Set forth below are policies outlining when and how email should be utilized to maintain your privacy and to enhance communication as well as a place for you to acknowledge your consent to its use. Your decision to utilize email is strictly voluntary and your consent may be rescinded at any time. Email will be accessed by Dr. _____ or a staff member _____ (specify when/how often email will be accessed). You may expect any required response _____ (indicate expected response time).

WHEN MAY I USE EMAIL TO COMMUNICATE?

EMAIL MAY BE USED TO:

- Prescription refill requests
- Appointment requests
- Other matters not requiring an immediate response

WHEN SHOULD I NOT USE EMAIL TO COMMUNICATE?

EMAIL SHOULD NEVER BE USED:

- In an emergency
- If you are experiencing any desire to harm yourself or others
- If you are experiencing a severe medication reaction
- If you need an immediate response

WHAT ARE MY OBLIGATIONS?

- I must let Dr. _____ know immediately if my email address changes.
- If I do not receive a response from Dr. _____ in the time frame indicated (state expected response time), I will contact him/her by telephone if a response is needed.
- I will use email communication only for the purposes stated above.
- I will advise Dr. _____ in writing should I decide that I would prefer not to continue communicating via email
- I understand that email may only be used to supplement my appointments with Dr. _____ and not as a substitute for them.
- To avoid possible confusion, I will not use internet slang or short-hand when communicating via email

WHAT ARE THE ADVANTAGES TO USING EMAIL?

- Unlike trading voicemail messages, email allows you to see exactly the question the doctor is responding to and to have a written record of that exchange for future reference.
- Email allows for the rapid transmission of forms or other paperwork such as information regarding your medications/ condition.

WHAT ARE THE RISKS OF USING EMAIL?

RISKS OF COMMUNICATING VIA EMAIL INCLUDE BUT ARE NOT LIMITED TO:

- Email may be seen by unintended viewers if addressed incorrectly
- Email may be intercepted by hackers and redistributed
- Someone posing as you could access your information.
- Email can be used to spread computer viruses
- There is a risk that emails may not be received by either party in a timely matter as it may be caught by junk/spam filters
- Emails are discoverable in litigation and may be used as evidence in court.
- Emails can be circulated and stored by unintended recipients
- Statements made via email may be misunderstood thus creating miscommunication and/or negatively affecting treatment
- There may be an unanticipated time delay between messages being sent and received

WHAT HAPPENS TO MY MESSAGES?

- Emails will be printed out and maintained as a permanent part of your medical record
- As part of your permanent record, they will be released along with the rest of the record upon your authorization or when the doctor is otherwise legally required to do so.
- Messages may be seen by staff for the purpose of filing or carrying out requests (e.g., appointment scheduling) or when Dr. _____ is away from the office.

WHAT STEPS HAS DR. _____ TAKEN TO PROTECT THE PRIVACY OF MY EMAIL COMMUNICATIONS?

- Dr. _____ (list steps taken)
- Example:
- Has installed software for encrypting email messages (Note: if you are not using encrypted email, you should indicate this clearly.)
- Set up a password protected screen-saver on his computer
- Educated staff on the appropriate use and protection of email
- Does not access patient email from public Wi-Fi hotspots
- Does not allow family members access to his personal work computer
- Will not transmit highly sensitive information via email
- Will not forward patient email to third-parties without your express consent
- Will verify email addresses before sending messages.

WHAT STEPS CAN I TAKE TO PROTECT MY PRIVACY?

- Do not use your work computer to communicate with Dr. _____ as your employer has a right to inspect emails sent through the company's system.
- Do not use a shared email account to transmit messages.
- Log out of your email account if you will be away from your computer.
- Carefully check the address before hitting "send" to ensure that you are sending your message to the intended receiver.
- Avoid writing or reading emails on a mobile device in a public place.
- Avoid accessing email on a public Wi-Fi hotspot.
- Make certain that your email is signed with your first and last name and include your telephone number and date of birth to avoid possible mix up with patients with same or similar names.

CONSENT TO EMAIL USE

By signing below, I consent to the use of email communication between myself/_____ (name of patient) and Dr. _____. I recognize that there are risks to its use, and despite Dr. _____'s best efforts, he/she cannot absolutely guarantee confidentiality. I understand and accept those risks and the policies for email use outlined in the form. I further agree to follow these policies and agree that should I fail do so, Dr. _____ may cease to allow me to use email to communicate with him/her. I also understand that I may withdraw my consent to communicate via email at any time by notifying Dr. _____ in writing.

Parent/Guardian
(print)

Date

Parent/Guardian
(signature)

Email Address

EMPLOYEE CONFIDENTIALITY AGREEMENT

Regardless of whether you are a HIPAA covered entity, if you employ others in your practice, they should be asked to sign a confidentiality agreement acknowledging their obligation to maintain the privacy of patient information. It is recommended that this be reviewed with your employees on a yearly basis

Confidential patient information includes any information about a patient or a patient's care regardless of whether it is written, observed, or overheard. Confidential information may not be disclosed without the express permission of _____ [name of person who approves requests for release of information] or under his/her direction.

EXAMPLES OF UNAUTHORIZED USE/DISCLOSURE OF CONFIDENTIAL INFORMATION INCLUDE BUT ARE NOT LIMITED TO:

- Revealing the fact that an individual is a patient of the practice
- Discussing a patient with anyone within the office who does not need that information to perform his or her job.
- Discussing a patient with anyone outside of the office including spouses, family members, and friends
- Reading a patient's chart without a legitimate treatment and or business purpose
- Posting information about a patient (even without the patient's name) on any form of social media
- Leaving a patient's chart or other information where it may be viewed by others.
- Discussing a patient within earshot of those not authorized to receive patient information including coworkers and other patients.
- Providing another person with your user ID, passcodes, or similar system access information

I understand that the unauthorized use/disclosure of confidential patient information may be grounds for discipline and/or immediate termination. I further understand that this obligation will continue even after my employment here has ended.

Employee Signature

Supervisor Signature

Date

Date

REGISTER TODAY!

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DATES

JULY 25
MIAMI, FL

AUGUST 22
PHILADELPHIA, PA

NOVEMBER 7
ATLANTA, GA

AUGUST 8
SEATTLE, WA

OCTOBER 26
SAN ANTONIO, TX

DECEMBER 5
ARLINGTON, VA

COST

FREE
RESIDENTS AND PRMS CLIENTS

$100
EARLY BIRD RATE

$25
EARLY CAREER PSYCHIATRISTS

$200
REGULAR RATE

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Have any comments or questions about an article?

We would love to hear from you!

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