
E-PRESCRIBING VENDOR CONTRACTS: 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 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 may 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.

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