
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 warranted 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 (again 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 vendor 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 within 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.

A FINAL THOUGHT

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.

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