



Health Information Technology
Practice Management Services

EHR Buyer Beware: Issues to Consider When Contracting with EHR Vendors

INTRODUCTION

Electronic health record (EHR) contracts typically are vendor-favorable. This paper discusses eight important EHR contract terms your medical practice should consider before signing an EHR contract. It is not an exhaustive list of considerations that could be important to a specific medical practice in selecting the right EHR vendor. Before you sign a contract, have your attorney carefully review it, and make sure you understand its terms.

Although this paper primarily addresses the contract terms, you also should make sure the product meets your needs and will live up to its advertised potential. You are likely to use the product a long time and have a long-term relationship with the vendor. You should be confident the vendor is capable of fulfilling its obligations and providing support and training whenever you and your staff need it. You should ask questions and seek confirmation through references and other methods to evaluate the product and the vendor.

DISCUSSION

1. A MULTIPLICITY OF FEES — EVALUATING THE TOTAL COST TO THE PRACTICE

One important consideration in selecting an EHR vendor is the total out-of-pocket cost to the practice. Of course, in addition to the total cost, you should consider the quality of the product and the continuing support, along with your expected return on the investment. Your return on the investment would include increased revenues through cost savings, improved billing practices, improved records, improved staff morale, and efficiency. The quality of the product and the vendor will significantly impact your overall net benefit. For a variety of reasons, many EHR contracts do not provide a single, bottom-line price or consistent pricing structures for a simple comparison of costs. Instead, they often provide numerous specific fees in exchange for specific products and services. In addition, some EHR contracts do not clearly define the products and services the vendor will provide, raising the possibility that the vendor later will charge you additional fees for services you may have thought were included in the original price. To avoid these unwelcome surprises, the EHR contract should clearly list the fees the practice will have to pay.

(a) *An Overview of Specific Fees.* As discussed above, instead of providing a single, bottom-line price, many EHR contracts provide numerous specific fees in exchange for specific services. Such fees may include the following:

- **Licensing Fees.** These are the basic fees the practice pays in exchange for the right to use the vendor's software. Additional discussion regarding the factors affecting the pricing of licensing fees appears below.
- **Equipment and Third-Party Software Fees.** If the practice decides to install and operate the software on its own hardware, the practice may need to purchase additional equipment from the vendor or a third party at an additional cost. Additionally, the practice may be required to purchase additional third-party software in order to operate the hardware. You also

need to consider the cost of local information technology (IT) support to maintain the software and your local network. However, if the practice elects instead to have the vendor install the software on the vendor's equipment, it may incur additional costs from the vendor in exchange for this service. Accordingly, you should evaluate and balance the hardware, software, and maintenance costs incurred in installing the software on your own hardware against the cost of having the vendor install the software on its hardware.

- **Maintenance Fees.** These fees are paid to the vendor in exchange for maintaining the software and, depending on the model, the equipment. As discussed below, the contract's definition of covered "maintenance" determines exactly what level of service the practice will receive for this fee. For example, this fee may or may not include the vendor's upgrades to new versions of the software.
- **Professional Services Fees.** These are fees the practice pays the vendor in exchange for consulting and similar professional services. Professional services often are procured through separate contracts with separate terms and conditions, and likely have separate deliverables.
- **Implementation Services Fees.** These are fees the practice pays in exchange for services the vendor provides in setting up the software for the practice's use, such as data conversion, software loading, equipment installation, software testing, services set-up, and training. You should ascertain if there will be an additional charge for any desired on-site vendor training; many vendors include web-based training with the standard fees but charge extra for on-site training.
- **Interface Fees.** These fees are paid to the vendor for developing interfaces to other health IT systems. Examples include interfaces to third-party laboratory systems such as Quest and LabCorp, interfaces to practice management systems (if the EHR and practice management software are not integrated), and interfaces to radiology information systems (RIS) and picture archive communication systems (PACS).
- **Fees for Additional Features.** Many EHRs have various levels of functionality and features beyond what one could call "basic" — personal health records, advanced patient portals, e-visit or virtual credit card swipe services, or health information exchange (HIE) functions. You should clarify which services and features a base quote will include and which will require an additional subscription or other fees.

(b) Key Definitions That Affect Costs. As discussed above, factors in addition to the fee rates determine the actual cost to the practice under an EHR contract. Frequently these additional factors are hidden in the definitions in the EHR contract.

- **Definition of a Provider.** Many EHR contracts are priced based on a fee rate that is multiplied by the number of "providers" covered under the contract. Accordingly, to ensure the fee rates are comparable between vendors, the EHR contract should clearly define what the vendor considers to be a "provider." For example, the following EHR contract language achieves this goal by providing a clear definition:

"Provider" means individuals who are employed by or under contract to provide health care services for the practice or its affiliates and who are legally licensed to either provide healthcare services to patients or to assist physicians in providing healthcare services to patients.

- **Definition of a User.** As an alternative to pricing on a per-provider basis as discussed above, EHR contracts may be priced on the basis of the number of authorized users or the number of concurrent users. If this is the case, it is important to note that a “user” generally is defined to be personal to a specific individual, rather than being interchangeable among different employees of the practice. For example, a “user” frequently may be defined as follows so as to make the definition personal to a specific individual:

User is defined as a particular individual who has been identified by name and user authorization ID, regardless of whether the individual is actively using the software at any given time.

If a “user” is defined in this manner, as it generally will be, you will need to pay additional fees to allow any additional individual, such as an assistant, to access the data.

- **Definition of Services.** Many EHR contracts carefully limit the exact services the vendor will provide, and this limitation is especially true for “maintenance.” Pay careful attention to the applicable definitions to ensure the services included in the standard fees are comparable from contract to contract. For example, an EHR contract may define “maintenance” with the following exclusions, resulting in the practice incurring significant additional costs down the road when it requires services that are outside the scope of the definition:

Maintenance Services do not include services required: (a) as a result of improper use, abuse, accident or neglect; (b) as a result of modifications or additions; (c) with respect to more than the two most current releases of the software; (d) as customizations; (e) to implement upgrades; (f) to correct improper installation or integration of the software that was not performed by vendor-authorized personnel; (g) system administrator functions; (h) help desk services; (g) enhancements; or (h) to correct problems arising from abuse of the system or custom changes.

Accordingly, to avoid additional costs outside the basic service fees, you should ensure the defined services to be provided are clearly understood and not unreasonably limited.

Additionally, if, as is typical, your contract excludes from “maintenance” services to correct problems arising from abuse to the system, custom changes, work performed by unauthorized personnel, or service performed not in accordance with the vendor’s directions, you will need to be cautious when servicing the software without the vendor’s assistance. Before commencing any self-service of the software, you should obtain the vendor’s permission and ensure that any work is performed in accordance with the vendor’s specifications.

- **Site Definition.** Many EHR contracts limit the software to a particular geographic location — a “site restriction.” Understanding this limitation is important if the practice has multiple office locations, all of which will use the same EHR. If your practice has multiple offices, you should make sure the contract expressly allows the EHR to be deployed in all practice locations.

(c) Limiting Subsequent Fee Increases and Negotiating Fees Up Front. Even when you identify all the individual fees and word all the important definitions favorably, there is still the risk that the vendor may increase fees at a later date. Many EHR contracts allow the vendor to increase fees in the future. To address this risk, the EHR contract should carefully limit the circumstances, both in terms of amount and frequency, in which the vendor can increase its fees. For example, the following contract language achieves this goal:

Vendor may increase its fees for services once every 12 months upon 60 days written notice to the Practice. The amount of any such increase will not exceed 3% or the percentage annual increase in the Consumer Price Index.

Similarly, practices should attempt to negotiate fees for items at the time the EHR agreement is negotiated. Examples include subsequent employee training, interfaces, and additional user licenses.

- (d) Sales or Other Tax.** You should make sure that any applicable sales or personal/business property tax is included in the purchase price and that the vendor will remit this amount to the proper taxing authority.

2. ENSURING THAT ALL SIGNIFICANT TERMS ARE INCLUDED IN THE EHR CONTRACT — THE EFFECT OF “MERGER” CLAUSES

Most EHR contracts contain a “merger” or “entire agreement” clause. Generally, these clauses state that the signed EHR contract includes all the terms upon which the vendor and the practice have agreed, and that any other prior oral or written promise made by the vendor’s sales representative is not binding on the vendor. The typical merger clause is easy to identify, and may read as follows:

Entire Agreement. This Agreement, including any documents incorporated by reference, is the complete and exclusive agreement between the parties with respect to the subject matter hereof, superseding and replacing all prior agreements, communications, and understandings (both written and oral) regarding its subject matter. Terms and conditions on or attached to customer purchase orders will be of no force or effect, even if acknowledged or accepted by the vendor.

While the inclusion of a merger clause in an EHR contract is not in itself a problem, it is important to remember its effect. Essentially, any special concession or other promise made by the vendor’s sales representative needs to be referenced and incorporated into the final, written EHR contract. Otherwise, it is not binding upon the vendor.

3. THE CONTRACT TERM — RENEWING, OR GETTING OUT OF, AN EHR CONTRACT

Most EHR contracts remain in force for a specified length of time, usually a year, subject to various renewal provisions. EHR contracts can renew at the end of the original term in two general ways. First, the contract could automatically terminate unless a new contract is signed. These contracts typically simply do not say anything as to what happens at the end of the term. Secondly, the contract could automatically renew unless either the practice or the vendor provides notice of termination to the other prior to the end of the original term. A typical auto-renewal or “evergreen” provision can be identified in that it may read as follows:

Following the expiration of the original term, subject to customer’s continued payment of applicable fees, vendor will continue to provide services for successive, automatically-renewable terms of twelve (12) months unless either party provides the other party with written notice of termination no less than 30 days prior to the end of the original term or a renewal term.

While neither renewal provision is necessarily preferable to the other, it is important for you to recognize which provision is included in your EHR contract. If the EHR contract contains an auto-renewal provision, you

will need to take affirmative action only if you want to terminate the contract and switch to another vendor. If the contract does not contain an auto-renewal provision, you will need to enter into a renewal contract before the end of the term, assuming that you do not wish to switch vendors.

4. TRANSFERABILITY OF DATA — WHAT HAPPENS WHEN THE PRACTICE WANTS TO SWITCH VENDORS OR WHEN THE VENDOR GOES OUT OF BUSINESS

Many EHR contracts do not discuss whether the practice can access its data after termination of the contract or after the vendor goes out of business. Either of these scenarios ultimately would force you to quickly transfer the records to a new EHR vendor, print the records, or — worst of all — lose the data forever. In general, you should know where your data will actually reside, what type of database will be used, and whether or not removing the data from the server would affect the data. To avoid the risk of losing the data, it is important that (1) the EHR vendor maintain the data in a format that allows it to be transferred from one vendor's software to another's, and (2) the EHR vendor will help accomplish such a transfer. You should consider asking for appropriate language to be included within or as an addendum to your final contract to address this possibility.

- (a) Ensuring That EHR Data Is Maintained in a Transferable Format.** You should negotiate termination issues up front so that you do not incur additional costs when the agreement terminates. You should require the vendor to provide you a copy of patient data stored in the EHR in an industry-recognized, nonproprietary format. The vendor should provide this format at no additional cost to you.
- (b) Obtaining the EHR Vendor's Assistance in Accomplishing a Data Transfer.** Even if the EHR data is maintained in a transferable format, you will need the vendor's assistance in actually accomplishing such a transfer. You can secure this assistance by ensuring the EHR contract specifically provides that the vendor will help with the transfer. For example, the following EHR contract language would achieve this goal:

If Vendor goes out of business or upon termination or expiration of this Agreement, Vendor will allow the Practice a one-time data transfer, to the Practice's new EHR system and/or provide the data securely onto a storage medium in a market-standard format (e.g., HL-7), for no additional fee, or for a mutually agreed-upon fee at the initial contracting, and will allow the Practice to continue to use the software until all data is transferred to a new system. Such data shall be provided to the Practice in an industry-recognized, nonproprietary format.

Additionally, as discussed in part 8 below, you should maintain periodic backup copies either to an on-site server or other storage medium.

5. REGULATORY COMPLIANCE

Medical practices generally operate in an environment that is subject to significant governmental regulation. These governmental regulations, such as HIPAA, change from time to time. Additionally, new regulations, such as the availability of federal stimulus funds for meaningful users of certified EHR technology under the Health Information Technology for Economic and Clinical Health Act, are periodically enacted. Such regulatory changes will require changes in the functionality of the EHR software in order to maintain compliance with all the regulations. Accordingly, the EHR contract should require the vendor to provide software updates to maintain compliance. For example, the following provisions achieve this goal:

To the extent that an amendment to HIPAA requires a modification of a Practice business process that is supported by functions of the software and support is necessary for such modified business process, Vendor will instruct the Practice as to reasonable methods for using the software to support the modified business process. If, despite the instructions, the modified business process cannot be reasonably supported by the software, Vendor will issue a regulatory update of the software within a reasonable time to support the Practice's use of the software in compliance with the applicable regulatory requirement.

*During the initial and any subsequent terms of this Agreement, Vendor shall provide any and all updates of the software at no additional cost to the Practice so that Software at all times complies with the Standards, Certification Criteria, and Implementation Specifications for Certified EHR Technology promulgated by the Office of the National Coordinator for Health Information Technology (ONC) and the Meaningful Use criteria promulgated by the Centers for Medicare & Medicaid Services. Furthermore, vendor guarantees and warrants that during the term of this Agreement, software will be certified by an appropriate ONC-recognized certification body such as the **Certification Commission for Healthcare Information Technology (CCHIT)**.*

Vendor represents and warrants that the EHR shall, at all times during the term of this Agreement, comply with the Section 13402 of the Health Information Technology for Economic and Clinical Health (HITECH) Act and any implementing regulations related to breach notifications and that all data contained in the software shall meet the definition of secured protected health information.

6. PRODUCT WARRANTIES AND LIABILITY LIMITS — PROTECTING THE PRACTICE FROM PRODUCT DEFECTS AND SERVICE OUTAGES

Because accessing EHR data is essential to the daily operations of a medical practice, it is important to address and reduce the risk that the practice will be unable to access the data due to service outages or defects in the software. To address this risk, the EHR contract should provide assurances that the software and equipment will perform to given specifications, usually in the form of a warranty. However, the scope of the warranty and the level of protection provided vary from contract to contract. Additionally, EHR contracts contain terms that limit the vendor's liability under the warranty.

(a) *The Scope of Contractual Warranties.* As discussed above, the EHR contract should provide assurances that the software will perform as advertised. Typically this assurance comes in the form of a contractual warranty such as the following:

Vendor warrants that, during the term of the Agreement, the software (i) will perform in all material respects in accordance with the functional specifications set forth in the documentation that accompanies the software; and (ii) will operate together with the versions of the applicable Third-Party software specified in the order form.

It is important to note the general, broad scope of the warranties in the foregoing. In contrast, some EHR contracts significantly limit the scope and duration of their warranties, as in the following:

Vendor warrants that, for a period of 90 days following the first live use of the software, the software will perform substantially in accordance with the applicable documentation. This warranty does not cover equipment or 3rd Party software delivered with the software and does not apply if the Practice operates the software on equipment other than that certified by the Vendor or if anyone other than the Vendor modifies the software.

The scope of the typical warranty will, of course, fall somewhere in between that of the two contrasting examples given.

(b) *Limits on the Vendor's Liability to the Practice.* As discussed above, EHR contracts will contain additional provisions that limit the vendor's liability under the warranty. These limitations often generally function to (1) cap the dollar amount of the vendor's total liability, and (2) disclaim liability for any indirect loss to the practice such as lost profits. The latter limitation is less objectionable because the vendor cannot reasonably know the extent of the loss that the practice might suffer. For example, the following provision achieves both of these functions to the detriment of the practice:

Limitation of Liability. Vendor's liability to the Practice for any losses in contract, tort, or otherwise, arising out of the subject matter of this Agreement shall be limited those actual and direct damages which are reasonably incurred by the Practice and shall not exceed the fees paid by the Practice over the months in which the liability occurred, not to exceed twelve (12) months. Vendor will not be liable for special, punitive, indirect, incidental, exemplary or consequential damages or loss of data, lost profits, loss of goodwill in any way arising from this Agreement, even if the Vendor has been notified of the possibility of such damages occurring.

Because these provisions affect the operation of the warranties, you should carefully review the limitations included in the EHR contract when evaluating the level of protection the warranties provide. As stated above, it is typical in all software contracts to contain these limitations. However, because the exact limitations may vary somewhat, you should take note of the exact limitations contained in each vendor's contract for purposes of comparison.

7. CHOICE OF LAW AND FORUM PROVISIONS — AVOIDING UNNECESSARY EXPENSE IN THE DISPUTE RESOLUTION PROCESS

Most EHR contracts specify which state's law applies to any dispute arising under the contract, as well as the location in which any dispute will be resolved. Because these contracts are written by the vendors, they often specify both that disputes will be governed by the law of the vendor's state (which would be a state other than Texas) and that they will be resolved in a location that is convenient to the vendor. This specification can cause you to incur significant additional expense should a dispute ever arise, in that you would be required to travel to another state and potentially hire out-of-state counsel to resolve the dispute. These contractual provisions can be easily identified, and may read as follows:

Governing Law. This Agreement is governed and will be construed in accordance with the laws of the State of Georgia, exclusive of its rules governing choice of law. Each party agrees that exclusive venue for all actions, relating in any manner to this Agreement, will be in a federal or state court of competent jurisdiction located in Fulton County, Georgia.

While these provisions generally are not negotiable, you should be aware of them when comparing different EHR vendors. Selecting a vendor whose contract specifies that disputes will be governed under local law and settled in a convenient location could save you from incurring unnecessary expenses should a dispute ever arise. Although not usually negotiable, it is still worth pursuing a more advantageous choice of law or venue provisions. For example, the agreement could provide that the law of the state of the vendor's choice applies, but any dispute between the parties concerning the agreement must be brought in the county where the customer is located, or in sparsely populated counties, a major metropolitan location in Texas. Another alternative to a lawsuit for the resolution of any disputes is binding arbitration under the rules of the American Arbitration Association or another nationally recognized arbitral body.

8. OPTION FOR PERIODIC BACKUP TO ON-SITE SERVER OR STORAGE MEDIA

A growing technical model for EHR is the web-based, ASP/cloud model, whereby the main hardware, storage, and software of the EHR is located off site and is maintained by the vendor, and the group accesses the system via the Internet. In a case of Internet failure, or destruction of the data warehouse, patient health information stored on the EHR would be lost temporarily or permanently or access interrupted, preventing effective patient care in the interim. One possible safeguard involves the vendor providing periodic downloads of the contracted group's patient data (e.g., monthly or weekly) either to a server hosted by the group's clinic or hospital facility, or in DVD or other storage medium securely stored on site. The contract should guarantee this service, as well as training on how to access the stored data in such case as the need arises.

CONCLUSION

Be sure you understand the contract, and ask for clarification of terms you may not understand or for additional terms you would like to have. Throughout your relationship with a vendor, you should be confident the vendor will be able to meet your expectations and fulfill its contractual obligations. In addition to the out-of-pocket costs and the contractual terms, please remember to consider the quality of the product and the quality of the vendor to achieve your best overall value.

QUESTIONS OR MORE INFORMATION

For questions or more information about health information technology, please contact TMA's Department of Health Information Technology at HIT@texmed.org or by calling (800) 880-5720. Visit the TMA web site HIT page at www.texmed.org/HIT.

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