

# Physician Organizations



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### Negotiating Electronic Medical Records Contracts: Business and Legal Issues

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The age of electronic medical records (EMRs) has arrived. EMRs are already widely used in medical practices of all sizes, and within a few years, the vast majority of practices may be going at least partially electronic.

The process of converting to an EMR system involves a number of steps, including deciding when the time is right to adopt a system; ensuring that physicians have bought in to the concept; determining the practice's needs; selecting a vendor; implementing the system; and managing the system after it has been implemented. This article focuses on a single, but important, element of that larger process, identifying the issues that lawyers for medical practices should consider in negotiating an EMR contract.<sup>1</sup>

#### I. Understanding Your Client's Needs and Expectations

An EMR system can involve many different components:

- *Viewing:* the ability to view progress notes, problem lists, lists of past medications and allergies, and perhaps other

information (lab results, consultant reports, hospital inpatient data, and other clinical data).

- *Documentation:* the ability to record progress notes, chief complaints, diagnoses, allergies, prescriptions, and other information, typically by using electronic templates that are tied either to the type of visit or to the patient's disease or condition. This can involve typing of free text, use of voice recognition, use of "pick lists," checkboxes, or other structured forms, and use of "macros" that can generate standard phrases.
- *Ordering:* the ability to enter prescriptions into electronic forms and to receive information regarding possible interactions between two or more specific drugs or between specific drugs and allergies,<sup>2</sup> and the ability to gain access to payors' approved formularies.
- *Messaging:* the ability to send messages electronically, both for interoffice purposes and over the internet.
- *Care Management:* the ability to incorporate updates and reminders into a patient's file by use of disease- or condition-specific templates containing standard clinical guidelines, or by customized entries, or both.
- *Analysis and Reporting:* the ability to search the entire patient database to identify all

patients sharing a common factor, for example, all patients receiving a certain type of treatment or suffering from a certain type of condition.

- *Patient Direction:* capabilities that enable patients to communicate with the practice electronically or to gain access to the practice's website to view the ability to view their own files.
- *Scheduling:* support for the scheduling function either through an interface with existing systems or on a stand-alone basis.
- *Coding and Billing:* the ability to have the system automatically suggest appropriate billing codes based on the encounter documentation, leading to more accurate billing.

Whether or not you are involved in helping your client decide which components it needs,<sup>3</sup> successful negotiation of the EMR contract will require an understanding of what sort of system your client is expecting to purchase. The terms of the contract should match that understanding.

#### II. Upgrades, New Releases, Bug Fixes, Interfaces, and Customizations

Implementing an EMR system is an expensive project under the best circumstances, and the contract negotiation process presents the last best chance to

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—from a declaration of the American Bar Association

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control the cost of implementation and continued operation.

*Upgrades, New Releases, Bug Fixes.* Inevitably, EMR vendors will upgrade their products and issue new releases. In many cases, the upgrade or new release will be necessary for interoperability with other systems. Be sure that the contract specifies whether upgrades and new releases will be provided free of charge. There may be good business reasons for selecting a vendor that charges for upgrades and new releases, but in any event your client should understand this before committing to a purchase. The question of bug fixes should be more clear cut: very few EMR contracts will explicitly give the vendor the right to charge for these, but if the contract is silent the practice may be at the vendor's mercy on this point.

*Interfaces.* If the EMR system interfaces or integrates with other systems, the contract should specify whether the interfaces are standard or custom, and who is responsible for configuring, testing, and maintaining those interfaces.

*Customizations.* Almost all EMR systems can be customized. Some customizations are cosmetic while others involve changing source code. Either way, the contract should specify the cost for customizations, whether the customizations that the customer pays for can be used in the next general release version of the software, and the effect the customizations will have on the warranty.

### III. Hidden Costs

The implementation of an EMR system is a process with many parts, each of which carries potential costs to the purchaser. There are costs associated with the purchase of software and hardware; the actual installation process; continuing support and maintenance; customization of the system to make it compatible with your other systems and interoperable with third parties; and subscriptions for updated "content" (coding and drug databases, for example). The EMR vendor should know enough about your client's systems and needs, and enough about the EMR product itself, to be able to identify substantially all of the costs that your client will need to incur in the implementation process. Accordingly, the contract should specify all of those costs and ideally should include a statement that the implementation process will not entail any other charges by the vendor.

### IV. Product Acceptance

An EMR contract should provide for an acceptance period of a reasonable length during which the practice can evaluate the EMR system. An essential element of the acceptance concept is that the practice can receive a full or partial refund if the system does not meet identified criteria. Of course, the contract should also specify those criteria.<sup>4</sup>

### V. Licensing Issues

An EMR contract will typically contain limitations on the scope of the purchaser's license rights. Those limitations can restrict the sites where the product can be used; the number of physicians and staff members that

may use the entire system (either at any one time or at all); and in some cases, the number of physicians and staff members that may use different components of the system (in other words, the contract may set different limits on different components). The contract should be clear on these points, as well as the cost of purchasing additional licenses, and you should be sure that your client understands the scope of its license rights.

### VI. Training

As with any substantial software implementation, training is an essential element of the adoption of an EMR system. The contract should specify how much training the vendor will provide, who will provide the training, when and where the training will take place (including post-implementation training), to what extent the cost of training is included in the license fee, and the charges for training that are not included in the license fee.

### VII. Technical Support

Technical support can be a substantial hidden cost with any software product, especially one that is not yet in widespread use. The EMR contract should define what technical support covers (technical issues, user issues, interface issues, training issues) and specify what types and levels of technical support are available (web-based self-service, telephone-based, dial-in, on-site; standard, priority, emergency), what hours it is available, whether a certain level of technical support is provided free of charge, and what the vendor charges for additional technical support that is not provided free of charge. The con-

tract should also impose caps on increases in support and maintenance costs.

### VIII. Warranty; Remedies; Limitation of Liability

The vendor's warranty is a critical element of the EMR contract. Warranties can vary widely from contract to contract, but the contract should at least contain an assurance that the system is substantially free from defects, will perform the functions for which it is intended, and is compatible with the practice's other systems (and any third-party systems with which the practice needs compatibility).<sup>5</sup> The contract should specify how long the warranty remains in effect (preferably, for the entire length of the agreement). While strict limitations of liability (no consequential damages, and no damages in excess of the amount paid by the practice to the vendor pursuant to the contract) are probably inevitable, there is often room for negotiation with respect to the practice's remedies for breach of warranty. The remedies provision should specify whether, and how quickly, the vendor will make on-site warranty calls, and whether all warranty calls are free of charge. The contract should ultimately place the burden on the vendor to remedy any warranty problems as quickly as possible at no cost to the practice.

### IX. Termination Rights

Any EMR contract negotiation should take into account the possibility that the EMR system will not meet the practice's needs, that the vendor will fail to provide adequate continuing

support, that the system simply will not function the way it was advertised, or that the system does not remain compliant with the Health Insurance Portability and Accountability Act and other laws and regulations. The practice should at least attempt to reserve the right to terminate the contract early if the EMR system or the vendor fails to perform at the level the practice is entitled to expect. In most cases, discussions about this issue will focus on the cost to the practice of early termination.

## X. Payment Schedule

While identification and containment of hidden costs is an essential part of the contract negotiation process, it is just as important not to lose sight of the payment schedule. In short, the vendor will want as much money as possible up front, and the practice's goal should be to defer as much of the payment schedule as possible. The reasons for this are not limited to enhancing the practice's cash flow; in addition, deferral of payments can limit the practice's vulnerability to events of the kind that will justify an early termination. In other words, reserving a right to early termination will be of little benefit if the practice has already paid substantial up-front costs that it will be unlikely to recoup. At a minimum, final payment under the contract should be deferred until after the practice has accepted the system.

## XI. Source Code Escrow

The contract should provide for an escrow of the source code, so that the practice will have access to that code in the event that the EMR vendor is

unable to continue to provide services under the contract. Most vendors will agree to keep the current version and past versions of the source code in escrow.

## XII. Data Issues

If the EMR vendor provides the system via an ASP (application service provider), the contract should state that the practice owns its data and should address the details of how the practice will be able to obtain the data in the event of contract termination, nonpayment, business interruption of the ASP, and other contingencies.

## XIII. Conclusion

Purchasing an EMR system is a substantial investment, and inevitably a practice's commitment to an EMR system will be, at least to some extent, a leap of faith. By understanding the client's needs and expectations, recognizing the most important contractual issues, and working with a knowledgeable consultant, the practice's counsel can help to manage the risk inherent in this process.

### Endnotes

<sup>1</sup> This article deals with two-party negotiations between medical practices and single vendors. Many practices will be implementing EMRs as part of a larger health information network (HIN). For an excellent overview of legal issues involved in establishing HINs, see American Health Lawyers Association Member Briefing, *The Quest for Interoperable Electronic Health Records: A Guide To Legal Issues in Establishing Health Information Networks* (July 2005).

<sup>2</sup> The Office of Inspector General (OIG) of the Department of Health and Human Services has published a proposed anti-kickback safe harbor for certain electronic prescribing arrangements, 70 Fed. Reg. 59015 (Oct. 11, 2005). In that same notice of proposed rule-making, the OIG discusses, and solicits comments for, proposed anti-kickback safe harbors for electronic health records, in which the OIG emphasizes the importance of electronic prescribing capabilities by suggesting that such capabilities will be an essential element of any electronic health records safe harbor (70 Fed. Reg. at 59022, 59023).

<sup>3</sup> In most cases, the practice should engage a technical consultant to help determine what sort of EMR system the practice needs and which components are necessary or desirable.

<sup>4</sup> This is another area in which the input of a technical consultant is critical.

<sup>5</sup> In this regard, note that "HL-7 compliance" is not, in and of itself, a guarantee of compatibility with other systems. In general, the practice and its lawyer should involve the practice's consultant in reviewing the EMR vendor's proposed contractual warranty and remedies and proposing alternatives.

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