

# Sublicensing of EHR and Related Systems

## Licensing and Contractual Considerations

**M**any healthcare entities are endeavoring to share their healthcare information technology with other healthcare entities in their communities, as part of a RHIO, HIE or otherwise. The underlying goal of many of these endeavors is to create the local building blocks that will eventually become a national network of interoperable health records. In addition, some healthcare entities have found these arrangements useful to provide non-electronic health record information technology to other local healthcare facilities that may not be able to afford such systems by themselves.

There are typically two contracts required for these transactions. The first is the agreement between the software manufacturer, which I will refer to as the “Software Vendor,” and the healthcare entity originally licensing the application, which I will refer to as the “Original Licensee.” This first agreement is referred to herein as the “Software Vendor Agreement.” The second agreement, which I will refer to as the “Sublicense Agreement,” is between the Original Licensee and the unrelated local healthcare entities, which I will refer to herein as the “Sublicensees.”

It is important to note, the arrangements described above raise numerous other legal issues that are not addressed in this article. For example, any healthcare entity that desires to provide access to a software application to another unrelated healthcare entity or clinician must be aware of the physician self-referral prohibition (Section 1877 of the Social Security Act) commonly known as the Stark law,

the federal anti-kickback statute, and, depending on the data being exchanged, the Health Insurance Portability and Accountability Act, commonly known as HIPAA. In addition, significant anti-trust issues could arise if the software allows the Sublicensees to share financial information. These additional legal issues are not addressed in this article.

The Software Vendor Agreement must contain specific provisions allowing the Original Licensee to provide access to (which I will refer to as a sublicense) the software application to the employees of the Sublicensee. The Original Licensee should not assume that it can provide access by simply executing the Software Vendor’s standard form license agreement. All license agreements contain a license grant section that specifies the parties and individuals that can use the software. In most instances, it is limited to employees of the legal entity that signs the contract. In addition, most license agree-

ments specifically prohibit the use of the software to process information for, or use the software for any other benefit of, any third party. The contractual language allowing the Original Licensee to provide access to the Sublicensee can take many forms. It may be as simple as expanding the definition of an authorized software user to include any other individual authorized by the Original Licensee to use the software. Alternatively, the license grant may specifically state that the Original Licensee may sublicense or provide access to the software application to a third party and set forth the conditions under which it can do so.

The Software Vendor Agreement should also address what happens in the event of termination of all, or some portion, of the Software Vendor Agreement. Will the sublicenses that have been granted to the Sublicensees also terminate?

The second agreement that is required is the Sublicense Agreement, which is the contract between the Original Licensee and the Sublicensee. The Original Licensee should put careful consideration into the drafting of this document. There are a number of issues that could arise for the Original Licensee if certain issues are not addressed in this agreement. Each Sublicense Agreement will need to address these issues based on the particular transaction at hand.

The Sublicense Agreement should address how fees will be structured and paid. As mentioned above, the Original Licensee should create a pricing structure for the products and services being provid-

ed to the Sublicensee, with legal oversight regarding Stark and anti-kickback issues. The Original Licensee will need to think about how these payment terms could produce problems in the future. For example, if the Sublicensee is allowed to pay for installation and start-up costs as a component of an ongoing monthly fee, what happens if the Sublicense Agreement is terminated prior to this fee being paid?

The Sublicense Agreement should address how the Original Licensee will control the Sublicensee's use of the software. In addition to the terms and condition contained in the Sublicense Agreement itself, the Sublicense Agreement should allow the Original Licensee to establish a set of policies and procedures to govern use of the system, and allow the Original Licensee to modify these policies and procedures from time to time as necessary.

The Sublicense Agreement should address who will have access to what information. If the system allows all Sublicensees to have access to the information entered by all other Sublicensees, especially with regard to patient information, the Sublicense Agreement should consider what issues this might raise, especially from a HIPAA perspective. Will the system notify the Original Licensee when a Sublicensee accesses information of another Sublicensee? What restrictions will be in place regarding access to information of another Sublicensee?

The Sublicense Agreement should address who will be allowed to access the system. The Sublicense Agreement should contain a procedure for requesting use rights for each individual user. The Sublicensee and the authorized user should address certain relevant issues with regard to the user, including scope and length of the use, acknowledgement that the requisite training has been completed, and terms regarding non-disclosure of confidential information.

The Sublicense Agreement should address what will happen if all, or some portion, of the Software Vendor Agreement is terminated. Will the Original Licensee continue to be obligated to provide access even if it no longer has the right to do so? What if maintenance and support for the software terminates or expires or is not renewed under the Soft-

ware Vendor Agreement? Will the Original Licensee continue to be obligated to provide maintenance and support services to the Sublicensee?

The Original Licensee should require the Sublicensee to agree to the same or similar terms and conditions to which the Original Licensee agreed with the Software Vendor. The Original Licensee should obtain the right in the Software Vendor Agreement to disclose certain terms and conditions to the Sublicensee for the purpose of requiring the Sublicensee to comply with the terms. The Original Licensee may want to attach certain relevant terms from the Software Vendor Agreement in an exhibit or attachment to the Sublicense Agreement.

The Sublicense Agreement should clearly lay out which party is responsible for the equipment and technology required to gain access to the software. Typically, the Sublicensee is responsible for obtaining and maintaining all equipment and software located at its site that is required for it to access and run the software. The Sublicense Agreement should also address which party will be responsible for errors that occur during transmission between the parties, such as third-party carriers, utilities and internet service providers.

The Sublicense Agreement should carefully spell out the Original Licensee's obligations, responsibilities, and potential liability. Will the Original Licensee provide any warranties to the Sublicensee with regard to the performance of the software? What are the Original Licensee's obligations and responsibilities if the software does not function correctly? What is the Original Licensee's potential liability under the Sublicense Agreement? The Original Licensee should also include a provision requiring the Sublicensee to indemnify the Original Licensee for damages arising out of certain events, including Sublicensee's breach of the Sublicense Agreement, Sublicensee's use of the software, and Sublicensee's violation of laws and regulations.

The Sublicense Agreement should also address what will happen when the Sublicense Agreement terminates. Will the Original Licensee be able to provide a copy of the data entered into the system by the Sublicensee? If an individual's electronic medical record has been modified by more

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than one Sublicensee using the system, how will a particular Sublicensee's data be separated on termination? On a related note, the Sublicense Agreement should address the situation where the Sublicensee does not pay its fees. Can the Original Licensee simply terminate or suspend access to the software? How would this affect the Sublicensee's ability to provide patient care?

Providing such access to software systems can be beneficial to the healthcare entities involved, as well as the communities they serve. However, the parties should be aware of the contractual issues which must be addressed with regard to these relationships in order to avoid legal, business and healthcare service problems in the future. **JHIM**

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