Electronic Health Records After the Contract Ends: Avoiding Pitfalls

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Since at least 2005, many medical groups have begun using electronic health records (EHR) software. As software ages into obsolescence, groups become dissatisfied with current software or interested in newer software, or EHR vendors cease support for a product or merge with other companies or go out of business, medical groups must change their EHRs. This necessarily raises a question: what happens to the group's data?

From clinical and billing records to patient scheduling and contact information, EHR records house a broad range of data, usually in a proprietary format readable only by the specific EHR software. If this information can be transferred to another EHR at all, the transferred record may have incomplete information, or may not integrate effectively with another EHR. Widespread interoperability is still a goal within the EHR industry, rather than a reality. This can lead to problems and necessarily raises several issues for medical groups switching from one EHR to another.

First, when switching EHRs, groups should examine their software license agreements (often called "end user license agreements" or "EULAs"). This document should address what happens to the group's data upon termination. At a baseline, the EHR vendor should convert the data into a "neutral" file format, such as a PDF. Vendors sometimes charge for these conversion services, which should be stated in the EULA along with the costs.

In the best circumstances, either the old vendor or the vendor for the new EHR will be able to convert the data into the new EHR's native format. This will preserve software functionality and make navigating the record easier. One drawback of the PDF format is that, without sufficient manipulation of the file (e.g., adding various indexing features), it can reduce records essentially to "electronic photocopies." In other words, the records may be simply an electronic image of what would otherwise be a paper printout, rather than a document that the new EHR can fully integrate to use all of the EHR's tools. Again, this issue should be addressed within – and first raised during the review of – the license agreement for the old EHR.

Another troubling issue is what happens to records if there is a dispute with the vendor. For example, if the vendor refuses to provide access to the group's records because the vendor believes it has not been properly paid, what happens? Under HIPAA, the vendor is legally required to continue to provide access to the EHR at least to permit the group to perform its duties as a "covered entity." The vendor is a "business associate" for HIPAA purposes, and therefore cannot simply cut off access to the practice, since this would effectively mean cutting off patient access to their own records. Nevertheless, there are still stories about vendors holding data "hostage" until they are paid. The Office of Civil Rights for the Department of Health and Human Services (OCR) is aware of this practice and has noted that it violates HIPAA. However, the OCR has also noted that it remains the covered entity's duty to ensure that it continues to have access to patient protected health information. Moreover, because there is no private right of action under HIPAA, the group cannot simply sue the vendor and claim that access must be restored pursuant to HIPAA; only the OCR may bring claims for violations of HIPAA. The group can only assert a breach of contract or make a claim under whatever state laws may be applicable.

We have represented clients who faced this very situation. The client was transitioning from one EHR to another and requested that the vendor provide the client with their data. The vendor refused to do so

unless the client paid the vendor $800 to convert the files into PDFs, even though conversion costs had not been referenced in the EULA. Although the client was furious at this, we ultimately advised that it made more sense to simply pay the fees and get the records back. The client still had a duty of its own under HIPAA, and the $800 price tag for the conversion was far less than what it would cost to sue the vendor and would likely result in a faster restoration of the records.

In some cases, however, the vendor may not even be available. For example, if the vendor merges with another company, or if it simply goes out of business, the group may be stuck using a now-defunct EHR program, or trying to access its records through a system that is no longer supported. We had a client that used an old EHR system where the vendor was absorbed by another company, the new company dropped support, and the records stored on the system could not even be transferred into a PDF. There was no way to get the records out of the software easily. As a result, our client had to maintain an old laptop to run the software, alongside the new EHR to which the client upgraded.

These problems can cause major headaches for a medical group. The easiest way to avoid them, or at least reduce their risk, is to address them when first considering the EULA and signing up with the vendor. Once the contract is signed, these problems can be harder to solve. By anticipating the types of issues that can arise upon termination of the license for whatever reason, the group can avoid being blindsided in the future when its data is already tied up in the EHR. Knowledgeable legal counsel can help in this process.