

**Hot Topics in Foreign Outsourcing:  
Anatomy of an Outsourcing Agreement**

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**I. INTRODUCTION:**

(a) Overview of an outsourcing relationship. Outsourcing is the process by which a company (in this case, a healthcare provider or “HCP”) retains a third-party (“Vendor”) to perform some process or function that was or would be performed by the company itself. A company may contract with a third-party to perform some functions which the company or one of its departments performs, may contract with a third-party to augment certain functions, or may move all of the functions to the third-party.

(b) Examples of outsourcing relationships.

(i) A physician group seeking to be more efficient with its transcription services contracts with a transcription outsourcer to perform all transcription services.

(ii) A cardiology group exploring alternative methods to save money in its billing department can reorganize the department or it can contract with an outsourcer who specializes in billing to serve as its billing and/or collection provider.

(iii) An ambulatory surgery center considering how to optimize its coding procedures can hire coding personnel or it can contract with an outsourcer who specializes in coding services.

(iv) A radiology group who needs to retain the services of additional physicians contracts with an outsourcer to provide remote consultations and interpretations (teleradiology services).

(v) A hospital seeking to streamline its technology support department can reorganize the department by hiring and/or firing personnel or it can contract with a tech support outsourcer to take over some or all of its technology support operations.

(c) Why does a healthcare provider outsource?

(i) Potential to save money.

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- (ii) The healthcare provider can gain access to a greater skill set.
- (iii) The healthcare provider can shorten response and cycle time.
- (iv) Allows the healthcare provider to focus on its core competencies.

For example, to maintain a transcription department, a healthcare provider must pay its transcription employees a salary and provide benefits to them, needs to dedicate space (whether on-site or off-site) to the department and pay all expenses relating thereto (including, rent, utilities, etc.), needs to retain the resources necessary for such department to function, such as a computer system and staff, and may need to retain a supervisor to oversee the department, among other things. Alternatively, the healthcare provider can engage the services of a transcription company which already has the personnel and expertise to perform the transcription functions.

(d) There are risks of an outsourcing relationship.

(i) Entrusting a critical function to a third-party makes healthcare providers uneasy about outsourcing.

(ii) Outsourcing decentralizes operations, making communications and management more difficult. To complicate communications between the company and the outsourcer, outsourcers located overseas, such as in Asia and Europe, operate in different time zones which, in turn, requires the company, the outsourcer or both to operate during non-standard business hours.

(iii) In addition to the cost of the outsourced function, there are additional costs, such as the start-up and maintenance costs of the relationship (including the cost of the staff and equipment necessary to coordinate the relationship).

(iv) The transition of the function into and out of the relationship may pose operational difficulties.

(v) When the outsourcer is overseas, cultural incompatibilities become an issue.

(vi) The necessity of complying not only with U.S. laws, but with international laws, treaties and regulations, becomes critical.

(vii) The outsourcer has access to confidential information and trade secrets.

(viii) Outsourcing may create a dependency by a healthcare provider on its outsourcer which creates a risk that a healthcare provider will not be able to change the

outsourcer at some point in the future, thus, giving the outsourcer bargaining leverage in the relationship.

(ix) Outsourcing can make compliance plans difficult to adhere to. When a healthcare provider has full access to all records, employees, physicians, etc. within its facility, it is easier to conduct investigations. If the compliance contact is outside the facility, day to day concerns must be channeled through phone and email and often critical issues go unaddressed.

(e) Overview of the Process.

(i) Identify function to be outsourced.

(ii) Identify internal and external personnel needed to assist with the project, including, without limitation, department supervisor, department personnel, chief financial officer, counsel and accountant in the US and in Vendor's country. Keep in mind that internal confidentiality is often critical as a healthcare provider will often terminate employees due to the outsourcing relationship.

(iii) Set forth goals and desired results.

(iv) Identify potential Vendors.

(v) Conduct a thorough due diligence investigation on each Vendor.

(vi) Choose Vendor.

(vii) Negotiate an Outsourcing Agreement.

(viii) Monitor the ongoing results of the relationship.

**II. FACT PATTERN FOR OUR PRESENTATION:**

- Healthcare provider practices in Tennessee.
- Healthcare provider desires to engage the services of transcription company to provide its transcription services.
- Healthcare provider conducted a worldwide search for a transcription company and selected a vendor in Europe.
- The vendor has provided the first draft of the Transcription Outsourcing Agreement to healthcare provider.

- The appropriate personnel within the healthcare provider are reviewing the Agreement and the issues raised therein.

### **III. ANATOMY OF AN OUTSOURCING AGREEMENT:**

#### **1. PREAMBLE**

(a) Reason for this Provision:

- (i) Identifies HCP and identifies its address.
- (ii) Identifies Vendor and identifies its address.
- (iii) Identifies date of Agreement.

(b) Issues and Concerns of Each Party:

(i) Must make sure that the party(ies) signing the Agreement are the parties which will perform under the Agreement. Often a subsidiary or affiliate will be responsible for certain obligations.

(ii) The date which the Agreement is executed may be different than the date which each party's obligations begin.

(c) Sample Provision:

**THIS OUTSOURCING AGREEMENT** ("Agreement") is entered into as of \_\_\_\_\_, 200\_ by and between [THE VENDOR] having a principal office located at \_\_\_\_\_ [India/Ireland/other] ("Vendor") and [THE HEALTHCARE PROVIDER] having a principal office located at \_\_\_\_\_, United States of America ("HCP").

#### **2. WHEREAS CLAUSES**

(a) Reason for this Provision: Sets the background or stage for the Outsourcing Agreement.

(b) Issues and Concerns of Each Party:

- (i) Not required.
- (ii) Legally not considered part of the Outsourcing Agreement unless incorporated by reference.
- (iii) Should set forth "legal consideration" between the parties.

(c) Sample Provisions:

WHEREAS, HCP deems it desirable to engage a third party to perform certain transcription services (“Services”) as further set forth herein, and

WHEREAS, Vendor is experienced in and capable of providing such Services, and wishes to provide such Services to HCP upon such terms contained herein.

NOW, THEREFORE, in consideration of the premises, mutual covenants and conditions contained herein, the receipt of which is hereby acknowledged, the parties hereby agree as follows:

**3. SERVICES**

(a) Reason for this Provision: It is critical that the exact nature of the Services to be performed are clearly set forth and each party’s responsibilities and the party responsible for the cost thereof, are enumerated. Disputes often arise if it is not clear whether a specific function is included in the Services or if included, if it is not clear who will perform such function.

(b) Issues and Concerns for Each Party:

(i) The exact nature of the Service must be set forth and each party’s obligations must be detailed. In the case of a transcription relationship, the following, among other things, must be addressed:

(A) What information must HCP transfer to Vendor for Vendor to perform the transcription services?

(B) How is such information to be transferred?

(C) In what form must Vendor prepare the transcribed document?

(D) How will Vendor deliver each transcribed document to HCP?

(ii) Must the delivered product meet certain accuracy standards?

(iii) If the delivered product is not acceptable or does not conform to the specification set forth in the Agreement, how will such product be corrected?

(A) Who will correct the deficient transcription document?

(B) At whose cost?

- (iv) Are there timelines in which the product will be delivered?
  - (A) What is the turnaround time for a transcribed document?
  - (B) Can HCP request a quicker turnaround time (at a possible higher rate)?
  - (C) Must HCP notify Vendor if it expects unusual levels of transcription activity?
- (v) Is any training needed?
  - (A) If so, specify the training.
  - (B) Will there be a cost for such training?
  - (C) Will the training occur at HCP's facilities?
- (vi) Is any special equipment required for the Services?
  - (A) Must HCP obtain any equipment?
  - (B) Must Vendor obtain any equipment?
  - (C) At whose cost?
  - (D) Must specify equipment.
- (vii) Is Vendor obligated to provide ongoing assistance?
- (viii) Will it be necessary for Vendor to store any information?
  - (A) If so, what information must it store?
  - (B) For how long must it store it?
  - (C) Must it deliver it to HCP from time to time and/or upon termination of the relationship?
  - (D) Are any special storage requirements necessary?
    - (1) On-site or off-site storage.
    - (2) Backup of data.
  - (E) Is a disaster recovery plan necessary?

(ix) Sample Provisions:

Services. HCP hereby engages Vendor to perform transcription services, and Vendor hereby agrees to provide transcription services on behalf of HCP, all upon the terms and conditions contained herein. Vendor shall produce all transcribed documents on HCP approved forms and shall deliver such transcribed documents electronically to a destination directed by HCP. HCP will be responsible for correctly entering the proper ID codes, patient, and report codes into the dictation system. If HCP codes a document as a priority item, it will be responsible for paying the priority billing rate on the final transcribed document. In order to ensure a high-quality recorded dictation, thus reducing the amount of time spent on corrections, HCP will, whenever possible, organize its thoughts prior to commencing dictation; speak clearly into the telephone or dictation equipment; carefully spell out all names of patients, doctors, new drugs, etc., and include all pertinent pieces of identification (dates, patient numbers, addresses, etc.) in its dictation. Vendor will work with HCP to develop a set of templates in order to standardize report formats. Vendor will not be responsible for printing envelopes, providing extra copies of a document, or including graphics in a report. Vendor will provide plain white paper for transcription. If HCP desires the transcription on other paper or letterhead, HCP shall provide Vendor with an adequate supply thereof.

Errors and Omissions. Due to the many variables involved in the process of converting dictation from voice to text, there will be times when a patch of unclear dictation needs to be filled in or certain terms may need to be corrected. In such instances blank spaces will be left in the transcribed document. HCP is ultimately responsible for proofreading each document. When information such as the patient's medical record number, the date of a procedure, etc., has not been provided by HCP, it will be HCP's responsibility to manually enter such data into the transcribed document. If HCP wishes to make extensive editorial revisions to a document there will be a service charge for word processing. The final responsibility for all text rests with HCP.

Time Parameters. For standard delivery rates, transcribed documents will be transmitted electronically within 48 hours of the time of dictation. For priority delivery rates, transcribed documents will be transmitted electronically as soon as possible, but no later than 24 hours after the time of dictation. Vendor will inform HCP of the minimum and maximum workload expected per day, weekend assignments, etc. so that Vendor can organize its resources properly to meet the work load.

Training. If any equipment necessary to perform the Services requires HCP's personnel to be trained in order to properly use such equipment, Vendor will provide on-site training in the use thereof, at a time or times

reasonably agreeable to both parties, for all users designated by HCP's project manager. All initial training by Vendor in the proper use of such equipment shall be at no additional charge.

Storage. Vendor will electronically archive all transcribed reports for the term of this Agreement, unless instructed otherwise by HCP. Upon the expiration or termination of this Agreement, Vendor shall deliver such archived reports, in a medium selected by HCP, provided that HCP requests same within ten (10) days of such expiration or termination date and pays Vendor's then retrieval fees.

Assistance. Vendor represents that it will be available to HCP, if needed, to answer questions and/or consultations.

Equipment. To perform the Services, HCP shall obtain, at its expense, the equipment listed on Exhibit \_\_ hereto.

#### **4. FEES, EXPENSES, AND INVOICING**

(a) Reason for this Provision: Clearly set forth the payment terms of the relationship.

(b) Issues and Concerns of Each Party:

(i) The fee for the Service should be clearly set forth. It can be any, or a combination of, the following:

(A) A fixed fee. For instance, regardless of the number of transcribed documents, the monthly fee will remain the same.

(B) A fee based on a formula. For instance, a fee per transcribed word, line or page.

(C) Is there an additional fee for priority or rush jobs? For instance, if a physician requires a delivery time on a document quicker than the standard delivery time.

(D) Will the fee increase from year to year? If the fee is subject to increase, HCP should consider requesting a cap on the increases.

(E) Will the fee be subject to a reduction (penalty) if the Services are not timely completed or subject to increase (bonus) if the Services are completed in advance of deadline. For example, in a transcription relationship, if Vendor exceeds a certain average time threshold for preparation of the transcribed records, it may receive a specified bonus or if it does not meet such threshold, the fee may be decreased.

time period. (F) Consider a discount on a fee if it is paid in an accelerated

(G) Are the fees in US dollars or a foreign currency?

(ii) In addition to the fee, are any expenses incurred by Vendor reimbursable?

(A) If so, HCP should consider that all such reimbursable expenses are subject to their prior approval or expenses over a specified amount are subject to HCP's prior approval.

(B) Items which require attention are usually travel and lodging expenses for Vendor to visit HCP's facilities, especially in the set-up phase of the relationship; training of HCP staff; and Vendor overhead.

(C) May any expense be marked-up by Vendor?

(iii) Who is responsible for the payment of the taxes relating to the relationship?

(iv) What is the invoicing procedure?

(A) To whom at HCP are invoices sent?

(B) What is the required payment time?

(C) Will late fees and interest be incurred on overdue payments?

(D) Is an invoice dispute procedure necessary? This is less relevant if the fee is a flat fee, and more relevant if the fee is a variable fee.

(v) Will reports or statements itemizing the calculation of the applicable fee be necessary? This is more relevant if the fee is a variable fee.

(vi) Is it necessary to have a right to audit the books and records of Vendor? This is less relevant if the fee is a flat fee, and more relevant if the fee is a variable fee.

(c) Sample Provisions:

Medical Transcription Services. Medical transcription services shall be billed at \_\_\_ cents per line standard rate for a 48 hour standard turnaround. Priority services shall be defined as any work requested by HCP to be completed in less than 24 hours from the time of receipt of materials by Vendor will be billed at \_\_\_cents per line. Rush or STAT services

(defined as a 4 hour turnaround) shall be billed at \_\_\_ cents per line by Vendor.

Special Work. Special work, including transcription of meetings, designing forms, any non-transcription work or any irregular transcription work (i.e. not patient reports, unscheduled clinics, etc.) requested by HCP shall be contracted on a per project basis at a rate agreed to by both parties.

Invoicing Procedure. Each properly submitted invoice will be payable within forty-five (45) days after its receipt by HCP, unless the fees or charges are subject to a bona fide dispute. Invoices are to be addressed to \_\_\_\_\_, Attn: Accounts Payable.

Reimbursable Expenses. Vendor will only be reimbursed for expenses that are reasonable, warranted and cost effective, and that have been approved in advance by HCP. For each item of expense for which reimbursement is requested, Vendor will submit substantiating documentation in accordance with HCP's policies. All approved business expenses and pass-through charges for third party service firms will be reimbursed at cost, without mark-up.

Non-Reimbursable Fees and Expenses. Vendor will not be paid for time spent educating Vendor's personnel, nor reimbursed for any related costs or fees. Vendor will not be paid for any charges reflecting duplication of services or costs (including more than one of Vendor's personnel attending the same meeting, or conversations among Vendor's personnel), unless such duplication is essential for Vendor's proper performance of its obligations and has been pre-approved by HCP. Vendor will not be reimbursed for charges incurred (i) for or by its support staff, (ii) for any other overhead items, or (iii) for the time spent preparing invoices.

Taxes. [HCP/Vendor] will be solely liable and responsible for the payment of all taxes, duties, fines, penalties and other similar amounts due or payable under the law of any jurisdiction (collectively "Taxes") that in any manner relate to this Outsourcing Agreement, or to any act done or payment made pursuant hereto. HCP may withhold or deduct Taxes (as required by the law of any jurisdiction) from any payment to be made by HCP to Vendor; and HCP's payment of the balance, after deducting any such withholding or deduction, will constitute payment in full of the amount owed by HCP to Vendor.

Disputed Invoices. Upon notice to Vendor, HCP may withhold payment(s) for any item(s) on Vendor's invoice(s) that HCP reasonably disputes. Pending settlement or resolution of the dispute, HCP's non-

payment of such disputed items shall not constitute default by HCP and shall not entitle Vendor to suspend or delay its performance of the Services.

Late Fee and Interest. If any fee shall not be received by Vendor within five (5) days of the date due, a late payment fee equal to five percent (5%) of each late payment shall become immediately due to Vendor for the purpose of defraying the expenses incident to handling such delinquent payment. If any fee shall not be received by Vendor within ten (10) days of the date due, such payment, in addition to the aforesaid late payment fee, shall bear interest from the date it is payable until the date it is paid, at a rate equal to the lesser of (a) one and one-half percent (1.5%) per month (or portion thereof) or (b) the maximum rate of interest allowed by law.

## **5. TERM AND TERMINATION**

(a) Reason for this Provision: This provision sets forth the date upon which the relationship commences, the date upon which the relationship ends and the events which gives a party the right to terminate the relationship prior to the stated date.

(b) Issues and Concerns of Each Party:

(i) The term of the relationship.

(A) When does the relationship begin?

(B) When does the relationship end?

(C) Must certain conditions occur before the relationship begins. For instance, if HCP is entering into a transcription outsourcing relationship, HCP and Vendor may need to upgrade their respective computer systems so that they can communicate with each other before the relationship officially begins.

(D) Is the term “evergreen”. That is, will it automatically renew for stated periods until one party notifies the other of its intention not to renew the term.

(ii) Upon what circumstances will the relationship end prior to the end of the stated term?

(A) Cause.

(1) Review the definition of “Cause” to confirm that it is not overbroad.

(2) Make sure appropriate notice and cure periods are included.

(B) Without cause.

(1) Is it mutual (that is, does both HCP and Vendor have this right) or one-way (that is, only one of HCP or Vendor has this right)?

(2) It is acceptable that Vendor may terminate the relationship without cause prior to the end of the stated term?

(3) Make sure a sufficient notice period is given to ensure that HCP can find a replacement Vendor or move the Services in-house.

(C) Bankruptcy or ceasing business.

(iii) How will the relationship be unwound upon termination.

(A) The transition services should be clearly set forth so there are no misunderstandings.

(B) Will HCP need Vendor's assistance to move the Services in-house or to another Vendor upon termination?

(C) How long after termination must Vendor cooperate?

(D) Will the assistance be with or without payment?

(E) Is there any data which must be transferred from Vendor to HCP?

(c) Sample Provisions:

Term. This Outsourcing Agreement shall commence on \_\_\_\_\_, 200\_, and shall continue until \_\_\_\_\_, 200\_, unless earlier terminated in accordance with the provisions of Section \_\_\_.

Termination. This Outsourcing Agreement may be terminated by either party as follows:

HCP may terminate this Outsourcing Agreement without cause, at any time in its sole discretion, upon thirty (30) days prior notice to Vendor. In the event HCP terminates this Outsourcing Agreement without cause, HCP will pay Vendor the reasonable value of the Services properly performed by Vendor prior to the effective date of termination.

HCP may terminate this Outsourcing Agreement for cause immediately with notice to Vendor. Cause shall mean Vendor is in breach of a term or condition contained in the Outsourcing Agreement and fails to cure such default within thirty (30) days after Vendor has received HCP's

notice of the default.

Vendor may terminate this Outsourcing Agreement with or without cause, at any time in its sole discretion, upon thirty (30) days prior notice to HCP.

Vendor may terminate this Outsourcing Agreement for cause immediately with notice to HCP. Cause shall mean HCP is in breach of a term or condition contained in the Outsourcing Agreement and fails to cure such default within thirty (30) days after HCP has received Vendor's notice of the default.

Orderly Transfer. Upon the expiration or termination of this Outsourcing Agreement for any reason whatsoever (including a default by either party), Vendor will provide such information, cooperation and assistance to HCP, as HCP may reasonably request, to assure an orderly return or transfer to HCP or HCP's designee of all proprietary data (and related records and files) and materials of HCP, and all work product for which payment has been or is made, in their then current condition. All such cooperation and assistance shall be at Vendor's then time and material rates. In addition, except as otherwise expressly provided in this Agreement, upon the request of a party after such expiration or termination, the other party will return (or purge its systems and files of, and suitably account for) all Confidential Information supplied to, or otherwise obtained by, such party in connection with this Agreement. A party will certify in writing that it has fully complied with its obligations under this Section within seven days after its receipt of a request by the other party for such a certification. Nothing in this Section shall be construed to limit either party's right to seek relief from damages that are caused by the other party's default.

## **6. PERSONNEL AND RELATIONSHIP BETWEEN THE PARTIES**

(a) Reason for this Provision: HCP may want to establish guidelines for personnel performing services on behalf of HCP, to establish procedures for the exchange of information, and to specify that Vendor is an independent contractor.

(b) Issues and Concerns for Each Party:

(i) Vendor's personnel performing the Services.

(A) Does HCP have the ability to select and reject Vendor's personnel performing Services?

(B) Does HCP have the ability to remove Vendor's personnel performing Services?

(C) Are there minimum training, experience or education levels which Vendor's personnel must possess?

(D) Should Vendor be prohibited from using personnel on HCP's account and its competitors accounts?

(E) May HCP hire Vendor personnel upon termination of the Outsourcing Agreement? In an overseas relationship, this issue is usually of a lesser concern.

(ii) Project coordinators and status reports.

(A) Is it necessary to identify contact personnel at each party to facilitate the exchange of information and provision of the Services?

(B) Must Vendor prepare periodic reports or make periodic presentations to HCP?

(1) What information must be in the reports or disclosed at the meeting?

(2) What is the frequency of the reports and meetings (weekly; monthly; other).

(3) Can HCP request reports or attendance at meetings at other intervals?

(4) Will there be an additional charge for such reports and/or meeting attendance?

(iii) Often a Vendor will want to use a subcontractor to perform some of the Services. HCP may not want Vendor to do so as it is not familiar with the subcontractor and its quality of work. There are differing approaches with respect to this issue:

(A) Prohibition of Vendor of using subcontractors.

(B) Vendor may only use a subcontractor after obtaining HCP's approval.

(C) Vendor has absolute right to use subcontractor (subject to HIPAA requirements, if applicable).

(iv) The parties want to specify that Vendor is an independent contractor.

(c) Sample Provisions:

Project Coordinators and Status Reports. Each party will designate a

suitably qualified project manager who will represent such party and be responsible for assigning, scheduling and supervising such party's personnel. Vendor's project manager will provide HCP's project manager with status reports (at intervals determined by HCP) containing the following: (i) a summary of the current status of the project (including number of documents transcribed); (ii) a summary of any problems identified since the preceding status report and any recommended remedial action; (iii) a summary of the status of, or progress made on, all problems identified in previous status reports (and not previously reported as corrected); and (iv) the amount of any anticipated delay in the completion of any milestone beyond the applicable date specified in the project schedule, the cause of such delay and any recommended remedial action.

Vendor's Personnel. Vendor will, if requested by HCP, furnish information substantiating the qualifications of any individual who Vendor intends to assign to perform any part of the Services. HCP shall have the right to approve or disapprove of any individual who is assigned to perform the Services and may request, at any time, that Vendor remove an individual from performing the Services. HCP will be entitled to review such information in order to confirm the qualifications. Vendor's personnel will not hold themselves out as employees or agents of HCP, nor seek to be treated as employees of HCP for any purpose, including claims of entitlement to fringe benefits provided by HCP, or for disability income, social security taxes or benefits, Federal unemployment compensation taxes, State unemployment insurance benefits or Federal income tax withholding at source.

Subcontractors. HCP reserves the right to approve all subcontractors that Vendor intends to use to perform Vendor's obligations under this Outsourcing Agreement. Approval of any subcontractor by HCP will not constitute the superseding or waiver of any right of HCP to reject work that is not in conformance with its standards or this Outsourcing Agreement. Vendor will be fully responsible for all acts and omissions of its subcontractors. Nothing in this Outsourcing Agreement shall be construed to create any contractual relationship between HCP and any subcontractor, nor any obligation on the part of HCP to pay or to ensure the payment of any money due to any subcontractor.

Independent Contractor. Vendor will perform all Services as an independent contractor. Neither this Agreement nor Vendor's performance of Services shall create an association, partnership, joint venture, or relationship of principal and agent, master and servant, or employer and employee, between HCP and Vendor; and neither party will have the right, power or authority (whether expressed or implied) to enter into or assume any duty or obligation on behalf of the other party.

## 7. HIPAA AND CONFIDENTIAL INFORMATION

(a) Reason for this Provision: In the event information of one party is disclosed to the other party which the disclosing party does not want to become public, the disclosing party will request a confidentiality provision pursuant to which the recipient agrees to keep all information confidential. In the event Protected Health Information (“PHI”) will be disclosed by HCP to Vendor, HIPAA requires that a business associate agreement is set forth in writing which governs the use of the PHI by the business associate.

(b) Issues and Concerns of Each Party:

(i) Is PHI being disclosed? If so, the Agreement must comply with the HIPAA requirements and include the following concepts (among other concepts):

(A) Vendor can only use the PHI to perform the Services and for no other reason.

(B) HCP can terminate the Agreement if Vendor breaches the HIPAA related provisions.

(C) If a subcontractor will be used by Vendor, it will comply with the use and disclosure restrictions.

(D) Vendor must have appropriate privacy safeguards.

(ii) Is a confidentiality provision necessary for non-PHI Confidential Information?

(A) Will it be a mutual confidentiality requirement (that is, both parties are subject to confidentiality restrictions) or one way (that is, only one party is subject to confidentiality restrictions).

(B) Must the disclosing party mark information as “Confidential” for it to be subject to the confidentiality restriction?

(C) Is it necessary to limit which individuals of a party have access to the Confidential Information? In other words, can the receiving party disclose Confidential Information to all of its employees or only those who “need to know”?

(c) Sample Provisions:

Confidential Information Generally. The party receiving (“receiving party”) Confidential Information of the other party (“disclosing party”) will exercise at least the same degree of care with respect to the disclosing party’s Confidential Information that the receiving party exercises to protect its own Confidential Information; and, at a minimum, the receiving

party will maintain adequate security measures to safeguard the disclosing party's Confidential Information from unauthorized disclosure, access, use and misappropriation. Without limiting the generality of the foregoing, the receiving party will only use or reproduce the disclosing party's Confidential Information to the extent necessary to enable the receiving party to fulfill its obligations under this Agreement. In addition, the receiving party will disclose the disclosing party's Confidential Information only to those of the receiving party's personnel who have a "need to know" such Confidential Information (and only to the extent necessary) in order to fulfill the purposes contemplated by the Agreement. Prior to disclosing HCP's Confidential Information to any of its personnel, Vendor will require each of its personnel who will be providing Services to be bound by a written Non-Disclosure and Work Product Assignment Agreement. Vendor will furnish executed originals of all such agreements to HCP prior to commencing any work hereunder. If Vendor becomes aware of any threatened or actual unauthorized access to, use or disclosure of, or any inability to account for, HCP's Confidential Information, Vendor will promptly notify HCP thereof and will assist HCP with its efforts to terminate such access, to curtail such threatened or actual unauthorized use or disclosure, or to recover such information or materials. "Confidential Information" includes all tangible and intangible proprietary information or materials furnished by the disclosing party that are expressly identified or marked by the disclosing party as "Confidential".

PHI Obligations of Vendor. Vendor agrees to not use or disclose PHI other than as permitted or required by the Agreement or as required by law. Vendor agrees to use appropriate safeguards to prevent use or disclosure of the PHI other than as provided for by this Agreement. Vendor agrees to mitigate, to the extent practicable, any harmful effect that is known to Vendor of a use or disclosure of PHI by Vendor in violation of the requirements of this Agreement. Vendor agrees to report to HCP any use or disclosure of the PHI not provided for by this Agreement of which it becomes aware. Vendor agrees to ensure that any agent, including a subcontractor, to whom it provides PHI received from, or created or received by Vendor on behalf of HCP agrees to the same restrictions and conditions that apply through this Agreement to Vendor with respect to such information. Vendor agrees to make internal practices, books, and records, including policies and procedures and PHI, relating to the use and disclosure of PHI received from, or created or received by Vendor on behalf of, HCP available to HCP, or to the Secretary of the Department of Health and Human Services ("Secretary"), in a timely manner or as designated by the Secretary, for purposes of the Secretary determining HCP's compliance with HIPAA. Vendor agrees to document such disclosures of PHI and information related to such

disclosures as would be required for HCP to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 CFR §164.528.

General PHI Use and Disclosure Provisions. Except as otherwise limited in this Agreement, Vendor may use or disclose PHI to perform functions, activities, or services for, or on behalf of, HCP in furtherance of the Services, provided that such use or disclosure would not violate HIPAA if done by HCP or the minimum necessary policies and procedures of HCP.

Specific PHI Use and Disclosure Provisions. Except as otherwise limited in this Agreement, Vendor may use PHI for the proper management and administration of Vendor, or to carry out the legal responsibilities of Vendor, and to provide data aggregation services, if such services are required as part of the Services. Except as otherwise limited in this Agreement, Vendor may disclose PHI for the proper management and administration of Vendor, provided that disclosures are required by law, or Vendor obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person notifies Vendor of any instances of which it is aware in which the confidentiality of the information has been breached.

## **8. PUBLICITY**

(a) Reason for this Provision: One party may not want the outsourcing relationship to be publicized or may want to approve marketing materials before it is released to the public.

(b) Issues and Concerns for Each Party:

(i) HCP or Vendor does not want its name and logo used without its permission.

(ii) It may be important to enter into a confidentiality agreement before the Outsourcing Agreement is negotiated. Often, HCP will be replacing personnel with Vendor and will not want such personnel to become aware of the potential relationship.

(c) Sample Provision:

Except as may be legally required, Vendor will not disclose the identity of HCP as a customer of Vendor or the existence or nature of this Outsourcing Agreement without the prior written consent of HCP, which HCP may withhold in its sole discretion. Neither Vendor nor HCP will use the other party's proprietary indicia, trademarks, service marks, trade

names, logos, symbols or brand names, or otherwise refer to or identify the other party in advertising, publicity releases, or promotional or marketing publications or correspondence to third parties without, in each case, securing the prior written consent of the other party.

## **9. REPRESENTATIONS AND WARRANTIES**

(a) Reason for this Provision: HCP should ensure that Vendor make certain representations so that it will have recourse should a breach thereof occur.

(b) Issues and Concerns for Each Party:

(i) Vendor will attempt to limit the representation that it provides to limit its potential damages.

(ii) Will the representations be mutual? In other words, will HCP make any representations?

(iii) HCP must perform due diligence. HCP should not rely on the representations as its sole form of due diligence.

(iv) Common representations include:

(A) Authority

(B) Standard of Services.

(C) Conformity of Services to specifications.

(D) Compliance with applicable law.

(E) Non-Infringement in the event technology is used or provided.

(F) Disabling devices in the event technology is used or provided.

(c) Sample Provisions:

Authority. Vendor represents and warrants that Vendor has all rights and authority required to enter into this Agreement and to perform the Services and furnish the transcribed documents contemplated by this Agreement, free from all liens, claims, encumbrances, and other restrictions.

Standard of Service. Vendor warrants that the Services will be performed and the transcribed documents will be prepared in a timely and professional manner by qualified individuals. Vendor further warrants

that it will assign its personnel to projects in a manner that minimizes disruptions caused by the need for reorientation. If one of Vendor's personnel is removed from providing Services at the discretion of Vendor or at the request of HCP, then Vendor will (at its expense) provide the training and orientation required to enable the replacement personnel to perform as warranted.

Conformity to Specifications. Vendor warrants that the Services will be provided in the time frames and other specifications set forth herein. Vendor will (at no charge to HCP) furnish such materials and services as may be required to correct any nonconformity or defect in the transcribed documents.

Compliance with Law. In performing Vendor's obligations under this Agreement, Vendor will comply, and will cause its personnel to comply, with the requirements of all applicable laws, ordinances, regulations, codes and executive orders of the United States and of the country in which Vendor is performing services. The provisions of such laws, regulations, and executive orders shall be deemed to be an integral part of this Agreement to the same extent as if they were written herein.

Non-Infringement. Subject to and in accordance with this Agreement, HCP will be entitled to use and enjoy the benefit of all Services without adverse interruption or disturbance by Vendor or by any entity asserting a claim under or through Vendor. Vendor further represents and warrants that the Services and all other materials of whatsoever nature furnished to HCP under this Agreement, and HCP's use thereof in accordance with the terms and conditions of this Agreement, will not infringe or violate the intellectual property rights of any third party or violate the laws, regulations or orders of any governmental or judicial authority.

Disabling Devices. If the Services involve the furnishing, implementation or development of software, Vendor represents and warrants that prior to delivering the software, Vendor will test the software and the media on which it is to be delivered with a reasonably current version of a leading anti-virus application, in efforts to detect, and if so detected, to eliminate, any computer code (sometimes referred to as "viruses" or "worms") designed to damage, disrupt, disable, harm, or otherwise impede in any manner, the orderly operation of the software or any other software, data files, firmware, hardware, computer system or network. Vendor further represents and warrants that any software developed, delivered or installed by Vendor shall not contain any computer code or any other procedures, routines or mechanisms designed by Vendor or its licensors to: (i) disrupt, disable, harm or impair in any way such software's (or any other software's) orderly operation based on the elapsing of a period of time,

exceeding an authorized number of copies, advancement to a particular date or other numeral (sometimes referred to as “time bombs”, “time locks”, or “drop dead” devices); (ii) cause such software to damage or corrupt any of HCP’s data, storage media, programs, equipment or communications, or otherwise interfere with HCP’s operations, or (iii) permit Vendor or its licensors to access such software (or HCP’s computer systems) to cause such disruption, disablement, harm, impairment, damage or corruption (sometimes referred to as “traps”, “access codes” or “trap door” devices). Vendor will not unilaterally (*i.e.*, without appropriate judicial order) remove, deinstall, repossess, modify, delete, damage, deactivate, disable, or interfere with the software because of any dispute relating to this Agreement.

## 10. INDEMNITY

(a) Reason for this Provision: Should a party breach the Agreement, the other party will be indemnified for damages resulting therefrom.

(b) Issues and Concerns for Each Party:

(i) HCP will want to be indemnified for a breach of any term or condition of the Agreement by Vendor as well as an inaccuracy of any representation or warranty.

(ii) If technology is developed or supplied by Vendor, HCP may want to be indemnified for damages arising from claims of third parties that such technology infringes on the third party’s rights.

(iii) Will HCP indemnify Vendor for its breach of a term or condition or inaccuracy of a representation or warranty?

(iv) Indemnification procedures.

(A) In the event the retention of an attorney is necessary, who selects such attorney?

(B) Who controls the claim or action?

(v) A Vendor will often try to limit its exposure by requesting a cap on its indemnification obligations (that is, its obligations will not exceed a certain dollar figure) and by requesting a basket on its indemnification obligations (that is, it has no indemnification obligation until its obligation exceeds a certain dollar figure).

(iii) Sample Provisions:

General Indemnity. Vendor will defend, hold harmless and indemnify HCP, its affiliates and their respective personnel (collectively, the

“Indemnitees”) from and against any and all losses, claims, liabilities, costs and expenses (including taxes, penalties, interest, reasonable expenses of investigation and attorneys’ fees and disbursements) as incurred (collectively “Damages”) arising out of, or relating to: (i) any obligation for which Vendor is responsible as employer or vendor of its personnel; (ii) any breach by Vendor of its obligations or its representations under this Agreement; (iii) any negligence or willful misconduct of Vendor; or (iv) any negligent act or omission by Vendor that results in personal injury or death, or damage to property.

Infringement Indemnity. Vendor will defend, hold harmless and indemnify the Indemnitees from and against any and all Damages arising out of, or relating to, a claim by a third party that the Services or any other materials furnished by Vendor to HCP, or that HCP’s (or an affiliate’s) use thereof, infringes or violates such third party’s intellectual property rights.

Indemnification Procedures. If an Indemnitee seeks indemnification under this Agreement, the Indemnitee will: (i) give prompt notice to Vendor concerning the existence of the indemnifiable event; (ii) grant authority to Vendor to defend or settle any related action or claim; and, (iii) provide, at Vendor’s expense, such information, cooperation and assistance to Vendor as may be reasonably necessary for Vendor to defend or settle the claim or action. The Indemnitee’s failure to give prompt notice shall not constitute a waiver of the Indemnitee’s right to indemnification and shall affect Vendor’s indemnification obligations only to the extent that Vendor’s rights are materially prejudiced by such failure or delay. Notwithstanding anything to the contrary set forth herein, (i) the Indemnitee may participate, at its own expense, in any defense and settlement directly or through counsel of its choice, and (ii) Vendor shall not enter into any settlement agreement on terms that would diminish the rights provided to the Indemnitee or increase the obligations assumed by the Indemnitee under this Agreement, without the prior written consent of the Indemnitee. If Vendor elects not to defend any claim, the Indemnitee will have the right to defend or settle the claim as it may deem appropriate, at the cost and expense of Vendor, and Vendor will promptly reimburse the Indemnitee for all costs, expenses, settlement amounts and other Damages.

Basket and Cap. Vendor shall not be required to indemnify and hold HCP harmless for losses pursuant to this Section until the aggregate amount due in respect of such losses exceeds \$\_\_\_\_\_, and thereafter Vendor shall not be required to indemnify and hold HCP harmless for all such losses in excess of \$\_\_\_\_\_.

## **11. INSURANCE**

(a) Reason for this Provision: HCP should insist that Vendor maintain certain minimum insurance coverage.

(b) Issues and Concerns for Each Party:

(i) What is the required coverage?

(A) HCP must consult with its insurance agent to ascertain the necessary coverage.

(B) Possible coverage includes general liability insurance and professional liability insurance, among other coverages.

(ii) What insurance company will be used?

(A) As Vendor will be overseas, it may have a relationship with an overseas insurance carrier. HCP should insist that a US based issuance carrier be used with specified minimum ratings. Also, the insurance carrier can be subject to HCP's approval.

(B) HCP should be named on each policy as an additional insured.

(iii) Certificates of insurance evidencing coverage should be presented to HCP at stated intervals (such as annually) and at other times requested by HCP.

(iv) The policies should contain a clause prohibiting cancellation without notice to HCP.

(c) Sample Provisions:

Required Coverage. During the term of this Agreement, Vendor will maintain insurance coverage with limits no less than those set forth below, and under forms of policies satisfactory to HCP. The insurance company shall be subject to HCP's approval.

(i) General Liability Combined Single Limit (CSL) providing coverage against liability for bodily injury, death, and property damages in the minimum amount of \$\_\_\_\_\_;

(iii) Professional Liability Insurance ("Errors and Omissions") in the minimum amount of \$\_\_\_\_\_, covering losses from operating errors, omissions, negligence and misrepresentations, and breach of contract related to Vendor's obligations under this Agreement;

(iii) Fidelity/Crime Bond insurance in the minimum amount of \$\_\_\_\_\_ per loss providing coverage for any loss sustained by HCP as a result of

any dishonest act by Vendor's personnel, including but not limited to theft, forgery, alteration, or transfer of funds (electronically or otherwise);

Certificates of Insurance. Vendor will submit Certificates of Insurance to HCP within ten (10) days after the Agreement has been executed. Each Certificate shall provide that no less than thirty (30) days advance notice will be given in writing to HCP prior to cancellation, termination, or redemption of any one of the policies. Such delivery and notification shall be addressed to the President for HCP. At least thirty (30) days before the expiration of any such insurance policy, Vendor will deliver to HCP certificates of insurance attesting to the renewal of such insurance. Acceptance by HCP of any certificate of insurance which does not conform to the requirements of this Section shall not relieve Vendor of its obligation to provide insurance conforming to the requirements hereof.

No Limitation on Obligations. The requirements set forth above as to types, limits and approval of insurance coverage to be maintained by Vendor will not in any manner limit the liabilities and obligations assumed by Vendor under this Agreement.

## **12. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY**

(a) Reason for this Provision: Vendor will often attempt to disclaim warranties by stating that it will not make any representations regarding the quality of its Services. Additionally, a Vendor often tries to limit its liability resulting from its provision of the Services by stating that claims made by HCP relating to the Services will not exceed a specified dollar amount or will otherwise be limited.

(b) Issues and Concerns for Each Party:

(i) Warranties.

(A) HCP should request certain representations and warranties as to the quality of the Services (as discussed above).

(B) On the other hand, Vendor will often state that it will not warrant the condition or quality of the Services; in other words, disclaim all warranties.

(C) If Vendor is developing software or some other physical deliverable, will Vendor warrant that such deliverable will function as stated for a specified period of time?

(ii) Limitation of Liability.

(A) This is another mechanism by which Vendor will try to limit its liability. Often the limitation is a fixed figure or a figure based upon the amount of payments made by HCP to Vendor over a stated period of time.

(B) Will it be mutual (that is, both party's potential liability is limited) or one-way (that is, only applicable to one party)?

(C) Consider requesting carve-outs to the limitation liability, which, if such carve-out was to occur, there would not be a limitation of such party's liability. Requested carve-outs often include damages resulting from the negligence or misconduct of a party or a breach of a confidentiality or HIPAA provision.

(c) Sample Provisions:

EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT, VENDOR DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

EXCEPT TO THE EXTENT OTHERWISE EXPRESSLY PROVIDED IN THIS SECTION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY (OR TO ANY PERSON OR ENTITY CLAIMING THROUGH THE OTHER PARTY) FOR LOST PROFITS OR FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL OR EXEMPLARY DAMAGES ARISING OUT OF OR IN ANY MANNER CONNECTED WITH THIS AGREEMENT OR THE SUBJECT MATTER HEREOF, REGARDLESS OF THE FORM OF ACTION AND WHETHER OR NOT SUCH PARTY HAS BEEN INFORMED OF, OR OTHERWISE MIGHT HAVE ANTICIPATED, THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT SHALL NOT APPLY TO DAMAGES, (i) RESULTING FROM THE GROSS NEGLIGENCE, BAD FAITH OR WILLFUL MISCONDUCT OF A PARTY, (ii) STEMMING FROM PERSONAL INJURY, DEATH, OR PROPERTY DAMAGE CAUSED BY THE NEGLIGENCE OF SUCH PARTY, OR ITS PERSONNEL, OR (iii) ARISING FROM CLAIMS FOR WHICH EITHER PARTY HAS AGREED TO INDEMNIFY THE OTHER PARTY PURSUANT TO THE PROVISIONS OF THIS AGREEMENT.

**13. ENFORCEMENT ISSUES**

(a) Reason for this Provision: How will the Agreement be enforced by HCP? Vendor may be a startup company with few assets. In any event, Vendor is overseas and may

operate in a country with lax laws. Even if such country's laws are not lax, enforcement is still an issue.

(b) Issues and Concerns for Each Party:

(i) Which country's laws will apply to resolve a dispute?

(A) US law and specifically the laws of the State of HCP.

(B) The laws of the country of Vendor.

(C) A neutral, foreign country law.

(ii) Where will disputes be resolved?

(a) In the US and specifically the State of HCP.

(b) Vendor's country.

(c) Neutral country or location.

(iii) What is the forum in which the dispute will be resolved?

(A) In the courts in the US and specifically the courts in the State of HCP.

(B) In the courts in Vendor's country.

(C) Arbitration (US or foreign).

(D) Rules of Arbitration of the International Chamber of Commerce.

(iv) If a judgment is obtained, how will it be enforced?

(A) Is Vendor a start-up company with no significant assets or does it possess assets?

(B) Is the country in which Vendor operates conducive to enforcing a judgment?

(v) Specify English language will be the controlling language.

(c) Sample Provisions:

Governing Law. The laws of the State of \_\_\_\_\_, United States shall in all respects govern this Agreement as an Agreement executed in, and to be entirely performed within, the State of \_\_\_\_\_, United States without

giving effect to the conflict of laws principles thereof. The parties expressly disclaim the applicability of, and waive any rights based upon, the Uniform Computer Information Transactions Act or the United Nations Convention on the Sale of Goods. For the avoidance of doubt, nothing stated in this Agreement will prejudice or limit the rights or remedies of either party to enforce any award or decree under the laws of any jurisdiction where property or assets of the other party may be located. English shall be the language used to resolve any such dispute.

Jurisdiction. All claims or disputes for which equitable relief is sought shall be heard exclusively by a federal or state court sitting in \_\_\_\_\_, United States of America, and shall not be subject to arbitration. Each party waives any objection it may have to any proceedings brought in any such court, waives any claim that the proceedings have been brought in an inconvenient forum, and further waives the right to object (with respect to such proceedings) that such court does not have jurisdiction over such party. Without limiting the generality of the forgoing, Vendor specifically consents to personal and subject matter jurisdiction for such claims in the federal or state court sitting in \_\_\_\_\_, United States of America.

Alternate Dispute Resolution. With the exception of claims or disputes for which equitable relief is sought, any claim or dispute between Vendor and HCP arising out of or in connection with this Agreement (including any question regarding its existence, validity or termination, or any act or omission pursuant to this Agreement) shall be referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”), which Rules are deemed to be incorporated by reference into this Section. The reference shall be to a sole arbitrator if the parties to the dispute, controversy or claim mutually agree upon a sole arbitrator within the period specified by the ICC; failing which, the reference shall be to three arbitrators who shall be appointed as follows: (i) Vendor shall appoint one arbitrator; (ii) HCP shall appoint one arbitrator; and, (iii) the two appointed arbitrators shall appoint the third arbitrator. If any party fails to appoint an arbitrator within the time specified by the ICC, then such arbitrator shall be appointed as per the Rules of the ICC. The place of the arbitration shall be \_\_\_\_\_. The language to be used in the arbitration proceedings shall be English.

#### **14. PROPRIETARY RIGHTS**

(a) Reason for this Provision: This provision is applicable if Vendor is creating a technology as part of the Services and will specify who owns the technology.

(b) Issues and Concerns for Each Party:

(i) Who owns the technology developed from the relationship (also known as work product)?

(ii) If HCP will own the work product:

(A) Vendor must agree to assign the work product rights to HCP.

(B) Vendor should be required to maintain written records relating to the work product and must be required to turn over all records when requested by HCP.

(C) If HCP desires to obtain patent or trademark protection, Vendor must agree to cooperate with respect thereto.

(D) If third party materials and technologies are incorporated into the work product, Vendor must obtain approval to incorporate same from such third parties.

(c) Sample Provisions:

Work Product. “Work Product” shall mean and include all ideas, concepts, know-how, techniques, inventions, discoveries, improvements, specifications, designs, methods, devices, systems, reports, studies, computer software (in object or source code), programming and other documentation, flow charts, diagrams and all other information or tangible material of any nature whatsoever (in any medium and in any stage of development or completion) relating to the subject matter of this Outsourcing Agreement, that are conceived, designed, practiced, prepared, produced or developed by HCP or Vendor or any of its personnel: (i) during the course of the project; (ii) based upon knowledge or information learned or gained from HCP; or, (iii) resulting from the use of HCP’s facilities, personnel, or materials. Vendor shall keep and maintain adequate and current written records of all Work Products made by Vendor or its personnel. The records will be in the form of notes, sketches, drawings, or any other format that may be specified by HCP, and will be available to and remain the sole property of HCP at all times.

Rights to Work Product. To the fullest extent permitted under law, all Work Product shall be the property of HCP and shall be deemed to be a “work made for hire” (as defined in Section 101 of Title 17 of the United States Code). To the extent any work product is determined not to be “work made for hire”, Vendor hereby irrevocably and exclusively assigns, transfers and conveys to HCP all intellectual property rights, in and to any and all work product; and Vendor acknowledges that neither it nor its personnel will retain any intellectual property rights in the work product. For this purpose, Vendor will require each of its personnel who provide

Services, or may in any way be involved or responsible or claim to be involved or responsible in the conception, design, practice, preparation, production or development of the work product, to be bound by a written Non-Disclosure and Work Product Assignment Agreement in the form attached as Exhibit \_\_. Vendor will furnish executed originals of all such agreements to HCP prior to commencing any work hereunder. Vendor acknowledges and agrees that: (i) the assignment to HCP of the work product and the intellectual property rights therein shall extend throughout the world, shall be in perpetuity and shall not lapse by reason of HCP not exercising the rights assigned to it within one year from the date of assignment or for any other reason; (ii) the assignment to HCP of the work product and the intellectual property rights therein shall be an integral part of this Outsourcing Agreement; and, (iii) no royalty shall be payable by HCP to Vendor for the assignment of the work product and the intellectual property rights therein, other than the amounts payable by HCP to Vendor under this Outsourcing Agreement. Furthermore, Vendor and its personnel shall not in any non-transitory manner store or cache information about the work product.

Legend. Vendor acknowledges that all or part of the work product may be copyrighted, trademarked, or patented solely by HCP. Vendor will assist HCP, or its designee, in every proper way to secure HCP's intellectual property rights in the work product, including (i) disclosing to HCP all pertinent information and data with respect thereto, (ii) executing all applications, specifications, oaths, assignments and all other instruments which HCP shall deem necessary in order to apply for and obtain such intellectual property rights in and to the work product. All items provided to HCP, or developed hereunder, or which otherwise qualify as HCP's property, shall be marked as follows:

“© (year) by (Legal name of HCP). All rights reserved. Unpublished.”

Any work product that is software will be programmed to display the foregoing legends in the opening screens produced at the initiation of any session in which such software may be accessed by a videographic device, as well as on such reports and print pages as HCP may designate.

Vendor's Materials. HCP acknowledges that in developing or providing the work product, Vendor may utilize certain proprietary methodologies, tools, models, software, procedures, documentation, know-how and processes owned by Vendor (“Vendor Materials”). HCP further acknowledges that Vendor may modify or improve the Vendor Materials during the course of providing Services. HCP agrees that all such modifications or improvements shall be included within the meaning of “Vendor Materials”. Where Vendor Materials are included within any

work product, Vendor hereby grants to HCP a perpetual, irrevocable, royalty-free, non-exclusive right and license to use the Vendor Materials in connection with HCP's use of the work product, for no additional cost. Vendor will notify HCP concerning any Vendor Materials that are included within the work product; and after such notice, HCP will maintain the confidential and proprietary nature of the Vendor Materials, subject to HCP's right to use the Vendor Materials in accordance with the terms hereof. Third party software or other intellectual property that HCP specifically agrees to license separately, will not be included within the meaning of the phrase "Vendor Materials".

Third Party Intellectual Property. If Vendor intends to include within the work product any software or other intellectual property of a third party ("Third Party Materials"), or if in order to use the work product HCP will be required to use any Third Party Materials, Vendor will so notify HCP and arrange for HCP to obtain (for no additional cost or on such terms as may be acceptable to HCP) a perpetual, irrevocable, royalty-free, non-exclusive right and license to use the Third Party Materials in connection with HCP's use of the work product.

## **15. MISCELLANEOUS PROVISIONS**

(a) Reason for this Provision: These are the general provisions which typically finalize an Agreement.

(b) Issues and Concerns for Each Party:

(i) Can the Agreement be assigned by a party?

(A) HCP may not want Vendor to assign the Agreement because will lose control over who is performing the Services.

(B) HCP may need the flexibility to have the right to assign the Agreement to a third party, especially if due to a merger or acquisition.

(ii) Will a party's breach of its obligations be excused if it results from a force majeure event?

(iii) To whom are notices given?

(c) Sample Provisions:

Assignment. Neither party may assign this Agreement or any of its rights or interests hereunder, nor delegate or subcontract any work or obligation to be performed hereunder, without the prior written consent of the other party, which consent shall not be unreasonably withheld. Any attempted

assignment, delegation or subcontracting in contravention of this provision shall be null and void, and of no force or effect. HCP may, with notice to Vendor, assign this Agreement or any of its rights or interests hereunder, or delegate any of its obligations hereunder, to (i) an Affiliate, (ii) HCP's successor pursuant to a merger, consolidation or sale, or (iii) an entity that acquires all or substantially all of that portion of HCP's assets or business for which Vendor's products or services were acquired or are being used. This Agreement shall bind, and inure to the benefit of, the respective legal successors and permitted assigns of the parties.

Force Majeure. Each party will be excused from a delay in performing, or a failure to perform, its obligations under this Agreement to the extent such delay or failure is caused by the occurrence of any contingency beyond the reasonable control (and without any fault of) such party. In such event, the performance times shall be extended for a period of time equivalent to the time lost because of the excusable delay. However, if an excusable delay continues more than thirty (30) consecutive calendar days, the party not relying on the excusable delay may, at its option (and without penalty or financial obligation of any kind), terminate this Agreement upon notice to the other party. In order to avail itself of the relief provided in this Section for an excusable delay, the party must act diligently to remedy the cause of, or to mitigate or overcome, such delay or failure.

Notices. Unless otherwise specified, any notice, demand or other communication (collectively "notice") required or permitted under this Agreement shall be given in writing and delivered personally, or sent by registered or certified mail (return receipt requested with postage prepaid), to the appropriate representative of the receiving party at the address set forth in the introductory paragraph of this Agreement. A notice shall be deemed to have been effectively given when actually received. Either party may change its address(es) or representative(s) for receiving notices upon notice to the other.