



### Termination and Transition Periods

By: Philip Hammarberg and Zachary Cohen

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- Philip Hammarberg:** Welcome to the Garfunkel Wild Health IT Podcast. I'm here with Zach Cohen, a Partner with the firm, and I'm Philip Hammarberg an Associate.
- Philip Hammarberg:** On today's podcast we're going to be discussing termination, provisions and transition periods.
- Philip Hammarberg:** So, Zach, what are some of the issues that commonly come up when negotiating termination provisions?
- Zachary Cohen:** Hi, Phil. So the issue that really comes up that I wanted to talk about today is making sure the client is in a position where, upon termination of the agreement, to the extent that they need some transition time while they're working with another vendor, that the old vendor will help them out, will continue to give access and won't just shut them off, and then the client is going to be in a position where they might have a very needed service that now no vendor is giving them, because their old vendor cut them off, and their new vendor isn't up and running yet. So that's why we have what's called transition period language.
- Zachary Cohen:** The importance of transition period language really depends on how important the software is to the operations of a client. There's certain software where, if you got cut off from it and you didn't have a new vendor up and running, it might be an inconvenience, but it wouldn't really add too much trouble for you to find another workaround. But then there's some solutions like an EHR system or your billing software, or other vital software, where you really need to have it up and running continuously, without any sort of a period of interruption.
- Zachary Cohen:** And so that's why you want to negotiate these in the beginning, because if you don't, you're leaving it up to chance as to whether or not the vendor is going to be cooperative with you.

- Philip Hammarberg:** Yeah, that certainly sounds like a nightmare scenario to not have a transition provision in place, and have that plan to keep continuity as you transition from one vendor to another.
- Zachary Cohen:** Yeah, and so I'll describe a couple of situations we've seen in the past where there was no transition period language in the contract, and we had a customer who all of a sudden they need something from their old vendor, and the old vendor tells them "Well, we can do that, but you need to sign a three year or five year agreement with us for that." and the customer really only needed maybe six months, maybe a year. But they're now at the mercy of the vendor or the vendor says "Fine, we'll do it for a year, but it's going to be at five X, eight X, ten X of what you were paying before."
- Zachary Cohen:** So those are those nightmare scenarios that you're talking about. And so what we recommend is making sure that there is a discussion with the business people of how dependent are you on this software.
- Zachary Cohen:** The best situation is always for the customer to figure out in advance, if they're not going to use their current vendor anymore, and they're going to move to another one. Ideally, you're doing that well in advance. You're talking to the new vendor while your current vendor is still providing services, and you have something that's going to be up and running right when your old contract is going to terminate. But again, a lot of times things come up and that doesn't happen.
- Zachary Cohen:** So we always recommend trying to get something in the contract that gives you a period of what you need, whether that's six months, a year, two years, and some sort of price certainty at the current rate. It could be at the current rates, maybe plus five percent or something.
- Zachary Cohen:** Sometimes the vendor could be hesitant because they're saying, "Well, you know you're leaving. You know. How do we know we can trust you to keep on paying?"
- Zachary Cohen:** A solution to that can be, you can put up a deposit of half the amount, and then pay monthly the remainder. There is always solutions, but it's something that you really need to focus on while you're negotiating the contract - figure out a solution that works for the customer and at the end of the day the vendor.
- Zachary Cohen:** It's in their best interest to provide you with something, because it prolongs the amount of money they're going to get for providing a service. So it's always in their best interest to agree to something. That's why you do it when you have the most leverage...in the beginning of the contract, while you're negotiating the contract.
- Philip Hammarberg:** That really makes a lot of sense. One issue that I've run into recently with some contracts is that some clients, instead of just the transition period where they're going to continue using the services sort of as is, or as they were during the term of the agreement, some clients need additional assistance to facilitate that transition from one vendor to another. So in situations like that, I try to include language that would address that, and make sure that the former vendor, the

vendor you're leaving, will provide those additional assistance and services necessary to smoothly transition to that second vendor.

**Zachary Cohen:**

Yeah, that's a great point. And again, for something like that, ideally, if you can, you want to try and negotiate some set rates. Because you don't want to be in a position where the vendor says, "Yeah, we'll help you, but again, it's going to be a number that is going to make you blush when we tell you how much it's actually going to cost you."

**Zachary Cohen:**

One last thing is clients also want to be sure that they know how they're going to get back their data. If this is something that's going to be on the vendors' cloud network, and if it's something that the client doesn't have. Like an EHR system where the client doesn't necessarily have it on their own system, then a duplicative set of data is going to the vendor. So to the extent that you're going to need this data back, you want to make sure that during the term of the contract the software has the ability for you to download it back to your system, if you need to. And then also on termination, you want something about how you're going to get the data back, what type of format it's going to be in, if there is any sort of encryptions that you're going to need their help unencrypting for your network, that all that's put out in the agreement. And again, the extent of how much you need in this is all dependent on how vital the software is, what data it has, and do you have other sources of that data?

**Philip Hammarberg:**

Yes, those are great points. And certainly on another podcast we can really get into like return of data and various data provisions and security and such. But I think we've touched on termination and transition period. So unless there's anything else you want to add, I think that's it for today.

**Zachary Cohen:**

Yes, thank you very much, Phil.

**Philip Hammarberg:**

Thank you. And thank you to the listeners. Please like and subscribe, and we look forward to speaking with you next time.