Health Care IT Contract Mistakes
By: Philip Hammarberg and Afsheen Shah

Philip Hammarberg:	Welcome to the Garfunkel Wild Podcast. My name is Philip Hammarberg, and I'm here with Afsheen Shah. We're both partners with Garfunkel Wild.
Philip Hammarberg:	Today, we're going to be discussing the top 3 mistakes that health care providers make when entering into IT contracts. Afsheen, in your experience, what are 3 of the most common mistakes?
Afsheen Shah:	Thanks, Phil. So, 3 of the most common mistakes that I've personally experienced are insufficient timing, meaning that clients often do not provide their legal team enough time to properly and comprehensively review a contract that covers the product they're looking to acquire or license. And as part of that, which is the second point, they also failed to properly vet the product before jumping into a contractual arrangement with the vendor.
Afsheen Shah:	And the final one I see quite frequently is unrealistic expectations of the product, which, again, ties into, usually, a failure to properly vet the product before acquiring it.
Philip Hammarberg:	Those are all extremely important issues. I guess starting with timing, what are the consequences of a health care provider failing to provide their operations team and their legal team with adequate time to properly negotiate a contract?
Afsheen Shah:	That's a great question, Phil. So, what can happen is when both legal and operational side are rushing to get a product implemented, you tend to miss some of the bigger red flags that normally could be picked up with sufficient time. And while they're the bigger red flags, they're often not the easier ones, to be quite honest, because sometimes the way a product impacts operations isn't easily flushed out by a simple review of the contract.
Afsheen Shah:	I tend to have in-depth discussions with the operational teams, with the IT teams, to figure out how a product works, and also what the client expects the product to do once they have been implemented. And in my experience, what I see all too

often is the expectations that a client will have sometimes do not align with what the vendor is actually providing. And so, luckily we've been able to address these issues, and we've resolved them very effectively, but if there is a time constraint, the ability to fully and comprehensively ensure that all legal compliance and even operational issues are addressed, it becomes much more challenging and can lead to missed opportunities.

Philip Hammarberg: To your point, I also think from a negotiating perspective, that when there's a tight time constraint, and both the vendor and the health care provider are aware of that time constraint, it can significantly reduce the leverage in trying to negotiate good terms. So, I think sometimes, even when you're able to identify those significant issues, you may not be able to get the vendor to show some flexibility on those issues if they know that you have to sign this contract by a specific date.

Afsheen Shah: That's absolutely correct, which is unfortunate, because sometimes vendors will give in to, let's call it, less than premium pricing, if they realize that this isn't a rush, if this isn't something that you must have in place for your operations to continue effectively. And if you don't have the time to really flush everything out, it makes it a little more difficult to find out what the true pricing is.

Afsheen Shah: What you see on paper isn't always the price that the vendor would realistically agree to if they didn't have the upper hand.

Philip Hammarberg: That's a great point. Moving to failure to vet the product fully, what are some specific issues or concerns that come up related to that?

Afsheen Shah: So, the biggest items I see on this one are, one, a lot of health care providers will think that a product is a good operational fit just because it's HIPAA compliant, but what they fail to check, because the vendor is saying one thing, and it's very easy to kind of just look at what I call "sneaky slides", where everything is laid out so beautifully and perfectly, and it looks like it will integrate perfectly into your system as well, but when you get down into the weeds, the product itself may be HIPAA compliant, but does not necessarily have the integration capabilities that you as a health care provider might need with your existing solutions.

Afsheen Shah: For example, there are products that a health care provider may need integrated with their existing EHR. And I've actually had this situation where a vendor had a solution that was a good solution overall and they had been in the business for a while, but they had not tested the integration capability with this particular client's EHR.

Afsheen Shah: So while they were able to say and confidently say that, "yes, we've integrated with many EHRs before", because this was the first use case, in this instance, they were ultimately unable to interface with this particular client's EHR, and that resulted in almost a year of being in a contract that ultimately provided no value.

Philip Hammarberg: And to your point, from time to time, there are instances where health care providers will be contracting with a very big and prominent company, and it seems like some health care providers, at times, will forego some vetting that they might

have done with a smaller company based on the prominence of that company in the marketplace, and that may not always be a great strategy. Sure, they may be a well-established company, but as you pointed out, it may be a novel use case, it may be a new solution, and unless that individual health care provider and their operational and perhaps IT team appropriately vets the product, it may not be a good solution.

Afsheen Shah: That's absolutely correct, Phil. And, what I always like to tell people is vet a solution the same way you would a potential high-level hire.

Afsheen Shah: Everything you would want to know about that hire, such as their experience, their background, their ability to work effectively within your organization, those are really the same criteria that would apply to a new product.

Philip Hammarberg: That's a great point. Moving to the last of the 3 common mistakes, unrealistic expectations. What have you seen as common issues related to expectations?

Afsheen Shah: So, one of the things I have repeatedly seen come up is unfortunately because so many products, especially nowadays are so advanced, the product itself could be a great product, but that does not mean that it's going to work for your system or fix any existing, what I would say, process gaps within your system.

Afsheen Shah: So I think sometimes health care providers will enter into arrangements with the hopes that a product will fix their operational issues, and when that doesn't happen, naturally there's frustration, and they feel as if the vendor has not given them the product that they actually contracted for, when in reality, the product is complying with its specifications. It's performing exactly the way it's supposed to, but there was, and this actually ties a little bit into number two, Phil, where there was a failure or a failure to properly vet the product, where the client didn't actually look to see if the product will work as anticipated within its systems.

Afsheen Shah: And so, solutions are great. AI and IT tools generally have advanced significantly, but that does not mean that they can fix structural or operational issues within an organization. It can only meet you where the organization is currently at, so before entering into that contract, I think it's important to make sure that whatever the product is promising will actually hold true for your particular organization.

Philip Hammarberg: I think that's a great point, it's important that with those expectations that health care providers choose solutions that are sort of right-sized for their needs and identify or address the specific issues that they're trying to solve.

Afsheen Shah: Correct, yeah. And some of the, let's just call them the common terms that I hear thrown around, which every health care provider naturally would be drawn to, is, this increases efficiency, this will improve your revenue, this will improve outcomes, and those are all great things.

Afsheen Shah: But how do you actually know that? How will you measure that? And that's the piece that sometimes health care providers will miss. If there's no way to actually

measure what's being promised, then chances are you may not get what you bargained for.

Philip Hammarberg: That's a good point. So with all of that in mind, from a legal and contractual perspective, what are some of the mistakes that these common mistakes cause? What are some of the legal deficiencies that can happen as a result?

Afsheen Shah: Well, aside from, one of the most obvious that I tend to unfortunately experience more than I would like to is a loss in revenue that was not previously accounted for.

Afsheen Shah: Naturally, when you have a transition, or you're bringing in a new provider, there may be a small period where you're losing revenue, or maybe you're not necessarily because the product isn't working, but because you have two solutions, there's a little bit of overlap.

Afsheen Shah: But what I think is even worse than that is when you have a gap period, where one solution has been terminated because someone's anxious to get rid of it and jump into a new, more promising solution, but the new solution isn't up and running yet, and now you have potentially months of no services that could prevent you from billing time in a timely manner, collecting in a timely manner.

Afsheen Shah: I think those are generally some of the larger outcomes that I've seen from a failure to include proper legal terms and probably vet contracts. There is also the other extreme, which, say you have a solution, and it just is not working, and you realize this fairly quickly. And usually when it is something that's critical to operations, that is something that will come to light very quickly. But now, you forgot to include a termination for convenience, right? And you're stuck in a 2-year term. And you can't get out.

Afsheen Shah: So either, you have to try to somehow make that product work for the next 2 years, which, if it's not working now, more likely than not, it's not going to work for the next 2 years, either.

Afsheen Shah: So now you're starting this whole process again, spending more money on a new vendor, new legal reviews, new operational reviews, and the cost of that initial product has effectively gone up considerably.

Philip Hammarberg: Yeah. That's a good point. Termination rights are crucially important to these types of contracts, especially if it's a multi-year contract.

Afsheen Shah: Correct, correct. And I think, especially for some of the smaller solutions, I think because, you know, sometimes we see problems based on the size of the solution, and the size of the fees that we're actually paying for that solution, but the issue is even a smaller product, and even low-priced items, can cause huge headaches, and if you don't have that, termination for convenience or a no penalty out, then that headache may not be worth the actual product.

Philip Hammarberg: Sure. And even if you do have good termination rights, it's important that you also have good transition rights, so that you can smoothly transition to a new vendor without having continuity issues.

Afsheen Shah: Correct, correct. And that's why one of my favorite clauses, actually in IT contracts is to build in a transition period. And most vendors are very open to it. I'm surprised sometimes when I see that contracts, that we've inherited, or, may have not fully undergone our legal process don't have those clauses, because in my experience, I will say that most vendors are willing to accommodate a seamless transition.

Philip Hammarberg: Okay. Unless you have anything else to add, I think we've covered this topic of the most common mistakes.

Afsheen Shah: I think, yeah, I would say I'm pretty good on my end also, Phil. I think that covers some of the more common ones. Obviously, we couldn't get through every single mistake today, but one thing I would love to tell people is in health care, the same way physicians tell us as humans that prevention is a cure, the same thing applies to your contracts.

Afsheen Shah: Prevention is a cure. If you can address concerns before they actually become concerns, then that is a key to a successful contractual collaboration and agreement.

Philip Hammarberg: Thank you. And thank you to the audience for tuning in. We hope you enjoyed today's podcast. If you found some valuable insights, please like and share, and stay tuned for more insights on future episodes.