SAMPLE PRO-VENDOR LICENSE AGREEMENT	COMMENTS FROM CLINIC'S PERSPECTIVE

SAMPLE PRO-VENDOR LICENSE AGREEMENT*

This License Agreement (the "Agreement") is made this _____ day of _____ ("Effective Date") by and between _____ ("Vendor") and _____ "Customer").

THE CUSTOMER ACKNOWLEDGES AND AGREES THAT CUSTOMER HAS CAREFULLY READ THIS LICENSE AGREEMENT IN ITS ENTIRETY, HAS HAD THE OPPORTUNITY TO CONSULT WITH ATTORNEYS AND OTHER ADVISORS CONCERNING THIS AGREEMENT, AND INTENDS TO BE LEGALLY BOUND THE ***TERMS AND CONDITIONS*** SET FORTH BELOW.

Comment: If a dispute emerges after signing the Agreement, this clause is designed to take away the argument from the clinics that they were misled by Vendor and didn't know what they were signing.

VENDOR

_____[Vendor's Name]_____

By: _____

_____
Print Name

_____
Title

CUSTOMER:

By: _____

_____
Print Name

_____
Title

* ***CAVEAT: This form of Agreement is provided merely as a guide in identifying some of the issues that arise in software licensing. However, because every transaction will have its own unique structure, features and issues, this form and its provisions will not be applicable to all situations and may not contain all of the provisions necessary or advisable with respect to a particular transaction. Therefore, this form Agreement is not a substitute for obtaining competent legal advice, and should not be used without review by competent counsel.***

TERMS AND CONDITIONS

Section 1 –General

1.1 Customer's Representations. Customer represents and warrants that (i) Customer is an entity duly organized, validly existing and in good standing in the jurisdiction of its organization and every other jurisdiction where any Product is to be located; (ii) Customer has obtained all approvals, permits or other authorizations required for Customer to enter into and perform its obligations under this Agreement hereby; (iii) the purchase of any Product contemplated hereby does not violate or conflict with any law, regulation, decree, order, judgment, contract, agreement, or other document applicable to Customer or its properties; and (iv) all financial statements and other information provided by Customer to Vendor are true, accurate and complete in all material respects.

1.2 Charges. Product charges applicable to a transaction shall be as set forth in an order or other Ancillary Document. In the absence of such a document Vendor's then current standard list of charges shall apply. Unless otherwise expressly provided by this Agreement, and regardless of the terms of any lease, license or Service arrangement pursuant hereto, recurring charges (such as monthly license or maintenance charges) may be increased at any time in Vendor's sole discretion upon thirty (30) days prior written Notice to Customer. Taxes and shipping charges (as set forth below) are in addition to all other Product charges.

<u>Comment</u>: In order to control costs and avoid nasty surprises, clinics should insist that all purchases and licenses are listed in an Appendix, along with corresponding prices and discounts. This Appendix should specify what items are being purchased for a fixed amount or fee, and what services are charged hourly. For hourly services, the clinics may want to specify "not to exceed" maximums.

1.3 Payment. (a) One-time charges are due and payable at the time of delivery of the Product. A recurring charge is due on the earlier of (i) the fifteenth day following the date of the invoice for such charge, or (ii) the thirtieth day of the Period to which such charge relates. Recurring charges shall be prorated in respect of partial Periods. **(b)** The payment terms for those items set forth in the attached Appendices shall be as follows: 50% upon Customer's execution of this Agreement and the balance upon the earlier to occur of (a) Software installation or (b) 3 months from Customer's execution of this Agreement. **(c)** All charges are due and payable as set forth above regardless of whether or not Vendor invoices Customer for such charges. In the event of a delinquency in the payment when due of any amount owing Vendor under this Agreement, so long as such delinquency remains outstanding in whole or in part, interest on the delinquent

<u>Comment</u>: Many vendor agreements specify that the clinics shall pay 50% or more <u>in advance</u> before the vendor has done anything, and before the clinics can verify that the software even works properly! Just as it would not be wise to pay a construction contractor most or all of your money before he has even picked up a hammer or driven a single nail, it is unwise to pay the software vendor substantial amounts of money before the vendor has performed. Despite what software vendors may say, installment payments triggered by the successful completion of

amount shall accrue at the rate of one and one-half percent (1.5%) per month (or, if less, the highest rate permitted by applicable law). All accrued delinquency interest shall be due and payable on demand, and in the absence of demand, on the first day of each calendar month. The accrual and collection of delinquency interest shall not constitute a cure of the continuing breach of this Agreement constituted by such delinquency, nor a waiver of any other right or remedy in respect of such breach available to Vendor under this Agreement, at law, or in equity.

specified milestone tasks are the norm, and clinics should insist upon them. Note that just as in a contract to construct a house, there should be a significant "withhold" to be paid only upon satisfactory completion of the work.

1.4 Taxes. All sales use or other taxes or governmental fees or levies related to a transaction (other than taxes based upon Vendor's income) shall be the sole responsibility of Customer. If advanced by Vendor, such taxes shall be reimbursed by Customer immediately upon delivery of the Product in question. Such reimbursement shall be due and payable as set forth above whether or not Vendor invoices Customer for such taxes. If a certificate of exemption or similar document or proceeding is to be made in order to exempt the transaction from any tax liability, Customer shall obtain such certificate, documents, and/or initiate such proceeding at Customer's sole cost and expense.

1.5 Term and Termination. This Agreement shall commence upon the Effective Date and continue until terminated as provided below. This Agreement shall terminate upon the first to occur of the following: (1) in the case of a breach of this Agreement which remains uncured thirty (30) days after Notice of breach was given to the Party in breach, the non-breaching Party may terminate this Agreement immediately upon written Notice to the Party in breach; (2) either party in its sole discretion (for any or no reason whatsoever) may terminate this Agreement upon ninety (90) days Notice of termination to the other Party. Unless Vendor otherwise elects in its sole discretion, any termination of this Agreement shall not be effective as to a Product under an extended term transaction (such as lease or License where a separately stated term for such transaction is set forth in an Ancillary Document) until the expiration of such extended term.

<u>Comment</u>: This clause allows the Vendor to terminate the Agreement for no good reason on 90 days notice. By the time a clinic enters into an agreement with a Vendor, it will have spent a great deal of time, money and resources identifying its software needs, developing specifications (see Addendum for definition of Functional Specifications), negotiating the business and legal terms of the contract with Vendor, and signing and commencing implementation. After these events occur, the clinic will want the Agreement to be binding on Vendor so it can't simply walk away from its obligations. See Addendum for proposed revision.

1.6 Confidentiality and Proprietary Rights. Except as provided in this Section, information exchanged between the Parties shall <u>not</u> be considered confidential unless both Parties agree otherwise in writing. Each Party shall keep confidential all terms, conditions or other provisions of this Agreement. Customer acknowledges and agrees as follow:

(1) The owner of each item of Intellectual Property embodied in any Product or Product component shall possess and retain title in and to each Product and its component parts, including without limitation all Intellectual Property embodied in (i) all Software code and documentation, (ii) all manuals or user information, (iii) the design and format of the input and output screens, graphical user interface, and printable forms, reports and other hard copy output incorporated in or generated by the Product, and (iv) all additions, enhancements, revisions, updates or other modifications to the Product or any part thereof, regardless of any fee or charge paid by Customer to Vendor in respect of the Product or the design, creation or use thereof. Customer shall not cause or permit removal or alteration in any way of any Notice, legend or symbol denoting any copyright, trademark, patent or other proprietary right or interest of the Intellectual Property owner appearing on any input or output screen or hard copy output incorporated in or generated by the Product, or any documentation, manuals, brochures, or other written or printed materials of any kind related to the Product.

(2) Each item of Intellectual Property embodied in a Product or any component thereof constitutes valuable proprietary information and trade secrets of the owner of such Intellectual Property. Consumer shall not disclose (nor permit any Customer employee, independent contractor, agent, or other person under its authority or control, to disclose) to any Person, or allow any Person access to, any such proprietary information or trade secrets in whole or in part; provided, however, use of the Product in accordance with the terms and conditions of this Agreement shall be permitted by employees of Customer in the ordinary course and scope of their employment by Customer. Customer shall not cause or permit any Software Product to be reverse engineered, decompiled, or disassembled in whole or in part. Customer shall not cause or permit the software, documentation, or other information related to the Product to be copied or reproduced in any form or medium, in whole or in part. Customer shall take such actions to preserve and protect Vendor's proprietary rights and interest of confidentiality in and with respect to the Products which are, at a minimum, commensurate with those actions taken by Customer to preserve and protect its most valuable trade secrets or other proprietary of confidential information.

(3) Customer's confidentiality obligations hereunder do not apply to any information which (i) was lawfully and rightfully in Customer's possession at the time of disclosure and was not acquired directly or indirectly from Vendor, (ii) was lawfully and rightfully acquired by Customer from others who acquired it by proper means and had no confidentiality obligation to Vendor with

respect to same, or (iii) is now, or hereafter becomes, through no fault of Customer, part of the public domain by publication or otherwise.

(4) Customer has no right to use any Software Product or any part thereof except as specifically granted under the license referred to in Section 3 hereof.

(5) Neither party shall infringe upon or otherwise make use of any trademark, service mark, tradename, or similar right or interest of the other Party.

1.7 Installation. Except as otherwise expressly provided in an Ancillary Document, the installation and set-up of all Products at Customer's site shall be the sole responsibility of Customer. Customer is solely responsible for providing an environment corresponding to the Product's Specifications and that is otherwise suitable for the Product's installation and operation. Without limiting the generality of the foregoing, the site for the Product selected by Customer shall be suitable as to space, temperature, humidity, and the availability of electrical power, cabling, connectivity devices, and al Hardware, Software and supplies not included with the Product but required for its installation operation or use. Where an Ancillary Document expressly requires Vendor to install a Product, such Product shall be installed by Vendor at Customer's site at a time that is mutually agreeable to the Parties.

<u>Comment</u>: You will notice that Vendor's sample License Agreement says that installation of the software is "the sole responsibility of Customer," and therefore, there is virtually no details as to how the installation and implementation will proceed. In short, this clause allows the Vendor to drop off the software and the rest is Customer's risk and responsibility. From the clinics' point of view, this is not acceptable. The reality is that a software installation project that is not properly managed is likely to fail. Please see the Addendum to the License Agreement, Section 1.7 et seq which sets forth an "Implementation Plan," detailing some of the key elements to be mindful of in (1) identifying the tasks that have to be done; (2) determining the proper sequence for the performance of those tasks; (3) allocating whose responsibility it is to perform those tasks; (4) verifying that those tasks have been properly performed before allowing the project to move on to the next phase; and (5) developing the management plans to make sure that these activities all occur. As specified in the Addendum, the implementation tasks include design and configuration of the Software, data conversion, creation of custom software, training clinic's staff, conducting acceptance testing (individual components, then conducting

end-to-end system), preparation for "Go-Live," etc. The Implementation Plan should include a series of "green light; red light system" which specifies that the Vendor cannot move on to the next step until the clinic has sign-off to verify the successful completion of prior steps.

Comment: A software implementation is loosely analogous to building a house. The tasks for the successful completion of both projects requires that the tasks be done in proper sequence, each satisfactorily completed, before the next task is commenced. For example, just as you would not erect the walls of a house before the foundation is poured and inspected, you would not schedule a "go-live date" before the software has been configured to your satisfaction, and such tasks as data conversion, training, and testing have successfully been completed. Nevertheless, many software agreements refer to "Go-Live Dates" as a date unilaterally set by the Vendor, as if such a date could be scheduled independent of other tasks that have to occur before the Go-Live Date is set. The definition of the "Go-Live Date" as set forth in the Addendum is intended to require the Vendor to have satisfactorily completed key steps before the Go-Live Date is set.

1.8 Other Customer Responsibilities. Except as otherwise expressly provided in an Ancillary Document, Customer is solely responsible for each of the following: (1) the suitability of a Product for Customer's purposes and intended use, (2) the use and operation of a Product in accordance with the Specifications and the manufacturer's operational instructions, and applicable law; (3) the use of a Product's operational results; (4) all data input into any Product, and (5) conversion of data or other files produced by non-Vendor products into a form suitable for use by a Product.

Section 2 – Hardware and Supplies

2.1 Shipping and Delivery. All shipping or other transportation charges related to a Product shall be the sole responsibility of Customer. If advanced by Vendor, such charges shall be due and payable at the time of delivery whether or not Vendor invoices Customer for such charges. In the absence specific instructions from Customer, Vendor will select the carrier but shall not thereby assume any liability in connection with shipment, nor shall the carrier be construed to be the agent of Vendor.

Comment: Assuming that the clinic will want to incorporate into the system software and hardware supplied or manufactured by a third party, clinic will want assurance from Vendor that the proposed components will all be compatible with each other. See Addendum Section 2.5 for proposed clause requiring Vendor to provide such assurance.

2.2 Title and Risk of Loss. Title to Products sold to Customer and all risk of loss related to such Products passes to Customer upon the delivery of the Products to either a carrier or Customer, whichever comes first.

2.3 Security Interest. Customer hereby grants to Vendor a first priority purchase money security interest in each Product sold to Customer until such time as all amounts due and owing Vendor by Customer in respect of such Product have been paid in full. Customer hereby constitutes and appoints Vendor as Customer's agent and attorney in fact for the purpose of executing, and filing with any appropriate authority, any and all documents (including without limitation Uniform Commercial Code financing statements) Vendor reasonably deems necessary or prudent in order to perfect its security interest in such Products. All filing fees and other out-of-pocket costs or expenses related to any such filings shall be reimbursed by Customer immediately upon demand.

2.4 Customer's Obligations. So long as any amount allocable to a given Product and owing hereunder remains outstanding, customer shall: (i) keep such Product in Customer's sole possession and control at the site where originally delivered to Customer or such other site as Vendor may consent to in writing; (ii) preserve and protect Vendor's security interest in such Product and keep such Product free of all other liens, security interests and encumbrances of any kind; (iii) keep such Product in good condition, repair and working order in accordance with the manufacturer's recommended service and maintenance procedures; (iv) keep such Product insured to the full insurable value thereof against loss due to fire, storm, theft and other casualties and hazards pursuant to a policy issued by an insurance company and otherwise be in form and substance acceptable to Vendor; (v) maintain and operate such Product in strict conformity with all applicable laws and regulations; and (vi) refrain from making alterations or modifications to such Product (including without limitation adding accessories, attachments, or connections) which deviate from or

otherwise fail to comply with the Specifications.

Section 3 – Software

3.1 Licensing. All Software made available to Customer by Vendor is licensed, not sold. Software Products owned by a Person other than Vendor and acquired by Customer pursuant to this Agreement are licensed to Customer under the owner's then current standard form end-user license agreement. Where a Software package not owned by Vendor is required for the proper operation of any Product acquired by Customer, Customer is solely responsible for obtaining the right to use such Software package. Adverse consequences, if any, to Customer or Product performance occasioned by Customer's failure to lawfully obtain use rights to any such required Software is Customer's sole responsibility.

Comment: This clause says that the clinic is solely responsible for securing the licenses to use any software from third parties. Assuming that the clinic will want to incorporate into the system software and hardware supplied or manufactured by a third party, clinic will want assurance from Vendor that it has received all of the necessary licenses to incorporate these components into the system. Clinic should require the Vendor to take on this responsibility as part of its installation obligations.

3.2 Vendor License Grant. Vendor hereby grants Customer a non-exclusive non-transferable right to use each Vendor-owned Software Product acquired by Customer in accordance with this Agreement for the period ending on the earlier of (i) the termination of this Agreement, or (ii) the expiration of any extended term applicable to such Software Product pursuant to an Ancillary document. Customer's use rights pursuant to this license are subject to the following limitations and Customer obligations:

(1) Customer has a right to the program portion of each Vendor Software Product only in object code format.

(2) In the case of a single-user license, Customer may install and use a Vendor Software Product only on one central processing unit ("CPU") at a time. In the case of a multi-user license Customer may simultaneously install and use a Vendor Software Product on that number of simultaneous users specified in the Product order or other Ancillary Document.

Comment: Vendors naturally will try to maximize revenues by limiting the number of work stations or the number of medical providers that can access the Software. In this regard, if a clinic desires to exceed the arbitrary thresholds that the vendor has set for purposes of pricing, the clinic is required to pay more money. Therefore, the clinics should think through how many work stations it requires to have access to the Software, how many of its providers (both full-time and part-time) that will need access, and how to account for such things as personnel

turnover or increases in staff and negotiate accordingly. See Addendum for one example of how a clinic might respond to this pro-Vendor clause..

(3) Each Vendor Software Product shall only be installed on a CPU located at the Customer facility identified in the Product order or other Ancillary Document.

(4) Customer may use a Vendor Software Product licensed hereunder only for Customer's own internal purposes to manipulate Customer's own data. Customer shall not use a Vendor Software Product to perform any data or information processing services for any third party in return for a fee or other pecuniary benefit of any kind.

(5) In addition to the licensed number of CPU installations of a Vendor Software Product, Customer may keep one back-up copy on archival media. Otherwise, Customer shall not copy and Vendor Software Product for any reason.

(6) Customer shall not re-license, sublicense, or otherwise transfer or distribute to any other Person all or any part of any Vendor Software Product, or any right, title or interest therein of any kind.

(7) Customer agrees not to modify, reverse engineer, disassemble, or decompile any Vendor Software Product, or any portion thereof.

(8) Upon termination of its license of any Vendor Software Product, Customer shall immediately erase all installed copies of such Software from all or Customer's Hardware, and Customer shall erase or return to Vendor all copies of such Software on magnetic media. Upon such termination Customer shall also destroy or return to Vendor all user manuals or other documentation in respect of such Software.

(9) Customer shall reproduce and include in all copies of any Vendor Software Product prepared by Customer (and in all derivative works thereof) the copyright Notice(s) and proprietary legend(s) of Vendor and Vendor's licensors/vendors (if any) as they appear in the Vendor Software Products and on the media containing the Vendor Software Products supplied hereunder.

(10) Customer acknowledges that it obtains no right, title, or interest in or to any Vendor copyright, trademark, patent, or other proprietary right relating to the Products, and agrees not to remove, alter, cover or obscure any copyright, patent, trademark or other

proprietary rights Notice on any Products or any portion thereof.

(11) Customer shall: (i) Notify Vendor immediately of the unauthorized possession, use or knowledge of any Vendor Software Products, materials, other items or confidential information or trade secrets supplied or made available to Customer under this Agreement, by a person or organization not authorized by this Agreement to have such possession, use, or knowledge; (ii) assist in correcting any such unauthorized possession, use, or knowledge; and (iii) cooperate with Vendor in any litigation against third parties deemed necessary by Vendor to protect its proprietary rights.

(12) To Assist Vendor in the protection of its property rights, Customer shall permit reasonable inspections by representatives of Vendor to review Customer's confidentiality policies and procedures relating to the safeguard or Vendor's Software Products and proprietary material, as well as the accounting information regarding the same. Additionally, Customer shall allow Vendor to examine the contents of Customer's hard drives and other storage media to confirm that Customer's use of Vendor Software Products complies with this Agreement.

3.3 Derivative Works. Customer hereby assigns and conveys to Vendor any and all right, title or interest of any kind Customer may have or acquire to derivative works of any Vendor Software Product, and all such derivative works shall constitute works for hire such that title thereto shall vest in Vendor.

Section 4 – Warranties and Liability

4.1 Warranty of Noninfringement. Vendor warrants that, at the time of delivery, a Product shall not infringe the patent rights or copyrights of any other Person. This warranty shall not apply to any infringement resulting from either: (1) operation or use of the Product with Hardware, Software or equipment not provided by Vendor; (2) operation or use of the Product other than in accordance with the Specifications therefore; or (3) alteration or modification of the Product by Customer or any other Person other than Vendor.

<u>Comment</u>: The only warranty that Vendor provides is that the Software will not infringe patent or copyrights. Please note that the Vendor provides no warranty whatsoever for defective software, or other malfunction. Would you purchase a new car or other "big ticket item" without a warranty? Probably not. Similarly, why should clinics pay literally hundreds of thousands of dollars (or more) for complex, potentially problematic software which has no warranty? They should not. Nevertheless, it is very common for vendor license agreements to disclaim all warranties, and to state that the software is licensed "as-is," meaning that all risk of

software failing to meet the clinics' expectations (or even failing completely) rests with the clinics. In short, clinics should insist upon adequate warranties as specified in the Addendum.

Warranty Disclaimer. Except as provided in Section 4.1 above, or except to the extent a warranty of a manufacturer other than Vendor may apply, ALL PRODUCTS ARE PROVIDED "**AS IS**" WITHOUT WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, VENDOR EXPRESSLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DATA INTEGRITY, ERROR-FREE OPERATION, OR UNINTERRUPTED SERVICE.

<u>Comment:</u> This clause expressly disclaims any warranty coverage, specifying that the Software is provided "as-is," whether defective or not. As stated above, the clinics should insist that (1) Vendor provide a warranty (e.g. 1 year) that the Software will meet the requirements of "the Specifications" (a defined term which includes the clinics' "mission-critical, must have" performance requirements, and (2) if it fails to do so, to repair or replace at Vendor's sole cost, and failing that, requires Vendor to provide a full refund of the clinic's payments.

4.2 Customer represents and warrants that it is a sophisticated purchaser and acknowledge and agree that the allocations of risks in this Agreement is reflected in the Software license fees, that Vendor is unable to test the Software under all possible circumstances, and that the allocation of risks under this Agreement is reasonable and appropriate under the circumstances.

<u>Comment:</u> The purpose of this clause is to protect the Vendor in a dispute. By this clause, the clinic agrees that it is "sophisticated," meaning that it has expertise and experience in software transactions, knows what it is doing, is capable of protecting itself, and fully understands the risks of this very unfair agreement, and accepts such risks. In short, this clause attempts to remove from the clinic the argument that it was misled by the Vendor. Obviously, a clinic should delete this type of provision.

4.3 Limitation of Remedies. Notwithstanding any other provisions of this Agreement, Customer's exclusive remedy in respect of or related (directly or indirectly) in any way to any Product (including without limitation the design, use, suitability, performance, features, characteristics or other aspects thereof, whether or not covered by any warranty) shall be for Vendor, at its option, to either: (1) repair or correct the non-conformity within a reasonable time; (2) replace the Product in question with an

<u>Comment</u>: As a mater of standard practice, a Vendor will attempt to limit its liability from any and all causes whatsoever, usually to the cost of repairing or replacing the Software, or refunding monies. However, the clinic should exclude from this limitation damages arising from (1) third party claims that the Software infringes the

identical but operational product; (3) replace the Product in question with a different Product whose functionality is substantially the same as the Product being replaced; or (4) refund to Customer all charges in respect of the Product previously paid by Customer to Vendor.

intellectual property rights of others, or (2) claims for personal injury. See Addendum for an example of exclusions to damages limitations.

4.4 Limitation of Damages. If, notwithstanding the provisions of this Agreement to the contrary, a court of competent jurisdiction determines that Customer is entitled to damages in respect of any claim by Customer arising under this Agreement, the total amount of such damages shall be limited as follows: (1) if such damages are in respect of the performance or nonperformance of any Product, the amount of such damages shall not exceed the aggregate amount of all charges in respect of such Product that (prior to the date as of which the damages are determined) were paid by Customer to Vendor; or (2) if such damages are in respect of any other breach of this Agreement by Vendor (other than a breach of the warranty of noninfringement set forth in Section 4.1), the amount of such damages shall not exceed the aggregate amount of all charges which, prior to the date as of which such damages are determined, were paid by Customer to Vendor in respect of this Agreement. IN NO EVENT AND UNDER NO CIRCUMSTANCES SHALL VENDOR HAVE ANY LIABILITY FOR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES FOR LOST PROFITS), PUNITIVE DAMAGES, EXEMPLARY DAMAGES, OR OTHER SPECIAL DAMAGES OF ANY KIND.

4.5 Indemnification of Vendor. Except as expressly provided by Section 4.1 hereof, Customer agrees to indemnify, defend and hold harmless Vendor and its Affiliates, and their respective shareholders, directors, officers, employees, agents and other representatives from and against any damage, loss, expense or other liability arising, directly or indirectly, out of either: (1) any claim by any Person other than Customer involving or related to any development or use of any Product by Customer (regardless of any flaw or defect of any kind in the Product, and regardless of any wrongful act or omission or other fault attributable to any of the above named indemnities), or (2) any breach of any of Customer's obligations under this Agreement.

<u>Comment</u>: You will notice that this is a one-sided indemnity, requiring the clinic to indemnify the Vendor, but there is no requirement that the Vendor indemnify the clinic. See Addendum for an example of one type of alternative more fair to the clinic. Indemnification provisions are powerful in that if the event requiring indemnity occurs, it is usually very expensive to the party providing the indemnity, and therefore they are hotly negotiated. Indemnity provisions usually require the indemnifying party to hire lawyers and to pay damages to protect the indemnified party against claims made by third parties. Even a frivolous lawsuit by a third party can be very expensive to defend against. Among the bigger risk for clinics is that the software infringes the

intellectual property rights of others, or that the software (or its malfunction) causes a patient to suffer injury. Vendor will strive to limit its indemnity obligations by limiting its obligation to the amount of money it has received from the clinic, or by refusing to provide any indemnity at all. Clinics should try to narrow their indemnity obligations to specific events such as in the event that they breach their obligations under the Agreement. They should try to avoid extending broad, open-ended indemnity obligations. Prior to signing an agreement with indemnity provisions, they should discuss the same with their insurance carriers to determine what indemnity obligations will be covered, and what are not covered.

Section 5 – Disputes

5.1 Arbitration. Except as otherwise expressly provided in this Agreement, all claims, controversies or disputes arising out of or related to this Agreement, or any breach thereof, shall be resolved by binding arbitration in the city of ABC, state of XYZ as provided herein and otherwise in accordance with the Commercial Arbitration rules of the American Arbitration Association. Where the amount in controversy is less than $100,000.00, the dispute shall be submitted to a single arbitrator. Otherwise the dispute shall be submitted to a panel of three arbitrators. The arbitrator(s) shall strictly enforce all provisions of this Agreement except to the extent applicable law requires otherwise. The arbitrator(s) shall have no authority to grant either Party punitive, exemplary, consequential or other special damages of any kind. Judgment upon the award of the arbitrator(s) may be entered in any court of competent jurisdiction.

<u>Comment</u>: Some litigators will argue that arbitration clauses favor the Vendor; e.g. there is no chance for "a runaway jury," damages tend to be much smaller, and it is sometimes (but not always) cheaper than court trials. All will agree that the parties will have significantly less rights in arbitration as compared to court proceedings, and that the proceedings will be faster than in court. Clinics should discuss with their counsel whether to reject an arbitration clause, but on balance, the issue is generally not a "deal-breaker."

5.2 Jurisdiction and Venue. The Parties agree that any action or proceeding arising out of or related to this Agreement shall be instituted only in the federal district court in (or closest to) the city of ABC, state of XYZ. Each Party consents and submits to the jurisdiction of such court and agrees that venue therein shall be proper and convenient. In any such action or proceeding in such court, each Party waives any right to raise any objection based upon improper venue, lack of jurisdiction, or inconvenient forum. In connection with any such action or proceeding, each Party

<u>Comment:</u> The last sentence of this clause specifies that a court proceeding will only occur if the arbitration clause is thrown out as invalid. See comment above. This proposed revision to Vendor's form is intended to provide some balance by stating that the party that brings the lawsuit, has to do it in the other party's neighborhood. It is a better alternative for the

consents to personal jurisdiction of such court and agrees service of process may be effected by United States mail. Notwithstanding the foregoing, the Parties agree to resort to such an action or proceeding only if (1) the arbitration provision of Section 5.1 is held to be invalid or unavailable, or (2) to enforce such an arbitration award.

clinics than Vendor's form agreement which states that all litigation will be heard where the Vendor is headquartered.

5.3 Attorneys Fees. In any action, proceeding, or arbitration pursuant to Sections 5.1 or 5.2, the court or the arbitration panel, as applicable (the "tribunal"), shall award to the prevailing Party all of such Party's costs related to the controversy (including without limitation attorneys' fees and out-of-pocket expenses). Where each Party prevails in part, the tribunal shall award to each Party that part of its costs which the tribunal deems allocable to those issues as to which such Party prevailed.

Comment: Please note that in most litigation, each side usually is required to bear its own costs, including attorneys' fees. Generally speaking, there are only two instances entitling the winning side to recover the costs of its lawyers from the losing side: (1) if there is a statute (written law) expressly requiring the losing side to pay for the winning side's attorneys (e.g. laws prohibiting discrimination and other civil rights laws), or (2) if the parties by agreement specify that the prevailing party shall be entitled to attorneys' fees and costs in addition to its damages. Thus, this provision is a "double-edged sword;" if a clinic has been victimized by a Vendor's breach, this clause can "level the playing field" by requiring the Vendor to pay for the clinic's lawyers in addition to paying damages. However, if the clinic is the party in breach, it can be required to pay damages plus the Vendor's legal fees. As a general proposition, some litigators will argue that such attorneys' fees provision often protects the smaller party with less resources. Whether to include such a provision or not is a business risk decision for the clinic to consider.

5.4 Limitation of Actions. Except as set forth below, neither Party shall bring any action or institute any proceeding related, directly or indirectly, to this Agreement more than two years after the Party initiating the action or proceeding knew (or reasonably should have known) of the essential facts giving rise to the underlying cause of action.

Comment: This is another clause that has been inserted to protect the Vendor. The statute of limitations in California to sue for breach of a written contract is four (4) years. This clause attempts to shorten (by agreement) such period to 2 years. Clinics should object.

5.5 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of XYZ.

Comment: While it would be preferable for a clinic to have disputes governed by the law of where the clinic is located because it will be easier and cheaper to access local counsel familiar with the law, the issue of whose state governs the interpretation of the contract is rarely a deal-breaker.

Section 6 – Other Services

Vendor may, in its sole discretion and at Customer's request, perform training, consulting, programming or other Services for Customer from time to time. The nature and scope of such Services (and a non-binging estimate of the total project cots) shall be set forth in reasonable detail in an Ancillary Document. Except as otherwise provided in an Ancillary Document, the following shall apply:

6.1 All work performed in rendering the Services (including without limitation time reasonably spent by Vendor personnel in formulating the scope document referred to above) shall be charged in accordance with Vendor's then current hourly labor rate schedule. Billable time shall be rounded up to the nearest half hour and shall include portal to portal travel time of Vendor personnel providing the Services. In addition, Vendor shall be reimbursed by Customer for the cost of all parts, materials, supplies, and other consumables related to the Services, as well as all other out-of-pocket expenses related to the Services such as travel expenses.

Comment: In order to control costs and avoid nasty surprises, clinics should insist that all purchases and licenses are listed in an Appendix, along with corresponding prices and discounts.

6.2 Where the estimated project costs exceed $5,000.00, prior to the commencement of work Customer shall pay Vendor on account twenty percent (20%) of the estimated project cost as a security deposit (the "Security Funds"). Vendor shall not be obligated to credit Security Funds against project billings until the final invoice. Any Security Funds balance remaining at the end of the project shall be rebated to Customer without interest. All project related charges shall be invoiced monthly. Vendor shall have the right, in its sole discretion, to credit Customer Security Funds against delinquencies. If Vendor uses Security Funds to cover delinquencies, Vendor shall have the right to cease all work until any remaining delinquencies have been satisfied and the Security funds account balance is replenished to equal the original amount thereof.

Comment: Clinics should delete this provision. Many vendor agreements specify that the clinics shall pay 50% or more in advance before the vendor has done anything, and before the clinics can verify that the software even works properly! Just as it would not be wise to pay a construction contractor most or all of your money before he has even picked up a hammer or driven a single nail, it is unwise to pay the software vendor substantial amounts of money before the vendor has performed. Therefore, please see the Addendum as one example of proposed installment payments payable upon the successful completion of specified

milestones. Note that just as in a contract to construct a house, there should be a significant "withhold" to be paid only upon satisfactory completion of the work. Despite what software vendors may say, installment or milestone payments are the norm, and clinics should insist upon them. Like virtually all of the terms in the maintenance agreement and license agreement, the timing of when payments are due will be the subject of negotiation, and the amount of concessions that the clinics will receive will depend upon their economic leverage and the level of their resolve.

6.3 With respect to those Services that are performed at Customer's site, during the period of such performance Customer shall make available to Vendor's personnel providing such Services suitable office, work, and storage space, and appropriate working environment, access to Hardware as necessary, and reasonable use of telephones and other standard office amenities.

6.4 Either Party shall have the right to terminate a project at any time upon ten (10) days Notice to the other Party. In such event Customer shall remain obligated to pay all amounts outstanding with respect to charges incurred in connection with the project on or before the termination date.

<u>Comment</u>: Like the clause in Section 1.5 above, this clause allows the Vendor to terminate the Agreement for no good reason after delivering notice of termination. By the time a clinic enters into an agreement with a Vendor, it will have spent a great deal of time, money and resources identifying its software needs, developing specifications (see Addendum for definition of Functional Specifications), negotiating the business and legal terms of the contract with Vendor, and signing and commencing implementation. After these events occur, the clinic will want the Agreement to be binding on Vendor so it can't simply walk away from its obligations. See Addendum for proposed revision.

Section 7 – Miscellaneous

7.1 Document Precedence. In the event of a conflict between the Terms and Conditions and an Ancillary Document, or between two more Ancillary Documents, that provision Vendor determines in its sole discretion best reflects the intent of the Parties shall control.

7.2 Acceptance. A document otherwise constituting an Ancillary Document becomes effective as such when (and only when) it is provided by one Party to the other and Accepted by the recipient. Such a document is conclusively deemed Accepted by Customer upon (and only upon) the first to occur of the following: (1) such document is signed by Customer and returned to Vendor; (2) after receiving such document Customer makes a payment or takes any other action that is consistent with the terms of such document; or (3) Customer fails to provide Vendor written Notice of non-acceptance of such document within ten (10) calendar days after Customer's initial receipt of such document. A document otherwise constituting an Ancillary Document and provided by Customer to Vendor is conclusively deemed Accepted by Vendor upon (and only upon) such document (or an unambiguous and written confirmation thereof) being signed by Vendor and returned to Customer.

Comment: Clinic should reject this clause as it would permit the Vendor to unilaterally change the terms of the Agreement. Any proposed change to the Agreement should require the clinic's prior written consent as evidenced by the signing of a writing by a person authorized to approve such change.

7.3 Forces Majeure. All periods of time specified for performance of obligations (other than monetary payment obligations) by either party hereunder shall be subject to an extension for a period of time equal to any delay caused by Forces Majeure. Following the occurrence of any Force Majeure, the performance effected thereby shall be extended to a number of days equal to the period of such delay.

7.4 Notices. All Notices, requests, demands, or other communications directed to a Party shall be in writing, and shall be personally delivered or sent by certified (return receipt requested) or registered mail, postage prepaid, to such Party's address specified below such Party's signature hereon, or to such other address as such Party may hereafter specify in a Notice to the other Party.

7.5 No Waivers. The failure of either Party hereto to insist upon strict performance of any of the terms or condition of this Agreement shall not be deemed to be a waiver of any rights or remedies of such Party in respect of any other provision hereof or in respect of any subsequent breach or default under such term or condition.

7.6 Effect of Agreement. This Agreement shall be binding upon, and inure to the benefit of, the Parties hereto and their successors and permitted assigns.

7.7 Entire Agreement. This Agreement (including without limitation subsequently effective Ancillary Documents) constitutes the entire Agreement between the Parties with respect to the subject matter hereof, and supersedes and replaces any and all prior agreements or arrangements between the Parties, whether oral or written.

Comment: This innocent-looking clause is quite powerful. In short, it means that if the clinic's rights are not specified in writing as part of this Agreement, the clinics don't have such rights. In practice, this means that whatever the Vendor salespersons have promised the clinic, unless it has been reduced to writing and expressly made a part of this Agreement, such promises are not enforceable as they are not a part of this Agreement. Lesson: get all promises in writing and incorporate them into the Agreement!

7.8 Assignment. A Party may assign its rights and benefits under this Agreement to any other Person upon thirty (30) days prior written Notice to the other Party if (and only if) the assignor remains liable in respect of all its obligations outstanding under this Agreement as of the date of such assignment, including without limitation obligations in respect of extended term Product transactions with terms remaining after the date of such assignment.

7.9 Amendments. Vendor may unilaterally amend any and all provisions of this Agreement effective as of a day not earlier than one hundred twenty (120) days after Notice of such amendment is given to Customer. Otherwise, all amendments must be in writing and duly executed by both Parties to be effective.

Comment: Outrageous! This is one the more unfair clauses of an already grossly unfair agreement. It permits the Vendor to unilaterally change the Agreement without the consent of the clinic. Obviously, this should be a deal-breaker as clinics should not sign any agreement which permits the Vendor to unilaterally change the terms later.

7.10 Relationship of Parties. The Parties agree that, in performing any and all Services, Vendor is acting as an independent contractor. Vendor assumes no liability or responsibility for obligations of Customer in respect of its customers or any other Person. Nothing in this Agreement shall be construed to make Vendor a partner, joint venturer or employee of the other Party. Nothing in this Agreement shall be construed to make Vendor responsible for complying with any disclosure, reporting or other

requirement of the other Party's business or operations.

7.11 Nonsolicitation. During the term of this Agreement Customer shall not solicit any Vendor employee to leave the employ of Vendor for any reason.

7.12 Definitions. All capitalized terms in this Agreement have the following meanings:

"Acceptance" has the meaning set forth in Section 7.2 hereof.

A Person is an **"Affiliate"** of a second Person if, directly or indirectly (whether through a chain of ownership or otherwise), either (i) the first Person owns or controls a majority of the equity or voting interests in the second Person, (ii) the second Person owns or controls a majority of the equity or voting interests in the first Person, or (iii) a majority of the equity or voting interests in both the first Person and the second Person are owned or controlled by the same Person(s).

"Ancillary Document" means any document involving a Product transaction between Vendor and Customer that becomes effective in accordance with Section 7.2 hereof. Such documents may include Product orders, invoices, confirmations, exhibits, schedules, addendas or similar documents confirming supplementary information (e.g., Product identification; quantity; pricing; shipment information; installation, training or other project scheduling information; etc.) concerning any such transaction.

"Effective Date" means the date immediately preceding the Parties' signature above.

"Force Majeure" means any cause or circumstance beyond the parties' control, (such as, but not limited to, acts of God, changes in government regulations, acts of governmental bodies or their employees or agents, weather, strikes, lockouts, boycotts, and inability to secure labor or any material specified or reasonably necessary in connection with property through ordinary business channels, fire, unusual delays in transportation, unavoidable casualties, etc.).

"Hardware" means computer-related tangible personal property such as computers, monitors, terminals, storage devices, connectivity devices, printers, etc.

"Notice" means a notice given in accordance with Section 7.4 of this Agreement.

"Operational" means the function of a Product without material deviation from its Specifications or the manufacturer's most recently

published user documentation for such Product.

"Party" means either Vendor or Customer.

"Period" means the calendar period (monthly, quarterly or annually) corresponding to the frequency of payments in respect of a recurring charge.

"Person" means a natural person, or a private or governmental entity of any kind.

"Product" means any Hardware, Software or Service provided by Vendor to Customer.

"Service" means any service, assistance, or use of a resource provided by Vendor to Customer.

"Software" means either: (1) a set of machine-readable instructions designed to perform a task or accomplish a purpose; (2) a set of machine-readable data; (3) a set of machine-readable instructions for formatting data; or (4) text or graphic material in any form describing or otherwise related to any of the foregoing items, or the use thereof, such as program listings, flow charts, manuals or other documentation.

"Specifications" means the specifications for a Product as published by its manufacturer from time to time.

[END OF TERMS AND CONDITIONS]