

Web Site Development Agreements: Protect Your Business

by Maria E. Recalde



An increasing number of health-care providers, including hospitals, medical practices, and nursing homes, are establishing an Internet presence to provide information regarding themselves to current and prospective patients, enhance their image, and increase marketability.

If as a health-care provider you are considering following this trend and retaining an independent Web site developer to create your site, you need a well-drafted agreement setting forth your rights and obligations as well as those of the developer. The hiring of an independent Web site developer raises significant legal issues, including those concerning ownership of and liability for the material posted on-line. In addition to such general contract provisions as specifications, pricing, timing, delivery, and termination, the Web site development agreement should, at a minimum, specifically address the following issues:

Ownership of Content

In the absence of an agreement to the contrary, the developer will own the copyright in the original content of the site created for the provider, including all graphics, text, sound, and source code. This limits the ability of the provider to freely update and/or modify the content and design of the site and to hire anyone the provider chooses to undertake such a task. Moreover, copyright ownership by the developer allows the developer to use derivative materials on other sites, thus undermining the distinctive value of the provider's Web site.

To avoid such problems, the agreement should contain a "work for hire" provision and an assignment that will vest the ownership of the content of the Web site in the provider. If the developer is unable to assign the copyright, either because components of the Web site have been licensed from third parties or certain components are part of the developer's personal library of materials, then a license to use such components should be required.

In addition, since the overall "concept" of the Web site may not be protectable under copyright law, a provision should be included in the agreement specifically preventing the developer from using a similar "concept" for another Web site it develops.

Third-Party Material

Material included in the provider's Web site by the developer could potentially infringe on a third-party's rights, including copyright and trademark rights. As the publisher of the site, the provider could be held liable for

any such infringement.

To address this issue and protect itself against actions arising out of material used by the developer, the provider should include a provision requiring the developer to obtain written permission to use any third-party intellectual property. This provision should specifically require the developer to identify third-party material and to provide the provider with proof of permission to use. The developer should warrant that the rights to include such materials in the Web site have been obtained.

An indemnification provision should also be included. The developer should bear sole liability in the event any materials it has used in developing the Web site infringe upon any third-party rights. Keep in mind, however, that to the extent any material included in the Web site by the developer was created by the provider, if such material infringes on the rights of a third-party it would not fall under the developer indemnity provisions.

Acceptance Testing and Approvals

A provision addressing acceptance testing and related approvals of content, layout, and graphic design should be included in the agreement. Sufficient time should be provided under the agreement to permit testing of the Web site to determine that it operates correctly and the content is acceptable. The expected purpose and functionality of the Web site should be described in sufficient detail to ensure that acceptance testing can be conducted. Both from a legal and business perspective, before the Web site is made available to the general public for the first time, the provider should seek the advice of legal counsel on the content of the Web site and ways of reducing exposure to liability.

Confidentiality

The agreement should contain a confidentiality provision to ensure that the developer is bound to keep all proprietary and confidential information strictly confidential and not to use the information and materials provided by the provider to develop the Web site for any other purpose. A provision requiring the developer to return to the provider all records, notes, documentation, and other items of the provider that were used by the developer in creating the Web site should be included. ■

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