keeping IT fair
how to avoid a stacked deck when dealing with IT vendors

High-cost IT implementations require not only substantial preparation but also a readiness to take steps to hold the vendor accountable if the implementation falls short of expectations.

Providing software and services to healthcare organizations is big business today, with a market that is dominated by several multibillion-dollar companies. Overall, the North American healthcare IT market has been valued at over $20 billion, and experts anticipate it will grow to more than $30 billion in the next five years.¹

Significant forces are driving the growth of this market. Having a sophisticated IT system is a critical success factor for healthcare organizations of all sizes seeking to make the transition to value-based payment and develop the ability to effectively manage the health of populations. Organizations require such IT systems not only to improve the efficiency of care processes, increase productivity, and reduce operating costs, but also to be able to coordinate care processes and data sharing across expanding care networks.

With so much hinging on the effectiveness of their IT systems, organizations can little afford to see their high-cost IT implementations fall short of expectations. Yet despite the sophistication of many of the most prominent IT vendors’ offerings, such an outcome is all too possible in the current marketplace. And a failed implementation can lead to a systemwide crisis for

the healthcare organization. Depending on the severity of the problem, a defective IT implementation can cost millions of dollars, as can settlements and judgments arising from disputes between hospitals and their IT vendors over problematic implementations.\(^b\)

Hospitals can glean a number of important lessons from instances of such disputes, including what to do when a software tool that was purported to be state of the art fails to function as advertised.

**Factors Contributing to Ill-Fated IT Implementations**

Healthcare IT vendors traditionally have had great leverage when negotiating with hospitals and health systems, particularly small and midsize systems. These systems find it difficult to attract or retain experienced IT professionals, and they consequently lack the adequate resources to evaluate the claims of vendors. The disparity of knowledge and expertise between sellers and buyers of IT products creates a temptation for vendors to exaggerate the capabilities and market-readiness of their systems.

The fact that many healthcare organizations prefer to use a single vendor for substantially all of their software needs exacerbates this problem. Just because a company has delivered a robust software product in one area does not mean it can successfully implement other types of software. Unfortunately, it is not always easy to differentiate between a vendor’s reliable product offerings and its less-developed ones, and the current competitive environment sometimes tempts vendors to obfuscate their products’ abilities and shortcomings.

For example, a vendor known for electronic health records (EHRs) might be asked to bid on revenue cycle software. The vendor’s salesperson may insist that the company can satisfy the client’s needs, even if the company’s revenue cycle product is an unproven “beta” product.

Similarly, after a successful implementation of one system, a vendor might attempt to capitalize on the trust built with that success to sell less-developed products.

Software vendors sometimes even market products that are in the early stages of development. They aim to lock clients into a contract with the hope that they can develop the promised capabilities before the software actually goes live, which may not occur until years after the contract is signed. A common industry term for this practice is “selling vaporware.”

The consequence of all of these issues is that healthcare organizations sometimes acquire IT products that are unproven or inappropriate for their operations.

**Selecting an IT Solution**

Hospitals and health systems can use the following tactics to identify risks as they are evaluating potential IT systems and to ensure they are protected from major disruptions caused by IT systems that fail to perform as advertised.

*Ask specific questions about the system’s capabilities, and record the answers.* Such questions might include the following:

> What standard reports is the product capable of running?
> What is the average duration of an implementation for an organization of comparable size?
> Can the software be interfaced with existing software products used at our organization?

*Speak with current and former users of the system and consult industry rankings of vendors.* One example of an industry ranking is the KLAS report (klasresearch.com), which provides data from end-user satisfaction surveys.

*Exercise due diligence in vetting the software.* A hospital should enlist in-house or third-party IT experts to closely vet IT software solutions being considered for purchase before signing a contract with the vendor to implement the...
solution. Experts who might be engaged for this purpose may include the CIO, supervisor-level end users, and outside consultants who will be working on the installation and training.

**Ensure the risks are mitigated through contractual provisions.** In general, it is best to avoid being an early adopter of a new healthcare IT solution. But if there are compelling reasons to pursue a particular option, a hospital can minimize the risk of a failed implementation by negotiating specific contract provisions. Such provisions may include benchmarks that must be met before the implementation team can leave the site and requirements that the vendor conduct more-rigorous testing before the product goes live. The vendor should also set forth appropriate disclosures in writing that define roles and responsibilities and clearly identify the risks to the client of using a product that is not yet widely available.

**Engage experienced attorneys to review the contract.** Attorneys can provide valuable insight about what provisions should be included in a contract and how to mitigate risk. After the contract has been signed, they can be powerful advocates to ensure that the vendor delivers what was promised.

**Responding to a Problematic Implementation**

When an organization finds that it has purchased a problematic product or undergone a troubled implementation, we suggest four steps.

**Evaluate the nature of the problem.** Even a relatively successful software conversion can be frustrating, expensive, and disruptive. Problems can be caused by numerous factors, including fixable bugs in the software, configuration issues, or users who have trouble adapting to the new system. In the initial stages, it is important to plan for regular evaluation of the progress of a system installation.

One important factor to consider when assessing whether problems have escalated to a full-blown IT crisis is the amount of time elapsed. If a system’s go-live date is several months past and significant issues persist (e.g., a sustained drop in staff productivity, a spike in accounts receivable days, a loss of reporting capabilities), the situation is probably more serious than routine problems that might arise during an implementation.

Another factor is the severity of the issues. In the case of revenue cycle software, for example, an unusually high denial rate and a persistent need for business office and IT staff members to work around the clock to address issues, with little sign of improvement, are likely indicators of a major problem, not merely a bumpy installation.

Consideration also should be given to whether the issues are being resolved. One way to track issue resolutions is to keep a log of the concerns or service requests raised with the vendor and recording whether those concerns are being resolved in a timely manner and whether the number of major outstanding issues is declining. If not, and staff are overwhelmed from dealing with problems, the healthcare organization may have to consider its options.

**Identify the root cause of the problems.** Unfortunately, reliable information and advice are not always easy to find. Although looking to the vendor’s representatives for guidance makes intuitive sense, they may be unwilling to admit responsibility when the problem is their software.

Vendors often have the following responses when asked what issues might be causing problems with implementations and how best to address them:

> “User error” is causing the problems.
> The organization can use “manual workarounds” (although this solution is likely to inflict unnecessary expense and inefficiencies on operations).
> The organization can fix the problems by purchasing additional products or services.
The issue identified is “not a bug; it’s a feature,” or “the software is working as designed.” The solution to the problems is not within the scope of the contract. The problem is occurring because in-house IT staff are not equipped to handle the issues. The problem will be resolved in a forthcoming upgrade.

These responses may simply reflect the vendor’s attempt to buy some time, defer responsibility, or sell more services. Remember, the software vendor is not an independent, disinterested party.

The healthcare organization’s in-house IT staff may be able to provide some valuable insight, but relying on in-house staff in this way can become complicated if the software vendor attempts to shift blame to them. The two parties may simply end up pointing fingers at each other. As the old proverb goes, “Success has many fathers; failure is an orphan.”

Considering these complications, the healthcare organization can benefit from retaining legal counsel or an outside IT consultant to perform an independent assessment that can provide a basis for developing a plan. Such neutral observers may be valuable in determining the best course of action, and they can act as the hospital’s advocates in resolving disputes.

**Understand a healthcare organization’s rights and options.** Although vendors often use the parties’ contractual agreement to pressure the organization to keep an unworkable software product, healthcare organizations often have more leverage than they realize in such disputes.

Part of the reason healthcare organizations may mistakenly assume they have little leverage is that software vendors frequently draft one-sided license agreements. In particular, these agreements may include limitation-of-liability provisions and/or caps on consequential damages. Nonetheless, even when such provisions were included in the license agreement, courts around the country have held software vendors liable for consequential damages caused by misrepresentations about their products’ capabilities.

Other perceived barriers to litigation also are not as prohibitive as they may seem. For instance, healthcare organizations may be reluctant to pursue litigation because of concerns that it may affect their use of a vendor’s other products. In reality, however, engaging in litigation with respect to one software solution (e.g., a patient-accounting system) should not affect other solutions (e.g., an EHR). Indeed, the vendor may actually be more willing to provide compensation or make efforts to remedy the problems with its software if there is an ongoing client relationship that the vendor is trying to preserve.

Further, while legal expenses are a factor when deciding whether to initiate litigation, some firms are willing to accept alternative fee structures, such as a contingency fee arrangement, that may lessen the financial risk of litigation to the organization. A firm’s willingness to take a case on a contingency fee basis may depend on the perceived merits and the damages that are at stake, which will vary depending on the nature of the dispute and severity of the problems. Firms that offer contingency fee arrangements are generally willing to perform an initial consultation and assessment without charge.

In short, managers of healthcare organizations should not be too quick to abandon a potential legal claim against a vendor, which ultimately could prove to be the organization’s most beneficial course: The organization may have a significant asset in the form of a claim for monetary damages, but that asset will fade if no action is taken. Thus, it may be considered due diligence to consult attorneys to ascertain the likelihood of potential recovery.

**Assess options and take action, pushing the vendor for a resolution.** Even if the healthcare organization decides that keeping the software and working through the issues is in its best interest,
it still may pursue concessions, a settlement, or another form of dispute resolution with the vendor. If an agreement can be reached, compensation may include not only cash but also write-offs of outstanding invoices, credits to be used toward products and services, and additional service hours toward resolving the issues.

Alternatively, if the problems are severe and not improving, the best option may be to de-install and convert to another system. De-installation can be expensive, disruptive, and time-consuming. A healthcare organization may be able to mitigate some or all of its damages by pursuing legal remedies against the vendor.

Correcting an Imbalance
Even when they are performed well, healthcare IT system installations are complex endeavors that can cause short-term operational disruption. When they are not executed well, serious problems can arise. Healthcare IT vendors may have an advantage in such circumstances because they are the software experts, it is their product, and they are often the healthcare organization’s primary (or sole) source of information about the product, which means the organization’s knowledge is limited to what the vendor chooses to disclose. The steps outlined above provide options for mitigating the consequences of that imbalance. ■

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