

**Strafford**

*presents*

# **Electronic Health Record Technology Contracts After HITECH**

## **Leveraging New "Meaningful Use" and EHR Technology Standards In Negotiating Provider-Vendor Agreements**

### **A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

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William J. Gillespie, Vice President and Chief Technology Officer, **WellSpan Health**, York, Pa.

Vadim Schick, **Post & Schell**, Washington, D.C.

**Tuesday, March 23, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

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# Electronic Health Record Technology Contracts after HITECH

March 23, 2010

By Steven J. Fox,  
William J. "Buddy" Gillespie, and Vadim Schick

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- Key Acronyms
- ARRA, HITECH Act and the Proposed Definition of Meaningful Use
- Incentives
- Business drivers for software acquisition
- Key Contractual Provisions
- Case Study – WellSpan Health

# Key Acronyms

- CAH = Critical Access Hospital
- EP = Eligible Professional
- EH = Eligible Hospital
- EHR = Electronic Health Record
- MU = Meaningful Use
- NPRM = Notice of Proposed Rule Making
- FQHC = Federally Qualified Health Center
- HPSA = Health Professional Shortage Area

# ARRA & HITECH Act

- American Reinvestment & Recovery Act (ARRA) – February 17, 2009
  - Includes HITECH Act
- EHR Incentive NPRM issued December 30, 2009; published in Federal Register January 13, 2010
- NPRM Comment Period Closed on March 15, 2010

# Meaningful Use Defined

- An EP and an EH shall be considered a meaningful EHR user for an EHR reporting period for a payment year if they meet the following three requirements:
  - Use certified EHR in a meaningful manner (ex. E-Prescribing)
  - Utilize certified EHR technology that is connected in a manner that provides for the electronic exchange of health information to improve the quality of healthcare such as promoting care coordination
  - Submit information on clinical quality measures and other measures in a form and manner specified by the Secretary

# Certified EHR

- A complete EHR or a combination of EHR modules, each of which:
  - meets the requirements of a Qualified EHR; and
  - has been tested and certified in accordance with the certification program established by the National Coordinator as having met all applicable certification criteria adopted by the Secretary
  - ONC released an NPRM on certification organizations on March 3, 2010
  - certification standards were subject of an Interim Final Rule published on January 13, 2010

# NPRM on Meaningful Use

- Notice of Public Rule Making (NPRM) regarding meaningful use published in Federal Register on January 13, 2010.
- Five Policy Goals for MU\*:
  - Improve quality, safety, efficiency, and reduce health disparities
  - Engage Patients and Families
  - Improve Care Coordination
  - Ensure adequate privacy and security protections for personal health information
  - Improve Population and Public Health
- Note; Definition published in NPRM may change in the final rule.

\* Same five goals were presented by the HIT Policy Committee in August 2009. See *also* pp. 1867-1870 of NPRM.

# Meaningful Use Criteria Timeline

2011 – Stage 1: capture/share data

2013 – Stage 2: advanced clinical  
processes with decision  
support

2015 – Stage 3: improved outcomes

# Medicare Incentives - EPs

TABLE 22—MAXIMUM TOTAL AMOUNT OF EHR INCENTIVE PAYMENTS FOR A MEDICARE EP WHO DOES NOT PREDOMINANTLY FURNISH SERVICES IN A HPSA

Calendar year	First CY in which the EP receives an incentive payment				
	2011	2012	2013	2014	2015– subsequent years
2011 .....	\$18,000	.....	.....	.....	.....
2012 .....	12,000	\$18,000	.....	.....	.....
2013 .....	8,000	12,000	\$15,000	.....	.....
2014 .....	4,000	8,000	12,000	\$12,000	.....
2015 .....	2,000	4,000	8,000	8,000	\$0
2016 .....	.....	2,000	4,000	4,000	0
Total .....	44,000	44,000	39,000	24,000	0

# Medicare Incentives – EHs

## **Initial Amount**

(\$2 million plus additional amounts calculated in accordance with each hospital's Medicare discharges)

**X**

## **Medicare Share**

(roughly, a hospital's share of Medicare discharges over total discharges)

**X**

## **Transition Factor:**

Year 1 – 100%

Year 2 – 75%

Year 3 – 50%

Year 4 – 25%

Year 5 – 0%

# Medicaid Incentive Program

- EPs and EHRs have the option to earn their incentive for the first payment year through the adoption, implementation or upgrade of certified EHR technology
  - Do not have to demonstrate meaningful use in first year
- Unlike Medicare, Medicaid has no statutory implementation date for making EHR incentive payments.
  - some states might be prepared to implement their program and make payments in 2010 for adopting, implementing, or upgrading certified EHR technology.
  - states can initiate payments after the final rule

# Medicaid Incentives – EPs

TABLE 27—MAXIMUM INCENTIVE PAYMENT AMOUNT FOR MEDICAID PROFESSIONALS

Cap on net average allowable costs, per the HITECH Act	85 percent allowed for eligible professionals	Maximum cumulative incentive over 6-year period
\$25,000 in Year 1 for most professionals .....	\$21,250	.....
\$10,000 in Years 2–6 for most professionals .....	8,500	\$63,750
\$16,667 in Year 1 for pediatricians with a minimum 20 percent patient volume, but less than 30 percent patient volume, Medicaid patients .....	14,167	.....
\$6,667 in Years 2–6 for pediatricians with a minimum 20 percent patient volume, but less than 30 percent patient volume, Medicaid patients .....	5,667	42,500

TABLE 29—MAXIMUM INCENTIVE PAYMENTS FOR MEDICAID EPs WHO ARE MEANINGFUL USERS IN THE FIRST PAYMENT YEAR

Calendar year	Medicaid EPs who begin meaningful use of certified EHR technology in					
	2011	2012	2013	2014	2015	2016
2011 .....	\$21,250	.....	.....	.....	.....	.....
2012 .....	8,500	\$21,250	.....	.....	.....	.....
2013 .....	8,500	8,500	\$21,250	.....	.....	.....
2014 .....	8,500	8,500	8,500	\$21,250	.....	.....
2015 .....	8,500	8,500	8,500	8,500	\$21,250	.....
2016 .....	8,500	8,500	8,500	8,500	8,500	\$21,250
2017 .....	.....	8,500	8,500	8,500	8,500	8,500
2018 .....	.....	.....	8,500	8,500	8,500	8,500
2019 .....	.....	.....	.....	8,500	8,500	8,500
2020 .....	.....	.....	.....	.....	8,500	8,500
2021 .....	.....	.....	.....	.....	.....	8,500
Total .....	63,750	63,750	63,750	63,750	63,750	63,750

# Medicaid Incentives – EHs

- Formula similar to Medicare
- Overall EHR Amount x Medicaid Share (Over 4 years)
  - Overall amount = Base Amount (\$2M) plus Discharge Related Amount Applicable\* for each year x transition factor applicable for each year\*\*  
X
  - Medicaid Share = Medicaid inpatient days plus Medicaid managed care inpatient days divided by total inpatient bed days x estimated total charges minus charity care charges divided by estimated total charges

# Licensing and Negotiations

# Provider Gap Analysis

- Undertake compliance assessment re gap between existing practices & Meaningful Use
- Restructure existing contractual relationships
- Begin RFP/contract process to add needed software applications and/or hardware

# Facts of Life

- “Meaningful Use” is an evolving concept – it will change over time
- Incentives insufficient to cover all real costs of achieving Meaningful Use
- Risk shifting will be attempted
- You do not want to be the last one in line

# Manage the Initial Contract Process

- Define requirements / contract
- RFP/RFS
- Build a negotiation team
- Control negotiations
- Pay attention to the schedules
  - Timelines
  - Exhibits, schedules and/or attachments

# Build an HIT Contract Structure to Answer These Questions

- What are we acquiring (vs. what do we actually need)?
- What are we paying for and when?
- How to assure our requirements will be met?
- What happens if the product fails?

# What Are We Acquiring Relating to Meaningful Use?

- Software
- Hardware
- Professional services
- Support and maintenance

# What Are We Paying For and When?

- Pricing metrics
- Pay for performance
- Time and materials vs. fixed fee
- Roles / responsibilities in workplan
- Adjustment to charges
- Price protection

# Payment Terms

- Vendor standard contracts typically specify payment terms by the calendar, regardless of whether milestones have been met
- Milestone payments keep the provider in control
- Milestone payments tied to achieving operational goals give maximum vendor alignment with your success
- Offering vendor incentives (financial or other) gives them a chance to win if you achieve your business objectives (rather than just installing the software)

# How To Assure Our Requirements Will Be Met?

- Scope of License
- Implementation Workplan
- Acceptance Testing
- Warranties
- Service Levels

# Deliverables / Scope

- Requirements definition
- Specific work done by whom based on specific payment
- Milestones, timelines & measurements
- Specific roles / responsibilities
- Obligations for maintenance, updates & repairs

# Meaningful Use Requirements

- Work in progress
- Agree to today's definition / interpretation
- Agree to agree to future regulatory changes (“We don't know what we don't know.”)
- Build a pro-rata cost for compliance

# Key Contractual Provisions

# Key Contractual Provisions

- Definitions
- License terms
- Warranties / Support
- Confidentiality & privacy
- Limitation of Liability and Indemnification
- Testing / Acceptance
- Pricing
- Termination / ADR

*Everything is negotiable*

# Acceptance / Refund

- Acceptance testing criteria
- Testing procedure
- Timeframe
- Remedies for non-acceptance

# License terms

- Shrink-wrap licenses, typically used for off-the-shelf software
- Site licenses, covering a specific geographical location; enterprise-wide licenses, encompassing an entire business or institution; network licenses, for all users of a specified LAN (local area network) or WAN (wide area network)
- Named user or concurrent user licenses
- ASP or SaaS (software as a service) licenses, governing the right to use software on a subscription-type basis

# Warranties

## Standard:

- Compliance to documentation & specifications
- Interoperability / Interfaces
- Compliance with laws & regulations
- No viruses; security protections
- Sunset issues

# Warranties

## ARRA:

- All products are “certified” and shall remain so
- Vendor will fully cooperate to enable customer to achieve “Meaningful Use”
- Vendor shall comply with all applicable HITECH & HIPAA rules

# Service Levels

- Uptime / downtime
- Response to severity level issues
- Minimum acceptable SLAs
- Remedies

# Support & Maintenance

- Answer questions 24x7
- Remote diagnostics
- Updates, releases, versions, new products
- Customizations / interfaces
- Regulatory compliance
- Limits on price increases
- Limit vendor's termination rights

# Financing Options

- Vendor financing may seem like a win-win situation
  - both parties are invested in successful implementation and operation of the product: healthcare provider must achieve meaningful use and the vendor will get paid when that happens
- Vendor-financed deals also pose serious risks
  - Leverage issues
  - Meetings of deadlines
  - Financing and payment terms
  - Many others

# Key Provisions in Financed Licenses

- Healthcare providers must be especially vigilant about protecting their interests in vendor-financed transactions
- Resist pressure to accept vendor's standard terms and conditions
- Engage in robust negotiations to include the following safeguards
  - Note: the list below is by no means all-inclusive, it is merely a sampling of the required provisions

# Key Provisions (cont'd)

- Financing and payments
  - No “hell or high water” clauses
  - Payments should be linked to vendor’s performance and achieving meaningful use
  - Restrict assignment of the note by vendor-creditor
  - Link loan and services/product agreements
  - Build some flexibility into the loans
    - Early repayment options
    - Refinancing options

# ASP / SaaS models

- Must avoid vendors holding data “hostage”
- Ensure access to customer data, including PHI, on vendor’s systems
- Regular back ups of data
- Disaster Recovery
- Mandate return of customer data upon termination of the contract
- Ensure security of data and access to such data if vendor goes out of business

# Remedies

- Acceptance / Refund
- Indemnification
- Escalation / Alternative Dispute Resolution
- Termination

# Termination

- For cause
- For convenience
- For force majeure
- Effect of termination; remedies

# Fine Print

- Limitation of Liability
  - Disclaimer of Consequential Damages
  - Needs to be mutual
- Disclaimer of Implied Warranties

## Fine Print (Cont'd)

- Limitation of Liability Carve-outs for:
  - Breach of confidentiality/privacy
  - Personal injury/death, property damage
  - Intellectual property infringement
  - Vendor's breach resulting in healthcare provider's failure to achieve Meaningful Use in a timely manner

# Indemnities

- IP infringement
- Confidentiality, privacy & security breaches
- Personal injury and bodily harm

# Privacy, Security & Confidentiality

- Need to stress confidentiality of PHI
- Who owns data; use of data by vendor
- Intellectual property issues
- Obligations of nondisclosure
- Remedies for breach
- Indemnification obligations

# Manage Conflicts Post Signing

- Develop common lexicon
- Certification standards / best practices
- Institute change control
- Communicate early and often
- Adhere to governance principles
- Use dispute resolution / escalation

# Governance

- Operating and strategic teams
- Shared strategic plan
- Communication plan
- Frequent meetings
- Reporting requirements

# Dispute Resolution

- Designate project sponsors for both parties
- Meet and communicate frequently
- Escalate through higher levels of each organization
- Continue contract while in dispute resolution
- Consider third party mediation / arbitration

# How to Avoid Disputes Regarding Meaningful Use

- Understand perspectives
- Provide ongoing value
- Set proper expectations
- Accountable leadership
- Project management process

# Case Study

## WellSpan Health - The Integrated Delivery System Perspective



# CASE STUDY

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- **Background**
- **Tips from the Trench**
- **Strategic IT Plan**
- **Project Methodology**
- **Vendor Relationships and Contracts**
- **Conclusion**



# IT Vision Statement

***“WellSpan Health Will Implement the Information Systems and Technology Necessary to Support Improved Clinical Care and Operating Efficiency, Improved Service for Patients and Families, Ease of Use of Physicians and Staff, and Informed Management Decision Making.”***



# HIT Policy Committee

## MU Goals

- Improve quality, safety, efficiency, and reduce health disparities
- Engage Patients and Families
- Improve Care Coordination
- Ensure adequate privacy and security protections for personal health information
- Improve Population and Public Health



# TIPs from the TRENCH

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- **Bi-Annual Meetings between WellSpan and Vendor executives**
- **Negotiate Organic growth in scope of license**
- **Include Interface Specifications**
- **Include Technical Specifications**
- **Term vs. Perpetual license**
- **Require a Technical Review prior to contract discussions**



# TIPs from the TRENCH

- **Verify that future Amendments reference and are governed by the contract**
- **Establish metrics and price points for scope of license change**
- **Negotiate MSO & Sub Licensing terms**
- **Lock fees for 24 to 36 months**
- **Negotiate fixed price for additional modules-futures**
- **Negotiate renewal fee for term license**



# TIPs from the TRENCH

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- **Extend Warranty Period for life of Service Agreement**
- **Negotiate future discount on additional software**
- **CLOUD/ASP/SaaS Considerations**
- **Don't let the contract gather dust**
- **Involve the customer in the negotiations if possible**
- **Enjoy use of vendor product if vendor breaches contract**



# TIPs from the TRENCH

- **Negotiate 99.99 % uptime**
- **Require vendor to provide data conversion to new system**
- **Non-recruit clause**
- **Require your locality to be legal jurisdiction**
- **Vendor must support standard virus protection**
- **Include sample implementation plan**
- **Vendor sub-contractors must comply agreement**



# TIPs from the TRENCH

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- Don't pay for vendor's implementation methodology
- Right to hold payments under a good-faith dispute
- Control and monitor vendor access to system
- Establish severity levels for problem resolution/cure period
- Just say "no" to point & click contracts



# TIPs from the TRENCH

- Consider purchasing 3<sup>rd</sup> Party hardware/software on prime-vendor paper
- Mergers & Acquisitions- Position for the inevitable
- Hybrid vendors are evolving and presenting new challenges
- Hold vendor accountable to certify new features of 3<sup>rd</sup> party software
- Know when to “fold-them”
- Avoid “You”, “ Yours”, “Us” and “Ours” references



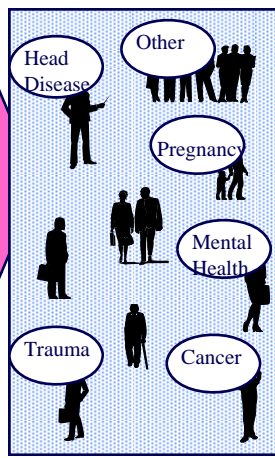
# WellSpan Health

## Financing System

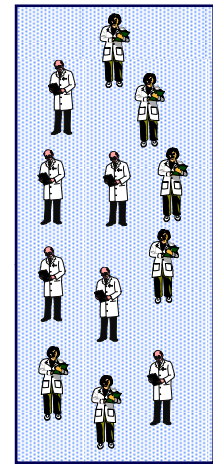
- Government
- Business
- Insurers
- Other

- Own Products
  - HMO
  - Insured PPO
  - PPO
  - TPA
- Third Party Contacts

Managed Care and Risk  
Marketing



## Physician Partnerships



## Delivery System

Healthy Community  
Health Promotion  
First Line of Care

- Cardiology
- Pharmacy/Home Health
- Behavioral Health
- Women & Children
- Medical
- Surgical & Rehab

## Continuous Improvement

Transparency	
Health Status	A+
Access	A+
Outcomes	A+
Cost	A+
Service	A+
Compliance	A+
Viability	A+

People with knowledge, skills and commitment

Governance and Management Structures

Management and Operational Support Systems

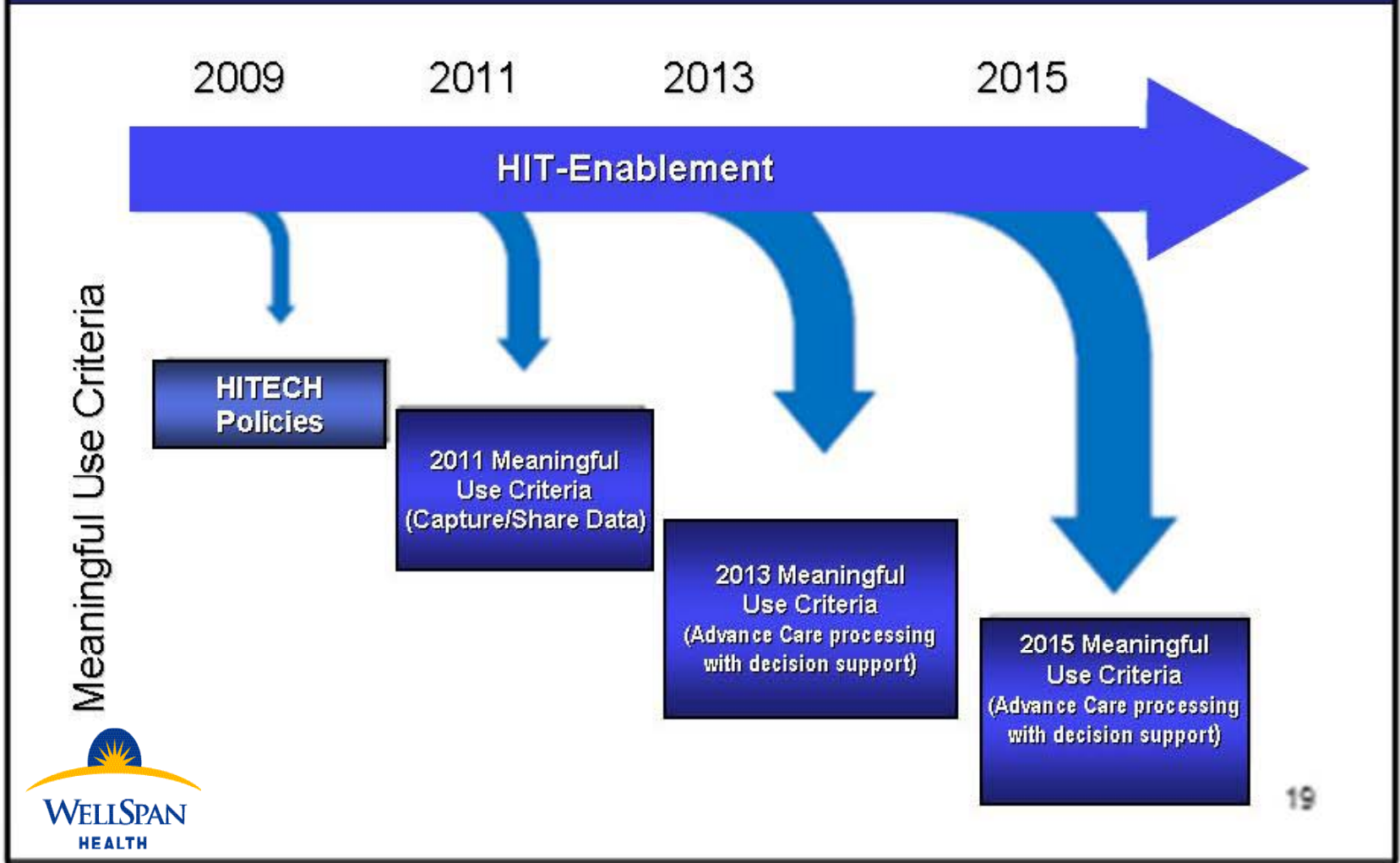
Information Technology

Facility

Capital

Medical Education

# Harmonizing Activities for HIT-Enabled Health Reform Aligning Stakeholders to Achieve Meaningful Use



# Strategic IT Plan

- Best of Breed Applications
- Electronic Health Record 
- MSO offering for practice EHR
- Care Communication
- Health Information Exchange
- ETL and Analytics
- Technology Infrastructure



# Strategic Goals

- *WellSpan Health-wide linkage & connectivity with appropriate level of security*
- **Universally conceived web presence (eHealth)**
- *Aligned provider connectivity, including regional allies*
- **Common Financial, Materials Management and Decision Support System**



# Strategic Goals

- ***Common Data Base/repository containing all patient related information***
- **Common “touch & feel” across all IT solutions**
- **Common systems for each functional area within WellSpan Health**
- ***Seamless & portable access***
- **Consideration of ROI**



# Strategic Goals

- *Implement IT solutions with appropriate levels of process re-engineering*
- **Enhanced WellSpan Health communications via multimedia**
- **General use of rules-based logic**
- **Support of Distance Learning**
- *Decision Support System – Financial and Clinical*



# PROJECT METHODOLOGY

**WellSpan Health's System Selection and Implementation Methodology is a detailed process to assist WellSpan Clients, IS and Vendors to outline Information Technology initiatives in a linear fashion**



# Project Knowledge Office (PKO)

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- **Supports the WellSpan Health IT Strategy & Implementation Process**
- **Provides the operational plan for the WellSpan vision of IT objectives across the Integrated Delivery System**
- **Provides Guidelines for RFP and Vendor Selection Process**
- **Provides sample vendor contract for reference**



# PKO Methodology

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## Provides :

- **Guidelines for the Client, IS and Vendor role and activities**
- **Clear direction to maximize effort, synergy, and economics**
- **Standard of practice for IT System implementation**



# PKO Methodology

**Successful IT Vendor selection and implementation requires:**

- **Vision – Strategic Goals/Service Catalog**
- **Process – Select Right Vendor**
- **Planning**
- **Collaboration between the Client, IS, and Vendor as equal partners in the process and success**



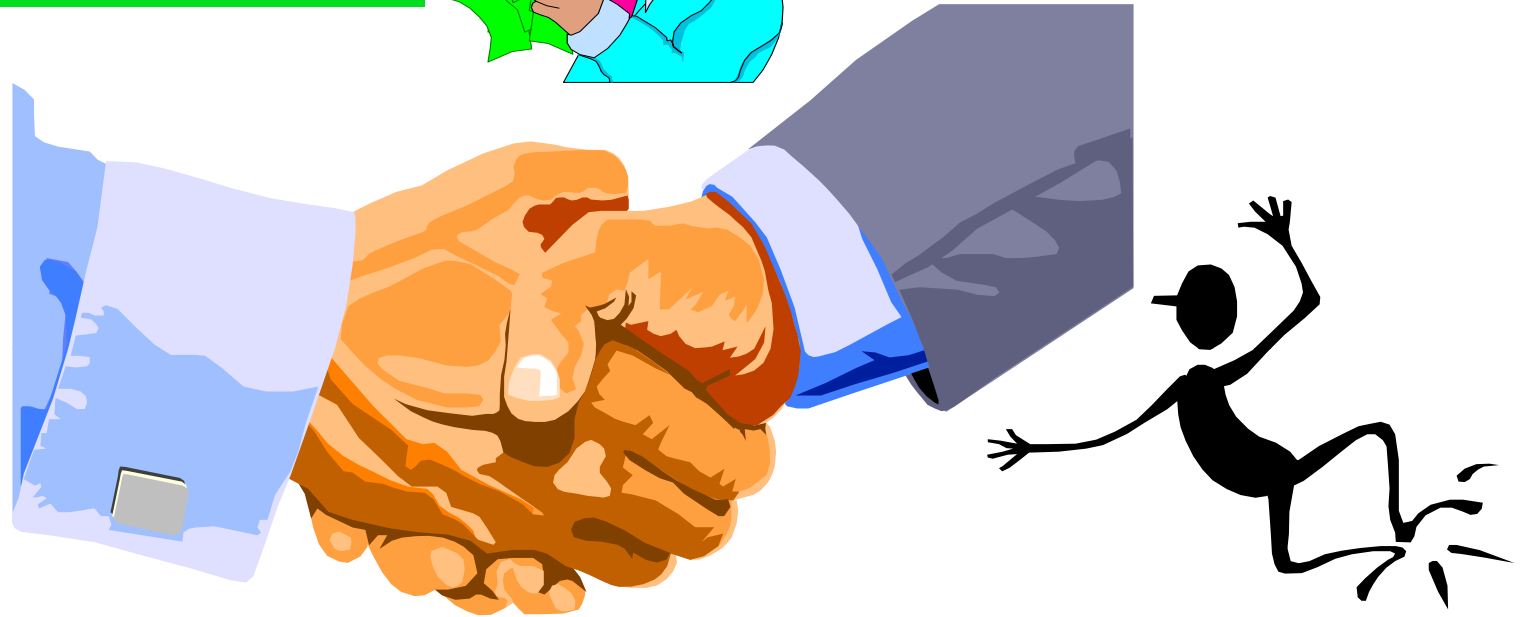
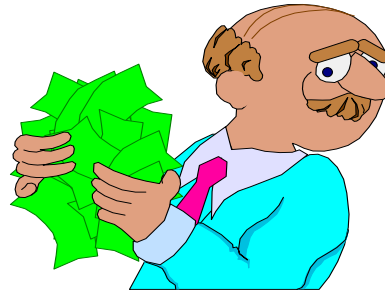
# MAINTAINING A HEALTHY CLIENT-VENDOR RELATIONSHIP

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- **After-the-Handshake**
- **Client Role**
- **Vendor Role**
- **Sustaining the Relationship**



**Vendor**



**WellSpan Health**



# STRATEGIC CLIENT-VENDOR RELATIONSHIP

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- **Purpose:**
  - **Better Achieve Business  
Mission Through Technology**



# STRATEGIC CLIENT-VENDOR RELATIONSHIP

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- **Result:**
  - Promotes a positive relationship which can resolve (almost) any potential conflicts in a mutually agreeable manner



# Client Vendor Relationship

## Partnership Benefits:

- **Cost Management**
- **Interface Optimization**
- **Increased Competence**
- **Focus and Control**



# Client Vendor Relationship

## Partnership Benefits:

### ■ Shared Risk

- Fixed and Variable Fee Schedules
- Incentive-based Fees
- Value-based Investments
- Shared Reward



# Client Vendor Relationship

## *Client Responsibilities:*

- Provide Resources to Support the Implementation Plan
- Deliver Technology to Support Vendor Certification
- Complete Acceptance Testing On-schedule and notify Vendor in Timely manner of Problems



# Client Vendor Relationship

## Client Responsibilities:

- **Serve as Positive Reference if Appropriate**
- **Attend Executive and User Conferences and provide constructive feedback**
- **Notify Vendor of Change in Business Drivers**



# Client Vendor Relationship

## Vendor Responsibilities:

- Client Agent for “Best of Breed” Services
- Partner Across the Continuum of Change
- Help Client to Achieve Competitive Advantage
- Deliver Business Results



# Client Vendor Relationship

## Vendor Responsibilities:

- **Benefit Client Organization, people and Community**
- **Flexible Approach to Partnering**
- **Co-operate with other best of breed vendors**
- **Strategic Alliances with Suppliers and Competitors**



# VENDOR CONTRACTS

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- **50 plus vendors; 190 contracts**
- **Contracts Stored On-line**
- **Protection of IT Investments**
- **Integrating Information within and beyond the IDS**
- **Maintaining Awareness of the IT Vision**
- **HIPAA and Regulatory Compliance**



# VENDOR CONTRACTS

- **Reduces or prevents potential issues between WellSpan and Vendor**
- **Ties payment terms to the completion of successful implementation-milestones**
- **Should be perceived as a win-win by WellSpan and Vendor**
- **WellSpan and Vendor representatives must be familiar with the key terms of the contract**



# Conclusion

- **The IT acquisition and contracting processes are generally complex, intensive, critically important and often exasperating to all of the participants.**
- **However, if the concepts, procedures and lessons demonstrated above are learned and utilized, the ultimate outcome is likely to be one that mutually benefits both vendor and customer.**
- **Patience is the key to success.**





## *Questions & Discussion*

# Contact Info

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