



# HEALTHCARE RISK MANAGEMENT™

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## ➔ INSIDE

How to work with outside counsel . . . . . 4

FTC looks at anti-competitive practices. . . 6

EHRs still not optimal for pediatric safety. . . . . 8

Emergency plan saves hospital in water crisis . . . . . 10

**Legal Review & Commentary:** Improper medication leads to patient's death, \$10 million verdict; nonoperating physician found exempt from liability



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## Outside Counsel Can Be the Right Choice, but Know When

Outside counsel can be an important resource for hospitals and health systems, but knowing when it is right to bring in someone can be difficult. If you move too quickly to call in an outside law firm, you may waste budgeted resources while casting doubts on the abilities of the risk manager and in-house counsel.

But holding on to legal matters that should be handled by outside counsel can have even worse consequences.

Regardless of the size of the legal department, there will always be times when it is appropriate to bring in outside counsel, says **Brent L.**

**Henry**, JD, an attorney with the Mintz law firm in Boston. Prior to joining the firm, he was vice president and general counsel of Partners HealthCare,

the largest hospital network in New England, overseeing the legal, internal audit, corporate compliance, and business ethics departments for the organization.

Determining when to bring in outside counsel depends on several factors, including the nature and

magnitude of the problem, the level of in-house expertise, client expectations, turnaround time, level of sensitivity, and budget, Henry says.

When an organization decides to keep a matter in-house, there still are considerations that need to be kept in mind, such as assembling the appropriate team to

handle the matter and maintaining the client's confidence.

When engaging outside counsel, the hospital or health system must consider

REGARDLESS OF THE SIZE OF THE LEGAL DEPARTMENT, THERE WILL ALWAYS BE TIMES WHEN IT IS APPROPRIATE TO BRING IN OUTSIDE COUNSEL.

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reputation, cost, quality, expertise in the area, track record with similar matters, and staffing patterns, Henry says.

“Make sure you understand the problem and its implications. When an issue arises that you feel might have to be sent out, take the time to think through the problem and its implications for your client before the decision is made,” Henry says. “In addition to the individual business unit/clinical department where the problem originated, this might involve a discussion with your colleagues in public affairs, internal audit, finance, compliance, regulatory affairs, and human resources.”

## Issues to Consider

Henry suggests considering the following issues when selecting and hiring outside counsel:

• **Magnitude of exposure.** Is the matter a “bet the farm” issue, or is the organization merely seeking a second opinion from outside experts? How big a public relations problem could an adverse outcome create? How confidential should the mere existence of the problem be kept? What are the adverse financial implications? Is there a regulatory

precedent to consider? Might the resolution of the matter result in employment terminations?

• **Client expectations.** Managing client expectations is key to long-term survival. First, make sure that you and client colleagues agree on what the goal should be as you seek to resolve the problem. If the goal has to be adjusted once more information comes to light, do not hesitate to initiate that discussion. Never promise more than you can deliver. Avoid predicting outcomes when you can; if pressed, better to state them in terms of percentages rather than absolutes. If it becomes clear that your client has unrealistic expectations, going outside might help increase your chances of success or at least help to reinforce your message to lower expectations.

• **Turnaround time.** What is the time frame within which the matter needs to be resolved? If you are faced with a tight time frame, consider going outside — but be prepared to pay for it. Unless it is a routine matter that inside counsel deals with regularly, if you are under a time crunch, you should not hesitate to find an outside firm that can put a team together to handle the legal analysis, document production, etc., in a timely manner.

## EXECUTIVE SUMMARY

Healthcare organizations will need to call on outside legal assistance for some situations, but it is not always obvious when that is the right decision. Many factors should be considered before entrusting a legal issue with a law firm rather than in-house counsel.

- Major lawsuits that could have serious consequences might be appropriate for outside counsel.
- In-house counsel may be inappropriate if they could be called as witnesses in litigation.
- Outside counsel may be best for negotiating with physicians and executives who will be in a position of power.

• **Sensitivity.** This issue cuts two ways. While clients almost always want to keep highly sensitive matters within the organization, they often present unique issues that compel looking to outside counsel for advice. If it is likely that resolution of the matter could lead to litigation, it is important to keep issues of attorney-client privilege in mind. While the safest route to protecting the privilege is to retain outside counsel and have them oversee the information-gathering, there are ways to avoid having to do that depending on how your legal department is structured.

Henry also cautions that you should not be handcuffed by your budget. While most legal departments have outside counsel budgets, it is important not to let a lack of budgeted funds restrict your decision at the outset, he says.

“When faced with a major matter that might be a ‘budget buster,’ talk with the appropriate people in the business unit or clinical department as well as your executive colleagues to make sure they understand the trade-off between staying within budget and solving the problem in the most effective manner,” Henry says. “Most will choose the latter. One way to ease the budget pressure on a major project is to have outside counsel team up with inside staff, both in and outside the legal department. But remember that someone will have to supervise and serve as a liaison with outside counsel.”

## Evaluate Resources Realistically

Do not underestimate your inside resources, but evaluate them realistically, Henry advises. Depending on the nature of the problem, you should not necessarily

be constrained by the size of your legal department, he says. Many matters will involve fact-gathering, document production, and other nonanalytical tasks that can be carried out by colleagues who are not attorneys.

“The key here is selecting an effective team leader and making sure your colleagues serving on the team understand the importance of the project so that they make it a priority. Assembling the right in-house team can help to deliver the results you need without blowing your outside counsel budget,” he says. “Keep in mind that at the appropriate point, you may have to integrate outside counsel into the team in order to ensure that you get the benefit of that expert advice in the most cost-efficient manner.”

Hospitals retain outside counsel for many different purposes, often in response to a significant event, says **Jeffrey P. Rust**, JD, partner with the Rivkin Radler law firm in Uniondale, NY. These events may include anticipated or pending litigation, a government or payer investigation, a major transaction, or some other legal concern that requires expert or impartial legal advice. These often are specific, stressful events requiring a proactive approach where outside counsel anticipates the client’s needs and remains focused on solving the client’s problem, he says.

In-house attorneys may not be the best choice to handle some of these matters if they specialize in risk management, or they may have a general practice background with experience in some specialized areas, Rust says.

“For instance, negotiating a complex commercial lease or an acquisition or merger with another hospital or system may require outside counsel experienced in such

matters,” Rust says. “Although most in-house attorneys have a wealth of experience, at times it makes sense to bring in the experts.”

## Impartiality Can Drive Decision

Another instance where it is important to bring in outside counsel is when dealing with a serious matter requiring an appearance of impartiality, Rust notes. There are times when in-house counsel’s participation in an actual or threatened litigation or investigation could be problematic because the in-house counsel could be called as a witness, he says.

“There is often a fine line between whether in-house counsel has been providing business advice as opposed to legal advice, leading to challenges of privilege,” Rust says. “Outside counsel should always be engaged if in-house attorneys played a part in the conduct being investigated.”

In-house counsel also may not want to take a lead role in negotiations with high-ranking physicians or hospital executives, Rust says. Bringing in outside counsel allows the in-house attorneys to avoid negotiating on behalf of the hospital with individuals that may be in a power position post-negotiation, he explains.

“Employment agreements with high-ranking persons are often heavily negotiated and may involve complex compliance and regulatory issues as they apply to healthcare providers and not-for-profit hospitals,” he says. “In-house counsel may be better served allowing outside counsel to handle these difficult negotiations so as to retain a positive working relationship with hospital leadership and to avoid any appearance of bias.”

# Establish Expectations, Communication With Outside Counsel

A hospital is best served when in-house counsel works closely with outside counsel, notes **Jeffrey P. Rust**, JD, partner with the Rivkin Radler law firm in Uniondale, NY.

In-house counsel can provide background information and assistance, as they are the most knowledgeable about the hospital's structure, policies and procedures, culture, and personalities.

Rust advises following these tenets of effective legal project management:

1. Define the scope of the matter and set clear goals to measure success.
2. Agree on a budget, understanding that unforeseen events may require adjustment to the matter's scope and budget.
3. Select the right legal team of both in-house and outside attorneys and legal assistants, each with the right level of knowledge and experience.
4. Assign specific tasks with due dates to each team member.
5. Communicate with the team through use of a secure shared site or other secure technology and scheduled status conferences.
6. Track all work against the budget regularly.
7. Analyze results with outside counsel after the matter concludes.

The reporting relationship also is important, says **David S. Sokolow**, JD, partner with the law firm of Fox Rothschild in Philadelphia.

"It is important to figure out who the outside lawyer reports to, who is hiring me, who is authorizing payment on my bills, who I'm supposed to send deliverables to. In many cases this will be the in-house counsel, but it also could be the CEO, the compliance officer, the board," Sokolow says. "There also is the political issue of how this relates to what in-house counsel is doing and how much I should keep in-house counsel in the loop. There is no one answer that works for every organization, and I have to understand that up front so that I don't exacerbate any existing issues."

Access to other hospital departments also can be an issue, says **Rodney K. Adams**, JD, a healthcare attorney with the law firm of LeClairRyan in Richmond, VA.

"Some hospitals want us to go through in-house counsel for everything, like a records request. So we have to ask their counsel, who will then go to the department and make the request, then pass the records on to us," Adams says. "Others will give us direct access, and that's most efficient. When in-house counsel wants to stay so much in the loop that we're not allowed to talk with other staff, that can get onerous sometimes." ■

In some situations, it may be necessary to bring in outside counsel due to the limited number of attorneys, nonattorney support staff, and technical staff in an in-house legal department, Rust says. The legal department's resources may be fully engaged in other matters, necessitating the assignment of overflow work to outside counsel.

Also, if the hospital is planning a potential transaction or litigation that requires a substantial due diligence review or other investigation, in-house counsel may not have enough qualified support staff to properly manage the investigation in a time-effective manner, Rust says. Outside counsel can draw from resources throughout the firm to focus on the matter and produce results more quickly and effectively than can in-house counsel acting alone, he says.

## Special Expertise May Be Needed

**Karl Thallner**, JD, partner with the Reed Smith law firm in Philadelphia, frequently works with hospitals and notes that in-house counsel are under pressure to keep their budgets under control, so they do not use an outside firm lightly. Hospitals only approach him after carefully determining that either they are not properly qualified for a particular matter or there is a strategic reason to have an outsider lead the effort, he says.

For instance, this may be the case when a broader perspective is needed to assess risks on an unusual proposed activity or arrangement, he says. Or, when in-house counsel is not experienced in situations such as an FDA dispute or a complex Stark Law issue.

The perceived credibility and

independence of an outside firm also may be helpful in dealing with a third party, he says. Attorney privilege and the need to protect work product from discovery also may be good reasons, he says.

“In-house counsel is usually given the authority to decide when and how to select the outside counsel. So you usually have a collaborative relationship rather than an adversarial relationship in which in-house counsel feels threatened or pushed aside,” Thallner says. “I can imagine in an organization where the in-house counsel isn’t given that authority and the decision is made by the CEO or someone else, that could create some friction or tension that is not good for the organization. If the in-house lawyers think of the outside lawyers as a competitive threat and don’t respect them, that could be problematic.”

## Serving Different Masters

Another attorney who works as outside counsel for hospitals is **David S. Sokolow**, JD, partner with the law firm of Fox Rothschild in Philadelphia. He finds that subject matter expertise is the most common reason hospitals call on him or other outside counsel.

For example, a high-stakes fraud and abuse investigation might require an attorney experienced in such matters rather than having otherwise qualified in-house counsel learn as they go, he says.

The need for impartiality also is a common reason, he says.

“There often is a perception of greater impartiality when the attorney is an outside person. Sometimes that is helpful when you’re dealing with the government or another third party that knows the firm,” Sokolow

says. “It can give a different air to the discussions rather than the government talking to an employee of the hospital, even though those employees may have ethical obligations as lawyers. That appearance that you serve two different masters — your employer and your legal ethics — can make people wonder if they’re getting the whole story.”

Sokolow notes that in-house counsel often wear different hats, acting as business advisor in addition to legal representative. That can blur the lines when it comes time to handle a negotiation or litigation. There is a greater ability to preserve attorney-client privilege with outside counsel who is clearly providing a legal service and nothing else, he says.

“Sometimes, the issue involves the actions of senior management, maybe even the legal or compliance office, and allegations that they failed to detect something or take action. That will be a time when you want to avoid the appearance of some kind of conflict or taint with people investigating the conduct of their own colleagues,” Sokolow says.

The outside firm also may have greater access to technology and other resources that are beyond the reach of the hospital, Sokolow says. (*See the story on page 4 for more on how to best work with outside counsel.*)

Hospitals also may leverage the independence of the outside counsel when difficult decisions or changes must be made, he says.

“Sometimes it’s helpful for inside counsel to go back to managers, especially if it’s a compliance issue, and say they consulted this impartial, well-regarded outside counsel and here’s their advice,” Sokolow explains. “Outside counsel can give political cover to in-house counsel to get the results they need. It’s harder to ignore the advice of outside counsel, whereas

you might think in-house counsel is being overly cautious or giving you business advice and not legal advice.”

The use of outside counsel might be downplayed when a medical center is involved in a controversial matter, says **Rodney K. Adams**, JD, a healthcare attorney with the law firm of LeClairRyan in Richmond, VA. He was called on to represent a hospital that was embroiled in litigation over discontinuation of life support for a brain-dead child.

The medical center wanted Adams to handle the litigation because he was more qualified than its in-house counsel, but he was not the public face of the hospital’s legal team. An in-house attorney acted as the public voice for the hospital regarding the litigation.

“They didn’t want it to look like the hospital was ganging up on the family by calling in an outside firm,” Adams says. “The situation was already so delicate that they wanted to avoid any impression that they were throwing their weight around and the family was at a disadvantage.” ■

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