

## Not Just Med/Mal

Remember that healthcare expertise is useful in legal matters outside of medical malpractice, says **Zachary Rothenberg**, JD, partner with Nelson Hardiman in Los Angeles. An employment issue may seem like it is the same no matter who the employer is, but that often is not the case, he says.

“You might think any employment litigator could handle it, but there are going to be opportunities along the way for an experienced healthcare lawyer to help their client,” Rothenberg says. “You want someone who knows the industry, the regulations that may have some influence on the case. Those may not be apparent to you or to an employment lawyer who doesn’t know your particular field.”

Good healthcare counsel will

have a deep enough understanding of applicable law to provide useful guidance, says **Mark R. Ustin**, JD, partner with Farrell Fritz in Albany, NY. That is more than just understanding what the law says, he explains.

“There are lots of people who can read the applicable statutes and regulations and tell you what they say, but you want someone who has their finger on the pulse of how the regulators think,” Ustin says. “That narrows down the pool a lot. You will find many attorneys who have a fine understanding of what the law says but not that many who can go a step further and help you understand what means for you, and where those laws and regulations might be headed in the future.” ■

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## Top Factors to Consider in Choosing Outside Counsel

This list of factors to consider in choosing outside counsel is offered by **Robert H. Iseman**, JD, partner with Rivkin Radler in Albany, NY.

• **Assessment of risk tolerance.** Healthcare is a high-risk business. The client should conduct an honest self-assessment of its risk tolerance and whether it is seeking a law firm that is more risk averse or willing to take reasonable risks.

• **Enterprise risk management (ERM).** Ask the firm about its view of ERM plans, the ERM process, and its experience in this area. Many firms practicing in the healthcare arena have no experience with ERM.

• **ERM experience.** The best

lawyers in this area often have backgrounds in litigation, which gives them a better understanding of practical problems, not just hypothetical ones. The approach to ERM from the perspective of the client and the law firm must be in the context of the complexity of healthcare regulation and risks.

• **Directive advice.** Many lawyers advise their clients by offering available alternatives. Few lawyers tell their clients what they would do if they were in their client’s shoes.

“I believe it is important to give clients what I refer to as ‘directive advice’ so that the client knows exactly what decision I would make if I were in the client’s position. This

is especially important in areas that involve a high degree of legal risk,” Iseman says. “The ultimate decision about what to do rests entirely with the client, where it belongs, but the client knows where the lawyer stands. Not all clients will want this, but most will.”

• **Cultural compatibility.**

Lawyers have different styles of practicing. Likewise, clients have their own manner of conducting business. The culture and manner of practice of the law firm should be compatible with the culture and manner of doing business of the client. For example, to what degree does the client wish its counsel to become involved in such areas

as governance, business strategy, and other services that are not purely legal in nature? What is the client's tolerance for risk, and is it compatible with the law firm?

- **Stability.** Movement of lawyers from firm to firm in the healthcare field is not uncommon. However, such events can negatively affect clients who either must engage new counsel or follow their lawyers to a new firm. Clients should inquire about how long the healthcare attorneys have been with the firm and try to get a sense of stability, especially in the specialized healthcare practice.

- **Breadth of services.** The firm should provide "one-stop shopping" for legal services. A large healthcare delivery system faces the same legal issues as any other large business, such as labor and employment issues, personnel and benefits, vendor contracts, and capital financing.

"In addition to these general issues, healthcare systems also must confront the extremely specialized and complex regulatory overlay applicable to healthcare," Iseman says. "The law firm should possess sufficient depth and experience to handle the full range of legal issues, from the more generic to the highly specialized."

- **Responsiveness and availability.** The client should ensure it is the law firm's practice to return email messages and phone calls the same day, and that the firm has the depth of personnel to accommodate emergent situations.

- **Relationship partner.** The client should identify and be comfortable with a designated relationship partner who will be responsible to the client and to the firm for the management of the engagement.

- **Openness to nontraditional**

**fee arrangements.** The firm should show demonstrable and genuine sensitivity to the client's budget and ability to pay professional fees. This means matching legal fees to the nature of the task undertaken by the lawyer, and the willingness to "push down" less demanding work to young associates and paralegals.

"Beyond that, the client should ask whether the hourly rates proposed by the firm are consistent with the rates being paid by other clients, or whether some clients are paying less," Iseman says. "Moreover, the firm should be open to being paid on a lump sum basis for particular engagements, lump sum retainers, and other arrangements that encourage rather than discourage the client's executives from picking up the phone and accessing the advice of counsel."

- **Added value.** The client should ask the law firm how it adds value. This includes the willingness of the firm to provide education for the client's employees in various legal areas, including risk management, and to provide similar assistance without compensation.

- **Conflicts of interest.** Clients should inquire about the other healthcare clients represented by the firm to ensure that there are no disqualifying conflicts of interest. Both business conflicts and legal conflicts should be considered carefully.

"For example, it may not be legally disqualifying for a law firm to represent one of the potential client's

competitors, but such a business conflict may not be satisfactory to the client," he says. "Beware of the law firm's promise to 'wall off' those having a conflict."

- **Use of technology.** Technology is an important part of efficiency. The law firm should show that it is committed to the use of technology in the interest of efficiency and controlling the cost of legal services.

- **Other fees and expenses.** Clients should ask about whether the law firm charges for electronic legal research, intraoffice conference, clerical overtime, and other similar expenses that sometimes are billed and sometimes not billed, depending on the law firm.

- **True depth of experience.** Clients should consider whether the firm has a true depth of experience and accomplishment in all areas of the law.

"Naturally, some practice areas will be stronger than others," Iseman says. "For example, many law firms hold themselves out as having practices in such specialized areas as antitrust, tax, and others, but sometimes do not have sufficient experience and depth of knowledge in such practice areas. The lesson here is, don't rely entirely on brochures and websites." ■

## SOURCE

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