



# How To Listen To Your Lawyer

**I**n a move to put a face on quality, the board decides it wants to hear about specific cases of patients who were harmed, by name, at the board meetings. The lawyer says: “Don’t, that will violate HIPAA.”

In fact, that lawyer would be wrong. Has your lawyer ever said to you: “If you do that, you will increase the hospital’s liability?” Did you ask yourself: “What is my responsibility as a fiduciary? How can I know what to ask? I’m not a lawyer.”

As regulations become more complex, and tensions increase between conservative legal guidance and the move to greater transparency around quality, the issue of when and how to listen to your lawyer deserves focused board attention.

Hospitals around the country obtain legal advice from diverse sources and often from a combination of sources—a single outside lawyer who sits on the board, in-house legal staff, a general practice outside firm, a large national firm, multiple boutique law practices with special expertise, and more. And

each of them may at some time recommend someone else. There is no single “best” way to obtain legal services, but there are factors that influence how advice is given and how it should be received. This article discusses the trustee’s responsibility in getting legal advice, how to think about legal risks, and questions you might want to ask to enhance your ability to decide what to do when you are given legal advice.

## The Fiduciary Standard

The business judgment rule allows trustees to rely on the reasonable information they are given with a reasonable level of inquiry. What level of inquiry is enough when the issue is legal advice? As we will see, both to make decisions appropriately as well as to be cost effective, some exploration of the lawyer’s advice beyond what is presented may be prudent. The lawyer in the opening scenario likely read the regulations but has little experience in applying them to quality assurance. The HIPAA

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regulations consider the board's access to patient information to be appropriate as part of normal hospital operations.

Related to the fiduciary standard is the "advice of counsel" defense. This defense is available where a hospital is charged with a violation of statutes for which intent matters, such as for antikickback and false claims. The party claiming this defense must have sought advice from a lawyer thought to be reliable before taking action and sought counsel in good faith to understand the lawfulness of the undertaking. To claim the defense, the client has to have made a full and accurate report of the known material facts and acted strictly in accordance with the advice given.

Of real significance here, though, is that the competence of counsel is relevant when the defense is raised. This means that the competence of counsel on the specific matter at hand is important. As health care becomes more complex, lawyers who are knowledgeable about corporate, employment, real estate or tax law, for example, may not be competent in this narrow legal sense, say, for false claims, Stark laws, antitrust or quality fraud purposes. Asking real questions about the lawyer's specific knowledge about the particular problem at hand is essential. (See sidebar, below.)

### Taking a Risk

The types of legal risks that trustees must assess are varied. They may range from the risks in a real estate transaction to those in a securities offering, in a joint venture, or antitrust liability. The risk of a bad verdict in a private lawsuit regarding malpractice or credentialing is quite different from a potential government investigation, which presents different risks from actual government enforcement. Whether the risk is money to be paid in settlement or fines, or exclusion from Medicare, or loss of an investment, or being sued for breach of contract, it is legitimate

to expect your lawyer to enumerate the types of legal risk the board is facing.

But the real issue is whose risk it is to take. It is not the lawyer's job to tell the board whether the risk is worth taking. That is the essence of the fiduciary responsibility. When a board decides it is important to be transparent about quality, including failures, the legal risk is the potential that a plaintiff's attorney might use that information in a lawsuit. But if the purpose of transparency is to improve quality, then the harmful incidents that lead to lawsuits might well be avoided. Which risk to take—more harmful incidents, which could cause lawsuits, or more openness, which could invite lawsuits—is the board's decision.

If the board wants to adopt a policy on apologizing to patients who were harmed, and the lawyer is skittish about the implications of such an admission for potential lawsuits, it is still the board's responsibility to decide whether to take that risk. If the lawyer insists on the point, the board should ask him to produce data showing that frank disclosure and apology increase the risk of lawsuits. He will find none.

By the same token, if a board wants to overrule the medical staff's credentialing recommendations or wants to ignore an adopted policy to curry favor with disgruntled physicians who are big admitters, the decision may be wrong—and it may have consequences—but it belongs to the board. Even if the lawyer recommends that the hospital voluntarily disclose a compliance violation, whether to proceed is the board's decision. In the last analysis, the lawyer's job is to explain the legal issues and the basis for his judgment regarding the legal risk.

That said, the lawyer can have personal exposure for what the board does. Outside lawyers have been indicted for giving advice and drafting contracts that violated the antikickback statute. An in-house lawyer has been charged with securities violations and false claims in certifying the hospital's actions under a corporate

## QUESTIONS TO ASK

1. Before you use the lawyer for a problem, ask: How many of these cases have you handled? Over what period of time? What was the result?
2. Also ask the lawyer: If the work will be done by someone else in the firm, please tell us the experience of the person who will do the work. How long has that person been with your firm?
3. When inside counsel recommends outside counsel, ask: What is your prior relationship with the firm—former employer, associate or colleague? If no prior relationship exists, ask: How did you identify them? Who else did you consider? Why did you choose these people?
4. When outside counsel recommends other technical counsel, ask: How do you know them? Do they refer to you? What is their specific expertise?
5. When choosing counsel for the board, consider a request for proposal to several firms and ask: How many lawyers will be specifically assigned, at what minimum level of experience, at what specific rates, and what are their specific expertise for specific problems? Can you provide demonstrated support for their assertions—i.e., published articles, presentations for bar groups, etc.?

integrity agreement. And in one case in Delaware, the in-house counsel, who was not a director, was held to the same fiduciary standard as a board member for ensuring compliance and avoidance of waste in the company.

In-house counsel seem to encounter more problems with liability than outside counsel. Sometimes it is because they are too close to the hospital and identify more with its business goals and lose their independent perspective. Sometimes it is because they are wearing too many hats as compliance officer, corporate secretary, privacy officer and more. Some in-house counsel may not even be aware of their exposure. The point, however, is that sometimes when you get advice from a lawyer, it is important to know how much he is focused on his liability and how much on yours. It is not unreasonable to ask: "What is your liability based on our decision?"

Rather than decide these issues on the fly, the board ought to have an explicit position about its acceptable levels of legal risk tolerance. One board may take the position that it will accept the risk of a lawsuit from an angry doctor whose privileges have been restricted for failure to follow evidence-based medicine. Another board might take the position that it will only engage in activities that are explicitly protected in safe harbor regulations, even though the government itself says that failure to comply with a safe harbor regulation does not mean the law is violated. Few boards have discussed the types of legal issues they are called on to determine. It is time for boards to develop a list of the types of problems they are likely to face and to make decisions about how they would confront them.

In the attorney-client relationship, no board should feel it is held captive by the lawyer, whether on compliance, false claims or tax liabilities. Some clients are paralyzed by the expense of taking a problem to another lawyer who is not as familiar with their circumstances. These situations can be managed when general counsel knows how to approach another firm. Good lawyers are not threatened when the client seeks additional expert advice on point. The best lawyers know their boundaries.

The best hospital lawyers either have connections in the legal field or know how to get them. There are rating lists, such as Best Lawyers, SuperLawyers, Best of the Best, and Martindale-Hubbell. There are special health law organizations including the American Health Lawyers Association and the subspecialty groups of the American Bar Association. Some state bar associations have local health law subgroups. The attorneys who write and speak for these organizations often have depth in specific topic areas.

### The Missing Data Problem

In health care, the lawyer is frequently asked to provide guidance when there is no case law or precedent on point. There may be ominous government pronouncements but no real enforcement. The Office of Inspector General (OIG) publishes fraud alerts and bulletins criticizing behaviors that it may take years for it to pursue. Sometimes agencies change positions. The OIG published a fraud alert castigating gainsharing programs and 18 months later published a positive advisory opinion, which has been followed by many more positive opinions.

Sometimes different agencies make apparently inconsistent

statements. The antitrust regulators encourage hospital-physician interactions for clinical integration about which the OIG can raise concerns. Stark and the antikickback statutes address many of the same issues but use different standards. You can violate Stark when your intentions are completely pure, but to violate the antikickback statute requires specific intent. One problem may have criminal penalties, civil penalties and a private right of action—all at the same time.

In these contexts, the questions that can help assess the lawyer's guidance include: How many of these specific problems have you personally handled? What is the government's history on these cases? How gray is the zone we are in—from charcoal to pearl? When the lawyer suggests a voluntary disclosure or other interaction, ask what other options exist. Ask explicitly why the lawyer assesses the risk as he does; a range of influences may be at work.

### What Influences Legal Advice?

Judgment, which influences how a lawyer assesses precedent and context, is the essence of a lawyer's advice. Simply reading regulations or statutes does not confer judgment about what they mean. Judgment comes from experience—years in practice or the number of cases of this specific type that he has handled. Because legal judgment is what makes legal guidance more than a mere research report, it is critical to be able to assess the lawyer's level of judgment. In weighing his advice, it is useful to consider what other factors may be at work. For example, if the hospital is a major client of the law firm, keeping the board happy may influence how he delivers difficult guidance. Knowing how important the hospital is to the firm's revenues can be revealing.

Asking probing questions about who actually did the work that is the basis for the guidance can be important as well. If a senior partner reports his judgment based on research by a more junior lawyer, that is not a problem. But if one lawyer reports the judgment of another lawyer, something could be lost in translation. The person who actually did the work may not be as experienced as it seems. In addition, the lawyer's tenure with the firm can be significant. Sometimes firms acquire expertise through a merger or a lateral hire, and the firm's lawyers who rely on them don't really know, yet, the true extent of their new colleagues' expertise.

### Conclusion

Lawyers give advice. Trustees steward the assets and resources of the hospital based on that advice. Knowing how risk averse your board is on specific legal topics will be increasingly important. Having that discussion before the moment of crisis is the best path. To be comfortable relying on an attorney's advice, the board should consider carefully the total context within which the advice is given and not just the recommendations the lawyer reports. **T**

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