Health law is changing, not fading away

As medical industry consolidates, many lawyer positions move in-house

By Gary Gosselin

As the health industry consolidates, health law attorneys tend to follow the same pattern, moving to in-house positions to service the larger entities.

But, because of the myriad changes that come with the Affordable Care Act (ObamaCare), the need for health care law attorneys to sort through it is still strong.

"I’m of the belief that with ObamaCare there are a lot of changes, some things haven’t gone into place yet, they still need a lot of lawyers," said Southfield-based health law attorney Robert Ivey. "I have seen a need for health law attorneys because it is a specialty that has become more and more complex."

In 2002, 75 percent of physician practices were physician-owned, and 25 percent were hospital-owned. In 2009, 56 percent of practices were hospital-owned and 44 percent were physician-owned, and that number is still rising, said Devin Schindler, professor of health care law and constitutional law at The Michigan State University Law School.

"What that does is it creates economies of scale," Schindler said. "Rather than 10 doctors in a partnership that each run their own office, they work with a hospital which has its in-house counsel, so the trend is moving in-house."

Ivey said there were numerous regulations before ObamaCare and there will be even more regulations after ObamaCare is implemented.

"I don’t see that there is suddenly a huge need for a lot more health care attorneys, but it is definitely an area for some growth," Ivey said.

A saving grace

A big move is toward what are called Accountable Care Organizations, which bring all types of health practices together under one management umbrella.

"The government is paying more to health care entities that provide soup to nuts, birth to death care," Schindler said. "So rather than have one doctor refer to another (standalone doctor), they are affiliated either through the hospital or through ACOs."

"The total amount of work in health care is increasing," he said, but the focus of where it’s done is changing.

"You see the commoditization of health law; at first, you get a lot of money and over the years, the system got normalized as more people got into it," Schindler said. "Now 60 to 70 percent is done in-house and outside firms do the bulk of it."

But some of the saving grace for those in the field is ObamaCare, which promises to "level the playing field, increase patient choice, and bring competition into the marketplace."

This is not your parents’ legal marketplace anymore

By Matthew Prinn and Katie Reagan

You may recall the famous "This is not your father’s Oldsmobile" advertising slogan from the 1980s. One could use a similar phrase when describing today’s legal marketplace.

Changes in billing methods, improvements in technology, a turbulent economy and the globalization of the legal practice have left us with a landscape far different from the one we worked in even a decade ago.

While there will always be a core skill set of legal expertise, quality legal work, strong ethics and the ability to provide a high level of client service, today’s lawyers need to constantly evolve their skills in order to keep pace with the rapid evolution of the legal industry.

There are four key areas in which attorneys should focus on sharpening their professional skills:

Pricing

Back when the billable hour was king, lawyers could concentrate on addressing matters at hand. As long as the bill wasn’t too outlandish, life was good. When the economy took a downward turn, however, buyers of legal services had more power and the emergence of alternative fee arrangements became noticeable at many law firms.

Due to the increased usage of AFA, lawyers must now be skilled in identifying which model best suits each needed situation. Options include fixed fees, capped fees, contingency fees and hybrid models, among others.

Attorneys must analyze the pros and cons of each model. They must educate both their in-house and internal law firm management and describe how they plan to execute under these billing parameters.

Even for matters in which the billing method is the traditional hourly model, a lawyer’s ability to negotiate an effective rate is a skill that is vital in today’s market.

With many companies requesting double-digit discounts, lawyers must be able to convey to the prospect or client why their proposed price is of more value to the company — especially since a competitor may be proposing a lower rate for the same project.

Negotiating a fair but profitable price is a skill that can positively impact both the firm’s bottom line and the lawyer’s own compensation.

Project management

While project management has always been an important skill for lawyers, it has never held such a high level of importance as it does today. Without proper project-management skills, a lawyer can provide high-quality legal work and still end up losing money on the matter.

In the past, when a project looked as though it could go overbudget, the lawyer could simply call the client and explain why the original cost estimate was going to be surpassed. Now, due to AFAs, the risk is shared or, in some cases, owned by the law firm, which may end up eating the cost.

There are training programs and tools available to help lawyers improve their project-management skills, and many firms have incorporated project management into their professional development curriculum. Attorneys who can manage a fixed-fee project and come in underbudget will not only increase the profit margin, but also improve the brand.

Lawyers should consider inviting IT managers to conduct group meetings to discuss how best to leverage the latest developments in technology and implement them in their practices.

By adopting new and relevant technologies, today’s lawyers are likely to experience a noticeable reduction in internal expenses, which will positively impact the firm’s profit margin.

Globalization

As companies expand into new international markets, the lawyers who are able to effectively service them beyond local borders will be in higher demand. Whether your firm has offices outside of the U.S. or uses a referral system to find legal counsel for clients, it is imperative that today’s attorneys possess a deep understanding of their clients’ global objectives.

Those lawyers who act as connectors and provide seamless entry into new markets will be seen as a valuable asset.

This is certainly not your parents’ legal marketplace. Times and technologies continue to evolve at breakneck speed. Today’s lawyers can keep pace by focusing on the four areas outlined above.

By honing in on each, attorneys will be better positioned to deliver superior service and value to their clients — and, in doing so, impress firm management.

Matthew Prinn is director of business development at Kelby, Gates in Boston. Katie Reagan is business development and communications manager at Jones Day and 2012 president of the Legal Marketing Association’s New England chapter. This article originally appeared in Massachusetts Lawyers Weekly, which, like Michigan Lawyers Weekly, is a Dolan Company newspaper.
Health
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to keep a good number of health law at-
torneys working for quite some time. So
there is some shakedown, but the total
number of health law jobs is growing, said
Lance Gable, associate professor of law
who teaches public health law, bioethics
and the law, torts, and other health law
subjects at Wayne State University Law
School.
"It's true that some jobs are lost to
consolidation, but I don't think there will
be less health law lawyers, there will still
be a need. . . . As the law keeps changing,
you will need the capability," Gable said.
"Opportunities might shift a little bit,
but more broadly I don't think there will
be less people in health law. I would think
that firms that have expertise in health
law will continue to find plenty of work in
the years to come, not only from the Af-
fordable Care Act, but just because the
system continues to change."
"When I talk to students who are think-
ing of this field, I think it is unlikely that
there will be a shortage of work; the op-
portunities may change over time, but
health is 17 percent of our GDP, it's a ma-
jor focus, our population is aging," Gable
added.
Troy health law attorney Mark Lentozze
said there is some upheaval in the med-
ical industry, but that shouldn't be a huge
impediment to a good lawyer.
"Even in a consolidating environment
there are a lot of opportunities," Lentozze
said. "It's highly regulated; always has been
and always will be and I think that
lawyers who understand their clients'
business will be successful.
"But getting from here to there I think
there will be some changes, and it's going
to be volatile for a while," he added. "It's
like anything else for a lawyer; you have to
understand your clients' business well
and cater to their needs."
Shift into health law
Irey said he knows a lot of lawyers in
other fields like real estate, corporate or
transactions, for instance seeing their
business drying up, and they're trying to
get into health care law.
"But I find it dangerous because it is
a minefield, so many regulations, and
so many gray areas," Irey said. "Also, some
of it is interpretation, a consensus of what
something means and you will not know
that without experience."
Med mal defense has been a niche itself,
Schindler said, and while the client is the
doctor, the unspoken client is the insur-
ance company. Now you see med-mal at-
torneys trying to expand into the regulato-
ry field, and it makes sense because they
have clients in the doctors they have served.
"But, you go outside of litigation and the
health attorneys play a role in the develop-
ment of policies, and you need to be
involved with even more things, more
issues, more areas, not just in law and
how the law impacts on the medical field,
but how the regulations impact on the
medical field as well," Schindler said.

Preclusion
Continued from page 1
daughter, contradicting his defense.
Despite her testimony, Trakhtenberg's
to file a malpractice claim against McKelvy. That case was
dismisse via summary disposition. The Court of
Appeals upheld the dismissal, citing the
"attorney judgment rule."
Trakhtenberg later filed a motion for re-
leif from judgment under MCR 6.508(D)(3)
that eventually led to the Supreme Court
ordering further hearing on the ineffect-
ive assistance of counsel claim.
The Gitchler hearing led to discovery
of a psychologist's report that suggested
that the daughter may have been coached.
According to the opinion, McKelvy tes-
tified at the Gitchler hearing that her strat-
cy was to impeach the daughter's trial
witness by having her testify that her
father's inattention was in no way
related to her husband's defense. The
trial court ordered a new trial.
The Court of Appeals reversed, ruling that
the ineffective-assistance-of-counsel claim
was precluded by the civil court's dismissal
under the collateral estoppel doctrine.
The Supreme Court reversed the Court of
Appeals and remanded the case for a new
trial.
Writing for a 4-2 majority, Justice
Michael Cavanagh said collateral estoppel
doesn't apply because Trakhtenberg didn't
"have a full and fair opportunity to litigate
his claim in the malpractice proceeding."
"Considering the nature of the forum in
which defendant's allegations concerning
counsel's errors were initially rejected, it is
clear that defendant's interest in pursuing
his civil malpractice claim differed from
his interest in asserting his constitutional
right to effective counsel in the criminal
proceeding," he wrote.
The majority agreed that the lower
court's finding of ineffective assistance of
counsel because "to purported limitation
on McKelvy's investigation of the case can be
justified as reasonable trial strategy."
First, Cavanagh said, by advising the
defendant to waive his preliminary exami-
nation and failing to file a motion for a
bill of particulars, McKelvy's strategy left
her client without the factual basis of the
charges against him.
Second, she failed to interview several
witnesses, admitting at the Gitchler hear-
ing that she decided not to do so before
she decided on her trial strategy that re-
quired no further investigation.
Third, Cavanagh noted, was that the
lack of investigation left McKelvy use-
fully unprepared to take advantage of the op-
portunity's to attack the credibility of the
victim and Tetary that developed at trial.
All of these contributed to prejudice
Trakhtenberg's defense, Cavanagh said.

Cavanagh was joined in the majority
by Justices Marilyn Kelly, Stephen Markman
and David M. Kelly.
Justice Robert Young Jr. dissented,
joined by Justice Brian Zahra. Young said
he agreed with the majority insofar that
collateral estoppel doesn't preclude the
defendant's claim, but he didn't agree with
the "mushroom analysis on that issue and
instead would simply hold that the prose-
cution has not satisfied the elements re-
quired to apply collateral estoppel."
Young disagreed with the majority's
opinion that about the ineffective-assis-
tance-of-counsel claim.
Justice Diane Hathaway "didn't partic-
tipate because of a professional relation-
ship with a member of a law firm involved
in the matter."

If you would like to comment on this sto-
ry, please contact Brian Frasier at (248) 865-3112 or
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