

# The War Is On: Why Your Medical Staff Needs to Incorporate and Obtain Its Own Independent Counsel

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## Introduction

The hospital industry, led by its lawyers (notably Harty Springer & Mattern of Pittsburgh, Pennsylvania, who represent hundreds of hospitals nationwide), is out to decimate the independence of medical staffs and take away physicians' rights. Their objective is clear: they want to place unfettered power and economic control over doctors in the hands of hospital administrators.

How do we know? Because they have said so (Footnote 1).

In a January 31, 2003 letter to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) (Footnote 2) commenting on its proposed new standards, leaders of the hospital bar made their position clear (Footnote 3). According to them, the medical staff is not an independent, self-governing body -- it is just a part of the hospital, like the dietary department. In their view, the medical staff is not responsible for quality of care, the hospital's board of directors is. Per these lawyers, the board of directors has the unilateral right to amend the medical staff bylaws. These attorneys also discourage medical staff meetings. Most tellingly, they believe:

...That hospitals should have the flexibility to define a core group of medical staff leaders who actually carry out most of the responsibilities of the medical staff. Reinforcing the perception that all actions flow from the entire organized medical staff as a democracy, in effect, perpetuates a structure that does not work and can actually impede the quality of care.

In other words, they see no need for elected medical staff officers, just doctors hand-picked by the administration to act for the medical staff. What they do not say (but most physicians know) is that the members of the hospital's hand-picked "core group" often receive hefty stipends from the administration or are dependent upon hospital contracts. They are not representative of the medical staff, but rather of the administration.

The letter goes on to take the position that hospitals can refuse to give applications to otherwise qualified doctors, based solely on the hospital's own *economic* plans or financial objectives. They also believe a hospital should refuse to credential any doctor who has a "financial conflict of interest," without defining what that is. Finally, they advocate eliminating any JCAHO standards assuring physicians fair hearing and appeal rights.

In short, the hospital attorneys have taken aim on over 50 years of solid development of "normal" medical staff relations and physicians rights and seek instead to emasculate the medical staff and place all power in the hands of the administration. If hospitals gain this power, they will have the ability to dictate the medical economics of their service area, including physicians' reimbursement and compensation. With no organized medical staff, administrators will also have the power to dictate issues of quality of care.

## The 3-Part Strategy

Currently, hospital attorneys are going from hospital to hospital promoting a "**Code of Conduct**" for doctors on staff. The hospital's board of directors usually adopts this Code, without medical staff input or approval. Its provisions are lengthy and vague and give the administrator the unilateral power to discipline doctors for alleged infractions, including the power to "exclude doctors from the premises" (Footnote 4). Using this Code, administrators can summarily cut off a doctor's livelihood. Infractions include such things as making disparaging remarks or just not fitting in with the hospital's economic or financial agenda (Footnote 5). And this is all done outside the medical staff bylaws.

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The third prong of the hospital bar's tactic is to encourage medical staffs to use the label "**disruptive physician**" to take privileges away from doctors who are targeted by the administration. This highly subjective phrase -- "disruptive physician" -- is dangerous, as the California Supreme Court recognized more than 20 years ago:<sup>[1]</sup>

The fact that a physician seeking admission to staff membership is shown to manifest characteristics of personality which other staff members or administrators find personally disagreeable or annoying is not in itself enough, in our view, to justify rejection under the subject bylaw provision. . . . To permit such application of the bylaw in question would, in the words of *Rosner* [ *v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592], pose a substantial danger of application "as a subterfuge where considerations having no relevance to fitness are present."

The use of labels can be very powerful. Increasingly, we are seeing good physicians wind up being punished as "disruptive" for advocating quality of care for their patients. In many scenarios, administrators (especially promoted nurses) solicit "incident reports" from hospital employees to build their trumped-up case. Then, using the nursing shortage as pretext, they claim the doctor is "disrupting" hospital operations because he/she is "upsetting" the nursing staff, which *could* lead to employee turnover, thereby "disrupting" hospital operations.

Physicians charged as "disruptive" are often subjected to psychiatric evaluation and labeled "crazy." In one Montana hospital, a radiation oncologist who had absolutely no adverse quality-of-care issues was ousted after 18 years for being "disruptive," and was even called "nuts" by the administrator, even though the only professional evidence in the record consisted of 2 independent psychiatric evaluations saying she is in fine mental health. Horthy Springer represented the hospital against her. She is now suing the hospital. Unfortunately, however, hospitals are using the "disruptive physician" jargon to shatter the lives and careers of dedicated physicians. Every doctor should beware and be vigilant, realizing *there but for the grace of God go I*.

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## The National Campaign Against Medical Staff Independence

The hospital lawyers, of course, are quite adept at packaging their proposals in smooth language to make them sound fair and reasonable. They are teaching these strategies at seminars at posh resorts and at medical staff meetings across the country (Footnote 6). A recent weekend seminar in Santa Fe, New Mexico entitled "Governance Problems & Solutions" included topics such as, "What is a medical staff and why doesn't it work?," "'Delegating' to the medical staff without abdicating," and "How does the board deal with 'medical staff' issues -- disruptive physicians, quality of care?" all on the first day's agenda. According to Horthy Springer's Web site, Partner Dan Mulholland was one of the workshop's faculty.

Mulholland taught at Horthy Springer's "Physician Contracts, Competition & Joint Ventures" seminar at the Ritz-Carlton in San Francisco in October 2003. The seminar promised to "help you evaluate your options and respond appropriately -- without breaking the law!" Seminar participants received "model agreements and practical tips to use when you get home," including "Board Policy on Competing Financial Interests" and "Medical Staff Financial Disclosure Form." Sound familiar? It may soon.

Hospital attorneys are also attacking medical staffs in the courts across the country to establish their agenda. In New Hampshire, the Horthy Springer firm convinced the State Supreme Court to rule that the medical staff is not a separate entity from the hospital.<sup>[2]</sup> In South Dakota, attorneys got the state Supreme Court to hold that a hospital can deny privileges to qualified doctors based on the hospital's own economic agenda.<sup>[3]</sup>

Now, Horthy Springer is on the attack in California. BondCurtis LLP represents the Medical Staff of Community Memorial Hospital in Ventura California, where the hospital administration and Board of Directors has:

- Taken the Medical Staff's bank account;
- Tried to oust duly elected medical staff officers and replace them with administration appointees;
- Unilaterally imposed an 18-page "Code of Conduct";
- Adopted a Conflict of Interest Policy without medical staff consent or input;
- Unilaterally amended medical staff bylaws:

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Courageously, the medical staff filed a lawsuit to challenge the hospital's unilateral power grab. The doctors seek to preserve a functioning, self-governing medical staff while the hospital wants to place outright control of "access to the hospital premises" in the hands of the administrator and ultimately require doctors to adhere to the administrator's economic agenda. The battle lines are drawn: the American Medical Association (AMA) and California Medical Association (CMA) are on the side of the Medical Staff, and -- just so there is no ambiguity as to where the hospital industry stands -- the California Hospital Association has entered the lawsuit backing the administration. Significantly, the court ruled that the medical staff was a separate, independent entity with standing to bring such a suit. The hospital administrator resigned, and the case now appears to be settling.

Medical staffs are under attack in other states, including Ohio and Florida. Horthy Springer lawyers are in the thick of it.

## Call To Action

Physicians ought to be mad as hell and not take it anymore. Accordingly, every medical staff should:

1. Hire its own independent lawyer who is an expert in medical staff and who is a **physician advocate**. Lawyers who primarily represent hospitals or are paid by hospitals will inevitably have divided loyalties. Don't be fooled -- a hospital-appointed lawyer is *not* in a position to represent your best interests: these are the lawyers who signed on to the letter to JCAHO. Use proven physicians' advocates -- lawyers who just represent doctors, not hospitals or health plans. There are several such law firms around the country, and having their undivided loyalty makes the effort of seeking out these dedicated attorneys worthwhile (Footnote 7).
2. Incorporate the medical staff as a separate entity to eliminate any challenge to its independence and right to self-governance (see FAQs below). A separate corporation assures the medical staff maintains control over its bylaws, establishes its own criteria for membership, and conducts its own elections. If the medical staff is incorporated, these matters are governed by corporate law, not the law of hospital/medical staff relations, which the hospital lawyers are now trying to manipulate and change.
3. Ask your state and national medical societies to lobby for stronger laws assuring medical staff independence and outlawing hospital stipends to medical staff officers. Amend your own medical staff bylaws to preclude stipended doctors from serving on peer review panels, especially appellate panels.

Finally as a physician, you should be active and defend your profession vigorously. The hospital industry, the health plan industry, the government and allied professionals all want to take pieces of your profession, and your professionalism, away from you. Without the support of organized medicine (notably AMA and CMA), the medical staff in Ventura would not be able to fight. So join and become active in your state and national medical associations, and give generously to their litigation defense funds and political action committees. They are fighting for you. Now is the time to revitalize organized medicine, and it begins with individuals like you.

## FAQs: Incorporating Your Medical Staff

### 1. Why incorporate our medical staff?

We recommend incorporation of medical staffs for the reasons outlined in the left column of the . In our opinion, they greatly outweigh the cons listed on the right.

#### Pros vs Cons of Incorporating a Medical Staff

Pros of Incorporating	Cons of Incorporating
Protects individual medical staff members from personal liability.	Slightly greater cost and time involved in incorporating, filing for tax-exempt status, and complying with Corporations Code formalities.

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Assures clear title and control over the medical staff treasury.	
Availability of tax-exempt status.	Restrictions inherent to tax-exempt status (prohibition in engaging in certain activities, increased governmental oversight, etc.), but the medical staff already has to deal with some of these restrictions.
Independent, self-governing medical staffs are essential to the maintenance of physician autonomy and the independence of the profession itself.	
A clear delineation of the functions of the medical staff and the role of the hospital can be spelled out in an agreement between them.	While we do not see the Hospital Board's approval as necessary, they could refuse to recognize the corporation, in which case the doctors would have to take a strong stand.
The time that physicians now donate voluntarily to the hospital for medical staff work would be paid for by the hospital, but the payment would be made to the medical staff corporation. That money would be used to pay the expenses of the medical staff, including the medical office staff, medical staff events, peer-review--related costs, fees for independent counsel, etc.	Greater accounting responsibilities for managing the medical staff budget.

## 2. Would it be a nonprofit corporation?

Preferably, to obtain a tax-exempt status. The medical staff can operate as a nonprofit membership corporation just like a medical association or professional society. The Medical Executive Committee can serve as the equivalent of the corporate board of directors or trustees.

## 3. Is it costly to set up and maintain?

Not particularly, in view of the advantages of incorporating (see ). In the past, opponents of medical staff incorporation (mostly hospital lawyers) have cited increased costs. Law firms who believe strongly in the need for medical staff incorporation have developed low-cost flat-fee packages, including model bylaws, to help medical staffs declare their independence.

### Pros vs Cons of Incorporating a Medical Staff

Pros of Incorporating	Cons of Incorporating
Protects individual medical staff members from personal liability.	Slightly greater cost and time involved in incorporating, filing for tax-exempt status, and complying with Corporations Code formalities.
Ensures independence of medical staffs. Hospitals, their boards of directors, and administrators would have no power to remove, replace, or refuse to recognize the democratically elected leadership of a separate nonprofit corporation.	
Issues such as amendment of the bylaws or directors' meetings become a matter of clear statutory law rather than court interpretation.	
Continuity of existence (perpetual unless dissolved).	
Assures clear title and control over the medical staff treasury.	
Availability of tax-exempt status.	Restrictions inherent to tax-exempt status (prohibition in engaging in certain

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	case the doctors would have to take a strong stand.
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#### 4. Does my hospital board of directors have to recognize the corporation?

No. Adopting the corporate form assures the medical staff of corporate independence. A hospital board of directors or administrators could not attempt to dictate or override the acts of the medical staff that is organized as a separate corporation, nor could the Hospital's Board of Directors attempt -- as they so often do -- to adopt Hospital corporate bylaws that purport to trump medical staff bylaws. The adoption of the corporate form for the medical staff thereby eliminates the problem of unilateral amendment of medical staff bylaws by the Hospital. If, in the exercise of its independence and self-governance, the medical staff elects to be organized as a corporation under general principles of corporate law, the hospital board may not unreasonably withhold its approval of the bylaws, simply because they are in corporate form. It is prudent, however, to obtain a working agreement between the medical staff and the hospital.

#### 5. Would the medical staff corporation be eligible for tax-exempt status?

Yes. Once incorporated as a nonprofit corporation, the medical staff should apply for tax-exempt status. Even if the medical staff does not incorporate, it should seek a tax exemption and its own tax as an unincorporated association. This is a highly regulated area and the application for tax-exempt status must be worded very carefully. Therefore, it is strongly advised to retain the services of experienced advisors in this regard.

#### 6. Would the hospital still provide the medical office staff and secretary?

Yes. Personnel arrangements between the medical staff and the hospital will remain the same after incorporation, and would be governed by the agreement between the medical staff and the hospital.

#### 7. Would the department or committee structure of our medical staff have to change?

No. The Medical Executive Committee could serve as the equivalent of the corporate board of directors or trustees and the other committees could remain in place as well.

#### 8. Would peer review change?

No. Virtually all aspects of the medical staff's role at the hospital, including administrative matters, peer review, credentialing, etc., would remain unchanged after incorporation.

#### 9. Would my medical staff dues still be deductible?

Yes. Conversion of the medical staff into a tax-exempt entity should ensure deductibility of all contributions to the medical staff. The retention of an experienced advisor in setting up the corporation and handling deductibility issues is strongly recommended to ensure maximization of all tax benefits in this regard.

#### 10. If my medical staff pays the chief of staff and/or other medical staff officers, would the medical staff have to withhold taxes like an employer?

Yes. Whether or not the medical staff incorporates, any physicians it pays should legally be characterized as employees, not independent contractors.

#### 11. Who would pay legal expenses for medical staff disciplinary proceedings?

Whether or not the medical staff incorporates, legal expenses for medical staff disciplinary proceedings should be borne by the

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2. This letter was signed by a number of prominent hospital attorneys and indeed was originally sent asserting that it was the position of the American Health Lawyers Association – the trade association for all healthcare lawyers. This unauthorized use of the Association's name prompted a storm of protest from lawyers representing physicians.
3. A copy of the hospital lawyers' letter to JCAHO is posted at <https://www.BondCurtis.com>.
4. The hospital attorneys are promoting the use of the phrase "exclusion from the hospital premises," rather than loss of privileges, even in medical staff bylaws.
5. This so-called economic credentialing is vehemently opposed by the AMA and all state medical societies on the basis that hospital privileges should be available to any qualified doctor.
6. Harty Spring lawyers are extremely active as faculty in the Aspen Seminar and other educational/strategic meetings for hospitals, medical staff leaders, and hospital attorneys around the country.
7. In the author's experience, when lawyers try to represent both hospitals and doctors, they inevitably shade their advocacy on behalf of their larger clients (ie, hospitals and healthcare institutions) to the detriment of their smaller clients (ie, doctors). In the spirit of full disclosure, the author's own law firm represents only physicians, because we pledged long ago not to place ourselves in that ethical dilemma.

## References

1. *Miller v. Eisenhower Medical Center* (1980) 27 Cal. 3d 614, 632.
2. *Exeter Hosp. Med. Staff v. Bd. of Trs. of Exeter Health Res.* (2002) 148 N.H. 492.
3. *Mahan v. Avera St. Lukes Hospital* 621 NW2d 150 (SD 2001).
4. Bond C. An alternative to hospital-dominated groups. *California Physician*, April 1993. Available at: <https://bondcurtis.com/articles.htm>. Accessed March 3, 2004.

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