

# Medical Staff Leaders: 10 Things Your Lawyers Want You to Know

Article By:

Erin L. Muellenberg

Sherri T. Alexander

---

Whether you are new to medical staff leadership or have served in the past and have been called to serve again, there are times when you will need to consult a lawyer who specializes in medical staff matters. While there is nothing simple about medical staff affairs, there are some basic guidelines and protections that your lawyers would like you to know that will make your term easier and make you more effective.

Understand that hospitals and medical staffs are highly regulated organizations with a myriad of laws and standards that must be followed. As a medical staff leader, advisor or medical staff professional, you are leading and advising the professionals responsible for practitioner competence and conduct within the organization. Medical staff law has evolved from the lawyer in the office who would return your call in a week, or fax you a letter, to a specialty area where your lawyer is your partner and there to assist in all aspects of medical staff affairs.

We hope you will benefit from and find the following 10 recommendations make your term or role more informed and manageable.

## **10. Keep Your Governance Documents Up to Date and Reflective of Actual Practice.**

We don't suggest you must read every page of your governance documents, but you should be sure you know where to look and how to use them. Governance documents include the medical staff bylaws, credentialing manual, hearing plan, rules and regulations, policies and other documents approved by the medical staff and designed to set and guide medical staff processes. Too often we have found the documents will conflict or are missing critical passages. Your medical staff bylaws or medical staff governance committee can be one of the strongest committees in the organization. This is the committee that will annually review the documents and make sure they are internally consistent, reflect actual practice and are relevant to your organization's practice and clinical services. Remember the medical staff bylaws set the overall guiding principles for the medical staff organization. All other governance documents flow from the foundation of the medical staff bylaws and must be consistent with their principles and mission. Undoubtedly, there will be some inconsistencies but look at those inconsistencies as opportunities to reexamine the principles and

---

consider what is best for your organization. All governance documents should be reviewed in the context of the laws and regulations that require these documents. State and federal laws and regulations set out the basic requirements for the contents of the documents, as do many of the accreditation standards. It is far better to review and revise your governance documents regularly, rather than learn they are deficient during an unannounced survey or regulatory proceeding.

## **9. Use Your Committees Effectively.**

There are two types of committees: those with authority to act and those that are advisory. The committees with authority are generally the Medical Executive Committee (“MEC”) and clinical department committees. All other committees are advisory to the MEC. Advisory committees can develop and recommend policies, rules and clinical practices. Authoritative committees approve policies and rules, take disciplinary action and make recommendations to the MEC. The MEC is the final medical staff authority that submits recommendations for final approval to the governing body. Knowing which committees to use and when is key to leadership success.

## **8. Know the Scope of Your Authority.**

As a leader, you are an agent of the medical staff and the spokesperson for the committee/department you chair. There are times when you will need to act without the benefit of input from your committee/department. Medical staff bylaws will generally identify the circumstances under which you can act alone and when your action(s) will need to be ratified by the committee. As the chair, you are acting on behalf of the committee/department between meetings. Do what is needed when needed, within the scope of your authority, but report your actions to the committee/department on a regular basis and be sure your actions are properly recorded in the appropriate minutes. If summary or urgent action is needed, do not hesitate to call a special meeting. You are better off to have the protection of a committee action than to be acting alone or without ratification.

## **7. Know the Peer Review Protections of HCQIA, Your State and Organization.**

Many, if not most, of your actions and the actions of your committees will be covered by federal, state and organizational protections. The Healthcare Quality Improvement Act (“HCQIA”) provides protection from liability for members of a professional review body/medical staff, who take a professional review action (a) in the reasonable belief the action was in furtherance of quality health care, (b) after a reasonable effort to obtain the facts, (c) after adequate notice and hearing and (d) in the reasonable belief that the action was warranted by the facts. In addition to this federal protection, many states have laws that similarly protect peer review participants, and often, your organization will have an indemnification policy or provision that further protects you and your committee members from damages. Remind your committee participants and members on a regular basis of these protections and that they were specifically designed to encourage peer review by allowing free discussions aimed at improving patient care.

## **6. Know Your Reporting Obligations.**

The National Practitioner Data Bank (“NPDB”) defines the circumstances under which a physician or dentist must be reported. Those include (a) when a professional review action adversely affects their clinical privileges for 30 days or longer or (b) when a physician surrenders clinical privileges while under investigation or in exchange for not conducting an investigation. The failure to report when required to do so can result in the loss of immunities under HCQIA for up to three years, along with a monetary fine. There are many nuances to reporting to the NPDB and we recommend you consult a

---

medical staff attorney who can assist with identifying when to report and what to say. Additionally, each state may have reporting requirements for professional review actions to the state licensing board that exceed the NPDB's requirements. The state licensing board may also have defined penalties for failure to report. In one state, the knowing failure of a physician leader to report a practitioner to the state licensing board can be considered unprofessional conduct, which can subject the physician leader to state board action.

## **5. Understand Confidentiality and Peer Review Privilege Protections.**

A best practice at the beginning of each meeting is to remind committee members of the importance of maintaining confidentiality. State peer review privileges and protections are often dependent on maintaining confidentiality of the records and proceedings. The failure to maintain confidentiality can act as a waiver of the privilege and permit the introduction of confidential peer review documents and testimony in litigation in the future. Peer review privileges and protections are designed to promote candor in the peer review process. This permits free discussion and identification of opportunities to improve patient care. Without confidentiality and the corresponding privileges and protections, committee members would be reluctant to analyze and frankly discuss areas for improvement in a peer's clinical care. Obtain information about your state's peer review privilege and protections and fully understand the circumstances that may cause a waiver, which would permit confidential peer review information to be discussed in open court and stifle important, free-flowing discussion of quality of care at peer review meetings.

## **4. Know Your Options.**

Every professional competence or conduct situation you face will be different. A sound guideline to generally follow is selecting the least restrictive action that will protect patients. Keep in mind that the goal of all peer review is education and remediation. For example, if a practitioner is having complications with robotic surgery, evaluate whether the complications are the result of technical skill, which can be remediated with more practice, or if the complications are the result of poor clinical judgment, which reaches into all areas of performance. In the first case, proctoring, monitoring or an additional educational course may correct the problem. But with the second, the cause of poor judgment is more challenging and may require a further workup, including a fitness for duty evaluation, retrospective review of cases, or an external expert review. Work with your committee and medical staff lawyer to identify all the facts and options to address the problem that has been brought to your attention. In some cases, it may be appropriate to have the issue addressed by the individual's department or interdisciplinary peer review committee, but in others, the nature of the problem may require the immediate attention of the MEC. In some cases, a discrete referral to your organization's well-being committee may be appropriate. Regardless, each matter must be carefully and thoughtfully analyzed in light of all the available facts. Then, with all appropriate actions on the table, an informed determination may be made.

## **3. Act When Indicated but Don't Shortcut the Process.**

. The law and your medical staff bylaws provide for the ability to take emergency action against a practitioner's privileges when there is a concern of imminent threat to patients or others. What constitutes an "imminent" threat or danger is often the source of hours of discussion and analysis by medical staff lawyers throughout the country. Your legal team is invaluable in working through the facts of a given matter and determining whether a decision for summary suspension is legally sound. If there is a circumstance where emergency intervention via summary suspension is necessary to avoid patient harm after an initial evaluation of the matter, do not hesitate! Take the action to

---

summarily suspend and remove an errant practitioner from the bedside. Afterward, there is time to re-examine the basis for the action and analyze whether continued suspension is necessary to protect patients or others. At that time, it is important to call on your MEC and legal team for their analysis and determination of whether the summary suspension should be upheld.

There are also times when summary suspension will be considered prospectively to address a chronic problem that is rising to an acute stage. The practitioner whose disruptive, bullying and retaliatory conduct has been tolerated may have reached a level where the cumulative effect creates the potential for patient harm because staff, for example, are afraid to call the physician at night about a patient's health condition, seek clarification of an order, or question whether a procedure is being done on the right side or on the correct patient. Following the medical staff bylaws investigation process will allow for a careful analysis of the reported conduct, which will provide a solid framework for later defense, should it be necessary. That process will almost always involve a committee evaluation of the facts, interview of the practitioner, and a determination of the appropriate next steps. Each of these steps, if followed, will support the action when later scrutinized by a court or jury.

## **2. Do What is Right for the Patients.**

Always put the patients first. There may be procedural missteps during a disciplinary process as the healthcare organization balances the need to protect patients with providing a practitioner due process. However, if the peer review being conducted is based in the foundation of improving patient care and patient safety, courts will generally consider the health care organization's goals before making a determination that would go against the organization and potentially place patients in harm's way.

## **1. Utilize Internal or External Counsel to Navigate Medical Staff Law so You Can Focus on Improving Patient Care.**

I (Erin) was asked recently what possible motivation there would be for a physician to enter leadership in a medical staff organization if their role consisted solely of consulting with a medical staff lawyer. In response, I reminded this physician that medical staff leadership and medical staff lawyers work together on challenging matters and daily operations with the lawyer recommending limitations and guardrails and advising on how to avoid legal missteps and pitfalls. This advice from the lawyer enables the leader to focus on monitoring the business of the organization and improving patient care.

## **Final Take-Aways**

Our medical staff organizations need people who are willing to serve as leaders during challenging times when caregivers are stretched thin, suffering burnout and subjected to daily difficulties that can be demoralizing. Strong leaders who are reassured of their legal protections can perform their leadership responsibilities without fear of reprisal when following the advice of their legal counsel. We encourage you to reach out and make your lawyer an integral part of your team so that they can understand your organization and business and provide you the best available advice that will reassure you and other leaders in the organization of the legal protections and immunities.

Source URL: <https://natlawreview.com/article/medical-staff-leaders-10-things-your-lawyers-want-you-to-know>