

# The Independent Medical Staff

*Be Careful What You Wish For*

By [Cal Raup](#)

## California's SB 1325

The California Legislature recently passed SB 1325, a measure that recognizes hospital medical staffs as independent entities with the right of self governance. This new law grants the medical staff entity the right to sue—and presumably to be sued. That issue is significant because SB 1325 also places responsibility for the quality of hospital medical care and the credentialing of physicians on the independent medical staff entity. Liability for negligent credentialing decisions appears to now rest squarely on the independent medical staff entity. A new liability target for the plaintiff's bar appears to have been born.

The California Medical Association, backed by the AMA, sponsored this legislation. The bill codifies the rights and responsibilities attendant to the medical staff's right of self governance: (1) the right to establish and enforce criteria for medical staff membership and privileges; (2) the responsibility for establishing and enforcing quality of care and utilization review standards; and (3) overseeing other medical staff activities, such as medical records review and meetings of the medical staff and its committees.

Jack Lewin, M.D, CEO of the California Medical Association proclaimed, "This law ensures that the relationship between a hospital and its medical staff remains a horizontal and balanced one and promotes having medical staffs and hospitals as partners in high-quality patient care, rather than adversaries." It remains to be seen whether the medical profession or the legal profession benefits more from the passage of this statute. SB 1325 expressly authorizes separate legal counsel for the independent medical staff entity—to be paid for out of medical staff dues.

## Independent medical staffs in Arizona?

The "Medical Staff" is something of a legal fiction in Arizona. In fact, a hospital's medical staff is nothing more than a group of men and women, not a legal entity with the power to sue and be sued. Although individual members of the staff may be sued for their actions while serving on hospital committees, the financial risk of such a suit generally is borne by the hospital, which in turn insures the risk and pays the premiums.

Under Arizona law the responsibility for credentialing, recredentialing and peer review is imposed upon the hospital, to be delegated to committees mandated by statute. The same statute makes these functions confidential and also provides immunity from civil damage claims for those participating in the process in good faith. See ARS § 36-445.01 and ARS § 36-445.02. (This immunity is substantially strengthened by the Healthcare Quality Improvement Act ( HCQIA) of 1986, 42 USC § § 11101, et seq.)

Arizona case law creates further difficulty for the formation of independent medical staff entities. Since 1972 Arizona courts have imposed corporate liability upon Arizona hospitals, for negligence in the credentialing and supervision of staff physicians. If this function could be assumed by an independent medical staff entity, that entity presumably would take on the liability currently shouldered by the hospital, with its far deeper pockets.

### Arizona has a better way

Some Arizona hospitals retain lawyers to serve as independent counsel to the medical staff. Arizona lawyers are ethically bound to serve the client they represent—regardless who pays their fees. Every lawyer hired by MICA to represent an Arizona physician is mindful that the physician, not MICA, is the client. The same rule applies to independent counsel for the medical staff.

For most routine medical staff matters, independent counsel to the medical staff is unnecessary. When action is contemplated against a practitioner's privileges, however, the Medical Executive Committee should ask the hospital to provide the medical staff with independent counsel. Adverse actions against a practitioner should be the actions of the medical staff, acting as peers, and not the actions of the hospital. Independent counsel should feel free to dismiss the hospital's counsel from meetings at which such issues are considered. This action assures the medical staff that the advice it receives is truly independent. (In the author's experience, this step is rarely taken, but the power to take it is important.)

A physician that has lost or failed to obtain privileges is free to pursue legal action against the hospital and those participating in the decision making process. Potent immunity defenses exist to most theories upon which these cases are pursued. These defenses are enhanced if the hospital and its medical staff leadership can establish that the adverse action was taken by the practitioner's peers with the aid of independent counsel.

### Observations

Despite Dr. Lewin's optimism, CMA may find that, along with increased independence, comes increased liability exposure and increased legal expense. The system in use in some Arizona hospitals serves Arizona physicians and hospitals far better than SB 1325 will serve their California colleagues.

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