

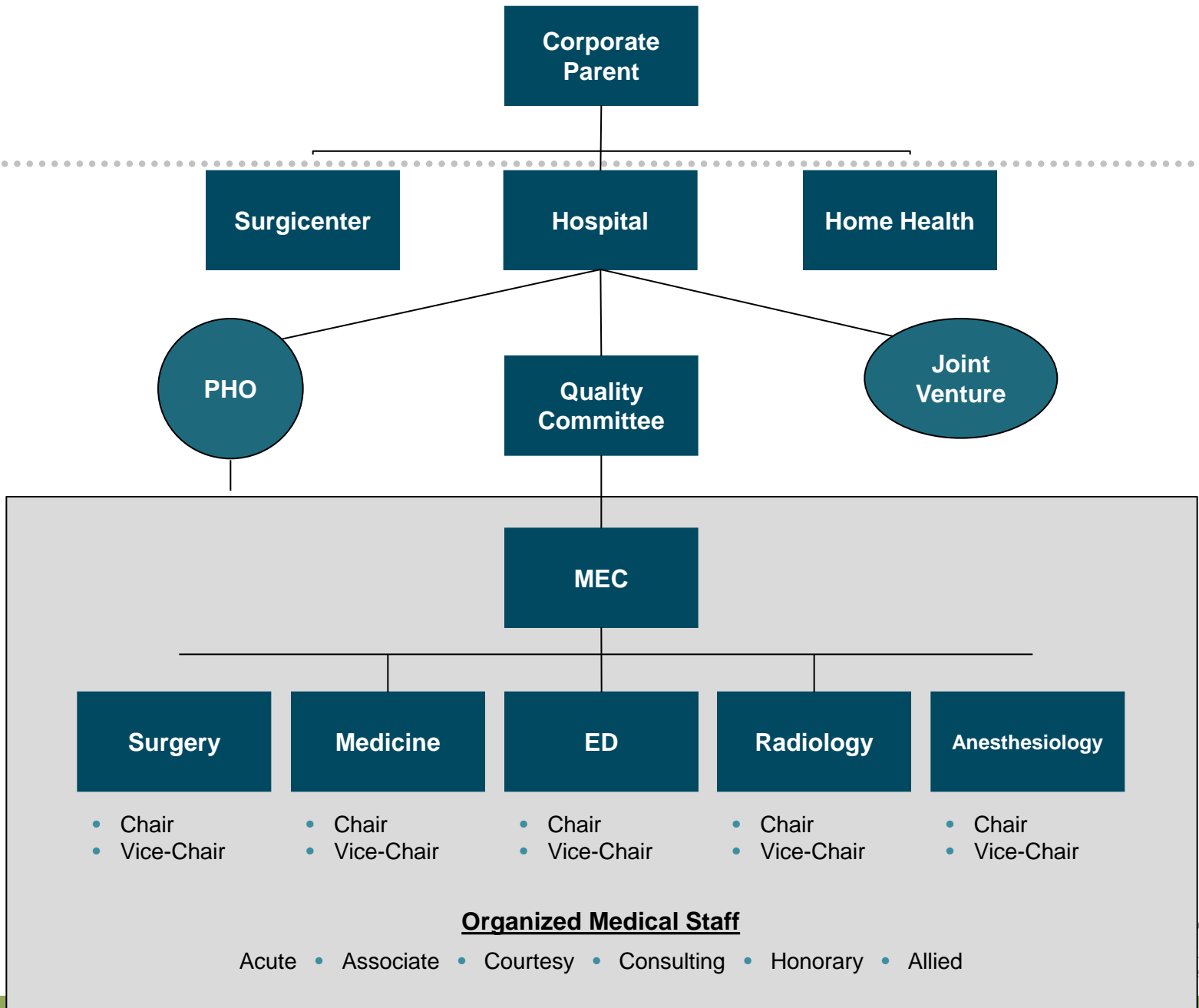


American Health Lawyers Association

Fundamentals of Hospital/Medical Staff Issues: Minimizing Risk and Maximizing Collaboration

November 15-17, 2015

Michael R. Callahan
Katten Muchin Rosenman LLP
525 West Monroe Street Chicago, Illinois 60661
(312) 902-5634
michael.callahan@kattenlaw.com
(bio/events/publications) www.kattenlaw.com/callahan



Health System Structure and Governance

- Health Systems usually composed of multiple providers including:
 - Hospitals
 - Surgicenters
 - Home health
 - Patient centered medical homes
 - Labs
 - Pharmacy
 - Nursing home/assisted living centers
 - Physician groups

Health System Structure and Governance (cont'd)

- Health systems also have joint venture, co-management and contract relationships
 - Hospital based physician contracts, i.e., ED and anesthesiology
 - Clinics
 - PHO (physician hospital organization)
 - ACOs

Health System Structure and Governance (cont'd)

- Health systems are not-for-profit or for profit corporations.
- Board composition
 - Community members
 - Hospital leaders, i.e., President/CEO
 - Physicians
 - Ex-officio, i.e., President of Medical Staff
 - At large elected physician reps

Health System Structure and Governance (cont'd)

- Board Committees
 - Finance
 - Audit
 - Strategic Planning
 - Executive Committee
 - Quality and Credentialing
 - Joint Conference Committee

Health System Structure and Governance (cont'd)

- Governance Documents
 - Corporate Bylaws
 - Rules and Regulations
 - Policies
 - Must comply with applicable state corporation statutes, state licensure, Medicare Conditions of Participation, accreditation standards and other legal requirements.

Medical Staff Structure and Governance

- Medical Staff is a voluntary association of independent and employed physicians, and sometimes advanced practitioners (APNs, PAs).
- Is not recognized as a separate legal entity.
- Practitioners must apply for membership through a detailed appointment process and seek reappointment every two years.

Medical Staff Structure and Governance

(cont'd)

- Practitioners apply to a particular membership category (Active, Consulting) and a particular department (Surgery, Internal Medicine) and request clinical privileges consistent with their education, background, training and experience in order to treat patients.
- Leadership
 - Officers elected by practitioners eligible to vote
 - President
 - President-Elect

Medical Staff Structure and Governance

(cont'd)

- Vice President
- Secretary
- Immediate Past President
- Elected/appointed Department Chairs/Vice Chairs
- Elected/appointed Section Chiefs/Vice Chiefs

Medical Staff Structure and Governance

(cont'd)

- Organizational Structure
 - Medical Executive Committee
 - Usually composed of Department Chairs and Medical Staff Officers
 - President/CEO – ex-officio, non-voting members
 - Departments (Surgery, Internal Medicine)
 - Sections (Orthopedics, Cardiology)

Committee Structure

- Medical Staff-Wide Committees
 - MEC
 - Credentials
 - Bylaws
 - Physician Wellness
 - Performance Improvement
- Department Committees
 - Surgical Review
 - Quality

Medical Staff Categories

- Associate Staff
 - Entry level category for practitioners interested in actively admitting and treating patients.
 - Cannot be elected to an Officer or Chair position but may serve on committees with vote.
 - Must take ED call, have back-up coverage for patients.

Medical Staff Categories (cont'd)

- Active Staff
 - Composed of practitioners who have served one to two years on the Associate Staff, have actively admitted/treated patients and have met all other qualifications.
 - Eligible to vote, serve on committees and be elected as an Officer, Chair, Section Chief.

Medical Staff Categories (cont'd)

- Courtesy Staff
 - Practitioners not as active, typically serve on other Medical Staffs, or cover for their more active partners.
 - Number of admissions typically limited under the Medical Staff Bylaws.
 - Usually have very limited voting rights.

Medical Staff Categories (cont'd)

- Consulting Staff
 - Practitioners who, by experience, reputation or needed specialty, are recognized as experts in their field of specialty.
 - Neonatologists
 - Surgical specialists
 - They do not admit but are called in to consult/treat patients.
 - Have no voting rights and cannot hold on elected position.

Medical Staff Categories (cont'd)

- Community
 - Are members in name only but have no admitting or clinical privileges.
 - Can refer patients and sometimes follow their patients while in the hospital but cannot write orders.
 - No voting rights and cannot hold elective office.
- Telemedicine
- Hospitalist

Medical Staff Governance Documents

- Medical Staff Bylaws
 - Most important governance document
 - Bylaws include following provisions
 - Appointment/reappointment process
 - Eligibility standards
 - Medical Staff responsibilities and duties
 - Process for nominating, electing and removing Officers, Department/Section Chairs and Vice Chairs and Committee Chairs

Medical Staff Governance Documents

(cont'd)

- Standing committees, their structure and responsibilities
- Peer review, remedial action provisions
- Fair hearing and appeal process
- Process for amending Bylaws, Rules and Regulations
- Dispute resolution process between Medical Staff and MEC
- Can only be amended by voting Medical Staff members but need final Board approval
- Bylaws cannot be unilaterally amended by the Medical Staff or Board
 - ❖ Urgent amendment provisions

Medical Staff Governance Documents

(Cont'd)

■ Rules and Regulations

- Usually address patient care and more detailed practices that apply to Medical Staff as a whole.
 - Medical record documentation standard
 - DNR
 - Withdrawal of life support
 - Admission and discharge procedures
- Some Medical Staffs identify essential elements of appointment/reappointment, fair hearing and other provisions in the Bylaws but place the details of these procedures in Rules and Regulations.

Medical Staff Governance Documents

(cont'd)

- Rules and Regs can be amended by MEC if permitted under the Bylaws but usually subject to Medical Staff Approval
- Policies
 - Conscious sedation
 - Code of Conduct
 - Disruptive Behavior
 - Physician wellness
 - Department policies
 - ED call schedule

Governance Relationship to Medical Staff

- Hospital has the final authority on most corporate, legal, accreditation, licensure, compliance and related matters.
- It also will be held legally responsible for such actions because Medical Staff makes “recommendations” to the Hospital and is treated as an “agent” of the Hospital.
 - Remember, Medical Staff is not a separate legal entity

Governance Relationship to Medical Staff

(Cont'd)

- Hospital typically indemnifies and provides insurance coverage for Medical Staff Officers, Department Chairs, Committees and others when carrying out their duties and responsibilities under the Medical Staff and Corporate Bylaws, Rules, Regulations and Policies.
- Most accrediting bodies recognize that the “organized Medical Staff” is “self governing” and has principal responsibility over patient care and Medical Staff matters albeit subject to the ultimate authority of the Board.

Applicable Legal Standards

- Medicare Conditions of Participation
 - Governing Body (42 CFR § 482.12)
 - Legally responsible for operations of the hospital.
 - Must determine categories of eligible members to the Medical Staff and appoint after considering Medical Staff recommendations.
 - Must assure that there are Medical Staff Bylaws and must approve Bylaws and other Medical Staff rules and regulations.

Applicable Legal Standards (cont'd)

- Must ensure that Medical Staff is accountable to governing body for the quality of patient care provided.
- Criteria for selection must be based on individual character, competence, training, experience and judgment.
- Membership cannot be solely dependent on whether practitioner is board certified, has been a fellow or is a member in a specialty body or society.

Applicable Legal Standards (cont'd)

- Medical Staff (42 CFR § 482.22)
 - Medical Staff must be composed of MDs or DOs and “may also be composed of other practitioners appointed by the governing body” in accordance with state law.
 - Standard was changed to allow APNs, PAs and other practitioners to be members of a Medical Staff if permitted under state law.
 - Medical staff must periodically conduct appraisals of its members.

Applicable Legal Standards (cont'd)

- Medical Staff must examine credentials and make recommendations to the governing body on the appointment of candidates.
- Sets forth telemedicine standards.
- Medical Staff must be well organized and accountable to the governing body for the quality of patient services in a manner approved by the governing body.
- Medical Staff must have an executive committee, the majority of which must be MDs and DOs.

Applicable Legal Standards (cont'd)

- Medical Staff must have Bylaws which are approved by the governing body, set forth the duties and privileges of each category of the Medical Staff, describe the organization of the Medical Staff, and describe the required qualifications for candidates.
- The Bylaws must include standard language for conducting a medical history and physical examination.
- CoPs now allow for a single, unified medical staff in multi-hospital systems if the licensed hospitals are controlled by a single corporate parent and if approved by each of the Medical Staffs. Bylaws must include option to withdraw from unified staff.

Applicable Legal Standards (cont'd)

- Accreditation Standards

- There are a number of hospital accrediting bodies, including The Joint Commission, which accredits a large majority of hospitals in the United States, Healthcare Facilities Accreditation Program, Det Norske Veritas Healthcare, Inc. (DNV) and the Center for Improvement for Healthcare Quality.
- Accrediting bodies establish comprehensive standards dealing with areas such as environment of care, human resources, leadership, life safety, as well as medical staffs and a dispute resolution process.

Applicable Legal Standards (cont'd)

- If the hospital is accredited by an agency approved by CMS, it is deemed to be in compliance with the Medicare Conditions of Participation.
- The accreditation standards must comply with the Medicare CoPs in order for agency to maintain its certification.

Applicable Legal Standards (cont'd)

- The Joint Commission Standards – Medical Staff
 - “The self-governing organized Medical Staff provides oversight of the quality of care, treatment, and services delivered by practitioners who are credentialed and privileged through the Medical Staff process. The organized Medical Staff is also responsible for the ongoing valuation of the competency of practitioners who are privileged, delineating the scope of privileges that will be granted to practitioners, and providing leadership and performance improvement activities within the organization.”

Applicable Legal Standards (cont'd)

- “The organized Medical Staff must create and maintain a set of Bylaws that define its role within the context of the hospital setting and responsibilities in the oversight of care, treatment, and services. The Medical Staff Bylaws, Rules, and Regulations create a framework within which Medical Staff members can act with a reasonable degree of freedom and confidence.”
- “The hospital’s governing body has the ultimate authority and responsibility for the oversight and delivery of health care rendered by licensed independent practitioners, and other practitioners credentialed and privileged through the Medical Staff process or any equivalent process.”

Applicable Legal Standards (cont'd)

- Key Joint Commission Medical Staff Standards
 - Medical Staff Bylaws
 - Structure and role of Medical Staff Executive Committee
 - Medical Staff role and oversight of care, treatment and services
 - Medical Staff role in performance improvement
 - Credentialing and privileging
 - Appointment to the Medical Staff
 - Evaluation of practitioners
 - Fair hearing and appeal process

Applicable Legal Standards (cont'd)

- Health Care Quality Improvement Act of 1986 (42 USC § 111101 et seq. (1986))
 - HCQIA is a federal law enacted as a result of concerns that physicians with significant malpractice and disciplinary records were moving from state to state in order to avoid detection.
 - HCQIA created a national tracking system which requires that health care entities, such as hospitals, professional societies and state licensing board, report malpractice, judgments and settlements, as well as certain categories of disciplinary action taken (i.e., suspensions, terminations) to a National Practitioner Data Bank.

Applicable Legal Standards (cont'd)

- HCQIA provides immunity protections from civil monetary damages in federal, civil and state proceedings for committees, professionals and other individuals participating in a professional review action. Immunity covers most claims except for civil rights actions.
- HCQIA sets forth minimum standards for what constitutes a professional review action, as well as minimal hearing requirements in order to access the immunity protections.
- A failure to report to the Data Bank can result in a civil fine and loss of immunity protections.

Applicable Legal Standards (cont'd)

- Health care entities must query the Data Bank at time of appointment, reappointment and when a physician requests additional privileges. A failure to query can result in a plaintiff's attorney access to information in The Data Bank that otherwise is confidential to use against the hospital in a liability action.
- Information reported to The Data Bank is confidential and cannot be disclosed or accessed, except to other health care entities upon querying the Data Bank.

Applicable Legal Standards (cont'd)

- State Licensing Laws

- All states have hospital licensing statutes and regulations which similarly address the legal responsibilities of hospitals and governing boards and the interrelationship between board and Medical Staffs.
 - The Illinois Hospital Licensing Act addresses issues such as appointment, reappointment, minimum hearing requirements, economic credentialing standards, telemedicine standards, the ability to enter into exclusive contracts and standards relating to employed physicians.

Applicable Legal Standards (cont'd)

- State Confidentiality and Immunity Provisions
 - Almost all states have statutes which provide confidentiality and privilege protections over recommendations, studies, data and analysis involving quality and peer review matters designed for the purpose of improving patient care, reducing morbidity, mortality and related activities. Like HCQIA, individuals involved in these peer review matters are immune from civil liability if acting in good faith or where conduct is not willful or wanton, depending on the state's standard.
 - Illinois Medical Studies Act (735 ILCS 5/8-2101 et seq.)

Applicable Legal Standards (cont'd)

- Patient Safety and Quality Improvement Act of 2005 (42 USC Chapter 6A, Subchapter VII, Part C)
 - This federal legislation established a system of patient safety organizations (“PSO”) and a national patient safety database to encourage reporting and broad discussion of adverse events, near misses, and dangerous conditions. The Act also established privilege and confidentiality protections afforded to data, reports, analyses and other patient safety work product created pursuant to a health care provider’s patient safety evaluation system which are collected and reported to a PSO.

Applicable Legal Standards (cont'd)

- PSA confidentiality protections also apply to peer review matters if collected in a participating provider's patient safety evaluation system and reported to a PSO. Protections generally are broader both in terms of scope and the entities covered when compared to state laws.
- Doctrine of Corporate Negligence
 - Under the Doctrine of Corporate Negligence, and the hospital has a legal duty to patients to make sure that every practitioner considered for membership has the background, training, education and experience to exercise each and

Applicable Legal Standards (cont'd)

every clinical privilege granted to them. If the hospital knew or should have known that the individual was unqualified, either at time of appointment, reappointment or any period in between, and took no remedial action to resolve quality of care or destructive behavior issues, it will held legally responsible should that physician injure a patient while rendering patient care services.

- Apparent agency issues associated with hospital-based practitioners.

Legal Principles as Applied to Hospital/Medical Staff Relations

- Medical Staff members generally do not have any legal right to obtain membership and clinical privileges at a private not-for-profit hospital.
 - Public hospitals generally have less flexibility if the physician is otherwise qualified for membership.

Legal Principles as Applied to Hospital/Medical Staff Relations (Cont'd)

- Physicians and other practitioners can be denied membership based on quality background, training and experience grounds, lack of need, as well as economic factors.
- Applications can be denied if physician fails to satisfy the burden of producing any and all information necessary in order for the Medical Staff and hospital to make an informed decision.
- When denying an application or membership, it is critical that the organization follow its stated procedures.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- Denials based on a physician's misrepresentation or purposeful failure to provide information can require a report to the Data Bank.
- Once the physician obtains membership on the Medical Staff he or she is typically entitled to any and all hearing and appeals rights before membership and clinical privileges can be terminated, suspended or reduced.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- It is important that all peer review investigations, corrective action proceedings and fair hearing and appeals adhere to HCQIA and any applicable state standard in order to maximize immunity and confidentiality protections.
- Physicians and Medical Staff committees should not be placed in a position to veto whether a physician gets an application applicant or if the application is denied – Medical Staff should always make recommendations to management and/or the Board of Directors in order to insulate them from antitrust and other legal claims.
- Medical Staffs and hospitals must always follow their internal standards, Bylaws and policies and apply them uniformly.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- When engaging in the ongoing monitoring of a physician's performance, it is important that any quality or other reviews that take place be considered part of the "peer review process" under the Bylaws. Once a matter comes under "investigation" a physician's decision to resign from the Medical Staff is reportable to the Data Bank.
- As a general matter, the following actions are reportable to The Data Bank:
 - Summary and other suspensions in excess of thirty days which are not considered an administrative suspension, i.e., failure to pay dues, failure to maintain adequate levels of malpractice insurance.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- Involuntary terminations or reductions of clinical privileges.
- A requirement that the practitioner engage in the mandatory consultation with another practitioner where that individual has the right to veto decisions on patient care.
- Denial of initial application if based on evidence that physician may or will adversely affect patients if granted membership.
- Resignations in lieu of corrective action or to avoid an investigation or while a physician is under investigation as per the Bylaws.
- Mandatory proctoring in excess of 30 days if physician is prohibited from providing patient care services unless the proctor is present.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- As a general matter, if a physician sues the hospital and the Medical Staff as a result of an adverse action which terminates, suspends or reduces privileges and therefore is reportable to the Data Bank, the scope of the court's review is limited to whether the hospital and Medical Staff substantially complied with its Bylaw and hearing procedures and whether the proceedings were fair.
 - Must also comply with HCQIA and state procedures where seeking immunity protections.

Legal Principles as Applied to Hospitals/Medical Staff Relations (Cont'd)

- In many jurisdictions, the courts hold that Medical Staff Bylaws constitute a contractual agreement between the Medical Staff and the hospital.

Impact of Health Care Reform on Hospital/Medical Staff Relations

- Industry movement from payment based on the volume of procedures and tests ordered to reimbursement based on the value of services rendered if established quality metrics and pay for performance standards are satisfied.
 - ACO quality metrics
 - Valued base purchasing standards
 - HACs and Never Events
 - Managed Medicare and Medicaid programs
- Movement from volume to value requires more scrutiny on utilization and performance of physicians, hospitals and other providers.

Impact of Health Care Reform on Hospital/Medical Staff Relations (cont'd)

- Unless practitioners meet and maintain standards, they may be denied membership or terminated from Medical Staffs, ACOs and other clinically integrated networks.
- Non-compliance with standards will lead to greater:
 - Liability risks
 - Greater enforcement by OIG, DOJ
 - Loss of Licensure
 - Loss of accreditation
 - Loss of Medicare eligibility

Impact of Health Care Reform on Hospital/Medical Staff Relations (cont'd)

- Denial or loss of ACO status
- Reduced reimbursement
- Hospitals have been employing more physicians and purchasing more practices leading to increased friction between independent and employed physicians on the Medical Staff and allegations of conflict of interest.
- Hospitals more closely scrutinizing who is applying for maintaining membership and clinical privileges on Medical Staff and ACOs.
 - “Competitors need not apply”.

Impact of Health Care Reform on Hospital/Medical Staff Relations (cont'd)

- In order to succeed, there needs to be greater collaboration between hospitals, physicians, Medical Staffs and other providers:
 - ACOs, CINs
 - Paid leadership positions
 - Employment?
 - Co-management arrangements
 - Joint ventures
 - “Just culture” principles

Katten Muchin Rosenman LLP Locations

AUSTIN

One Congress Plaza
111 Congress Avenue
Suite 1000
Austin, TX 78701-4143
+1.512.650.1000 tel
+1.512.650.1002 fax

HOUSTON

1301 McKinney Street
Suite 3000
Houston, TX 77010-3033
+1.713.270.3400 tel
+1.713.270.3401 fax

LOS ANGELES – CENTURY CITY

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
+1.310.788.4400 tel
+1.310.788.4471 fax

SAN FRANCISCO BAY AREA

1999 Harrison Street
Suite 1800
Oakland, CA 94612-0850
+1.415.360.5444 tel
+1.415.704.3151 fax

WASHINGTON, DC

2900 K Street NW
North Tower - Suite 200
Washington, DC 20007-5118
+1.202.625.3500 tel
+1.202.298.7570 fax

CHARLOTTE

550 South Tryon Street
Suite 2900
Charlotte, NC 28202-4213
+1.704.444.2000 tel
+1.704.444.2050 fax

IRVING

545 East John Carpenter Freeway
Suite 300
Irving, TX 75062-3964
+1.972.868.9058 tel
+1.972.852.9119 fax

LOS ANGELES – DOWNTOWN

515 South Flower Street
Suite 1000
Los Angeles, CA 90071-2212
+1.213.788.7445 tel
+1.213.788.7380 fax

ORANGE COUNTY

650 Town Center Drive
Suite 700
Costa Mesa, CA 92626-7122
+1.714.966.6819 tel
+1.714.966.6821 fax

CHICAGO

525 West Monroe Street
Chicago, IL 60661-3693
+1.312.902.5200 tel
+1.312.902.1061 fax

LONDON

125 Old Broad Street
London EC2N 1AR
+44.20.7776.7620 tel
+44.20.7776.7621 fax

NEW YORK

575 Madison Avenue
New York, NY 10022-2585
+1.212.940.8800 tel
+1.212.940.8776 fax

SHANGHAI

Ste. 4906 Wheelock Square
1717 Nanjing Road West
Shanghai 200040
China
+11.86.21.6039.3288 tel
+11.86.21.6039.3223 fax

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Katten Muchin Rosenman LLP is a Limited Liability Partnership including Professional Corporations.
London: Katten Muchin Rosenman UK LLP.

Attorney Advertising. Please see our web-site for further information

www.kattenlaw.com

Katten

KattenMuchinRosenman LLP