The Hospital, the Board, and the Medical Staff:  
Who is the Client when Advising on Medical Staff Issues?

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Organizational Model

Board of Trustees
- Administration
  - CEO
  - CFO, COO, etc.
  - CQO, CNO, etc.
- Medical Staff
  - Med. Staff Officers
  - Med. Exec. Committee
    - Med. Staff Committees
      - Credentials Committee
    - Quality Committee
    - Departments/Services
      - Dept./Svc. Leadership
      - Individual Practitioners
Organizational Model

- In multi-hospital systems, the number of constituencies with potentially competing interests is even greater
  - Board, management, and in-house counsel for corporate parent and/or operator
  - Subsidiaries and affiliated entities of the corporate parent and/or operator
  - Other hospitals or health care facilities owned and/or operated by the corporate parent (where decisions made with respect to one facility have ramifications for the others)
  - Board, administration, medical staff, and all of the other constituencies of the hospital itself
Framing the Question
Relevant Rules

- Sources of Authority
  - ABA Model Rules of Professional Conduct
  - State law

- Other Considerations
  - Attorney-generated materials (e.g., engagement letters)
  - State hospital licensing regulations
  - Accreditation standards
  - Medical staff bylaws
Rule 1.13 – Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents
Rule 1.13 – Organization as Client

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
Rule 1.13 – Organization as Client

Continued . . .

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law
Rule 1.13 – Organization as Client

(c) Except as provided paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
Rule 1.13 – Organization as Client

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
Rule 1.13 – Organization as Client

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.
Rule 1.13 – Organization as Client

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
Rule 1.13 – Organization as Client

(g) A lawyer representing an organization **may also represent** any of its directors, officers, employees, members, shareholders or other **constituents**, subject to the provisions of Rule 1.7

If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
Organizational Clients

- Parents, subsidiaries, and affiliated entities
  - Generally, the interests of these parties are aligned, but who’s the client becomes an important question when the interests of the parents and subsidiaries or affiliated entities diverge
  - Rule 1.13(a)
    - “[E]mployed or retained by [the] organization”
    - “[D]uly authorized constituents”
  - Note also state/local ethics rules and opinions regarding the propriety of in-house counsel providing services to affiliated entities (e.g., Tennessee Formal Ethics Opinion 83-F-52)
Medical Staff as Separate Entity

- When conflicts between the hospital and medical staff emerge, question might arise as to whether the medical staff should be treated as an unrepresented party (in accordance with the directives of Rule 4.3) rather than a constituent of the hospital.

- Recall, though, that even if the medical staff is merely considered a constituent of the hospital, the lawyer must, per Rule 1.13(f), explain who the client is when he/she knows or reasonably should know that the interests of the organization and constituent are adverse.

- In fact, Rule 1.13, Comment 10 provides that in such cases the lawyer should advise the constituent that he/she cannot represent the constituent and that the constituent may wish to obtain independent representation.
Medical Staff as Separate Entity

- Generally speaking, the hospital and medical staff are considered part of the same legal entity
Medical Staff as Separate Entity

- Similar findings have been reached by courts in determining whether the hospital and medical staff have conspired in violation of antitrust laws
  - *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990)
Medical Staff as Separate Entity

- In contrast, California law contains clear support for treating the medical staff as a separate entity
  - Cal. Bus. & Prof. Code § 2282.5
- In two isolated cases, courts in other jurisdictions have made similar findings
Medical Staff as Separate Entity

- How might Joint Commission standards bear on this issue?
  - Some standards offer indirect support for status as separate entity
    - MS.01.01.01 (as revised) (see Introduction and EP 10)
    - LD.01.02.01, EP 1 (“unique responsibilities and accountabilities”)
    - LD.02.04.01 (conflict management process for leadership groups)
    - MS.01.01.03 (no unilateral amendment of medical staff bylaws)
  - But others support the idea that it is subordinate to the board and perhaps part of a single entity
    - LD.01.05.01 (medical staff accountable to board)
    - LD.01.03.01 (board ultimately accountable)
    - See also Medicare Conditions of Participation (governing body accountable for hospital – 42 CFR § 482.12), state licensing regulations, and analogous provisions of the medical staff bylaws
Scenario 1

The Rogue Administrator
The Rogue Administrator

Facts

- In the not so distant past, nurses in the hospital’s pain management clinic issued prescriptions without physician countersignature in violation of state law
- You, outside counsel for the hospital, receive a call from the CEO, who notes his receipt of a complaint from the local pharmacy about the validity of some of the prescriptions filled
- The following week, you’re asked to participate in a conference call with the CEO, in-house counsel, and other employees of the corporate parent
- In-house counsel asks the CEO whether there have been any issues concerning prescribing practices at the clinic
- CEO denies the existence of any such issues
The Rogue Administrator

- Do you disclose the contents of your prior conversation with the CEO to in-house counsel?
  - Rule 1.13(a), (b)
  - Rule 1.4 (communication)
  - Rule 1.6 (confidentiality)

- Do you have a duty to report up the ladder within the client?
  - Rule 1.13(b), (c)
Scenario 2

Negligent Credentialing
Negligent Credentialing

- Facts
  - CEO recruits a plastic surgeon to join the medical staff
  - Department chair objects to appointment on the ground that the application lacks sufficient evidence of training in plastic procedures
  - CEO wants to push the applicant through the credentialing and privileging process despite red flags on the basis of “community need” for specialty
  - CEO requests you to come to the next meeting of the medical executive committee (MEC) to advise as to why the MEC should process the application
Negligent Credentialing

- Who’s the client and what are your duties?
  - Rule 1.13(a)

- What sort of advice may you give?
  - Rule 2.1 ("[A] lawyer shall exercise independent professional judgment and render candid advice [and] may refer not only to law but to other considerations [...] relevant to the client’s situation")
  - Rule 2.1, Comment 1 ("[A] lawyer should not be deterred from giving candid advice by the prospect that the advise will be unpalatable to the client")
  - See also Rule 1.2(d) ("[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client")
Negligent Credentialing

- Additional facts
  - After advising the CEO that you will not tell the members of the MEC that they must process the application, the CEO withdraws his request for you to attend the meeting and says, “I’ll handle it myself”

- How do you proceed?
  - Rule 1.13, Comment 3 (“When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful”)
  - But note, Comment 3 further provides that if the standard in Rule 1.13(b) is met, the lawyer must proceed as is reasonably necessary in the best interest of the organization
Scenario 3

Advising in Fair Hearings
Advising in Fair Hearings

- **Facts**
  - MEC recommends that a staff member’s privileges be permanently revoked on the basis of numerous quality concerns and staff member requests fair hearing per medical staff bylaws.
  - Counsel appears on behalf of the MEC at both the hearing before the hearing panel and the subsequent appellate review before the hospital’s board of trustees (BOT).
  - After the appellate review, the BOT requests counsel to advise as to how it should proceed.
Advising in Fair Hearings

May counsel advise the BOT?

- Generally, the medical staff and the governing body are not considered separate legal entities, but rather components of a common organization (i.e., the hospital)

- Accordingly, and because counsel’s role is to ensure that the processes followed are appropriate and consistent with applicable standards, advising the BOT may be appropriate
Advising in Fair Hearings

- But to what extent should counsel advise the BOT?
  - May advise on procedure (e.g., elements to be included in the appellate review panel report, timeframes and other requirements of the medical staff bylaws)
  - May advise on legal standards (e.g., requirements for immunity under the Health Care Quality Improvement Act (HCQIA), liability of participants in peer review process under state law)
  - Should not advise on substance (e.g., how to weigh the evidence, specific wording to be used in the report) – no second bite at the apple
Advising in Fair Hearings

- **But note**, California case law may suggest a different answer
  - Court declined to consider the potential composition of an appellate review body (as appellate review had not yet been requested), but advised generally that, if the appellate review occurs without either party being represented by counsel, “it would strain the bounds of due process to allow the hospital’s attorney, who took an active role in assisting the MEC, to serve as advisor to the board”
Advising in Fair Hearings

- May in-house counsel for the hospital serve as hearing officers in a fair hearing?
  - HCQIA immunity requirements, 42 USC § 11112(a) ("fair [...] under the circumstances")
  - Tactical considerations (i.e., would you really want to have to explain to a judge why doing so did not make the process unfair to the physician?)
  - See also Yaqub (finding that hospital’s procedure for appointing hearing officer was not consistent with the appearance of impartiality—even though there was no evidence of actual prejudice or of a direct financial interest in the case—where hearing officer was formerly a member of the board of a non-profit hospital fundraising entity)
Scenario 4

Representing Staff Members
Representing Staff Members

- **Facts**
  - A medical staff leader with whom you have worked extensively in the past on various medical staff issues asks you to represent her in a malpractice action.

- **May you represent the individual? If so, what is required to do so?**
  - Rule 1.13(g) (permitting representation of constituents)
  - Rule 1.7 (concurrent conflicts of interest)
  - Tactical considerations

- **If you decline the representation, may you notify the hospital or the corporate client about the malpractice action?**
  - Rule 1.18 (duties to prospective clients)
Suppose instead that the medical staff leader served as your star witness in a physician’s internal due process hearing—does the analysis change if you are asked to represent both the medical staff leader and the hospital in litigation brought by the aggrieved physician subsequent to the hearing?
General Rules of Thumb

1. Address foreseeable ambiguity in initial client contact (i.e., clearly establish the scope of representation)
2. Understand any unique requirements of state law and the medical staff bylaws
3. Account for tactical considerations (especially the potential for future litigation)
4. Disclose the identity of your client on the front end (as appropriate)
Questions?
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