

# WEISS



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## **What a \$24.3 Million Judgment Tells You About a Potential Tool to Fight Unfair Awards of Exclusive Contracts**

An interesting case illustrates a potential new tool in the arsenal to fight against fixed hospital exclusive contracts and, potentially, against the consultants who helped put lipstick on the pig.

Many hospital-based groups have been there: the situation in which a longstanding relationship with a hospital, whether or not via exclusive contract, is disrupted, in favor of another group.

Absolutely keep reading if you think that you're in an office-based specialty. As the case I'm about to describe illustrates, one side effect (not a bug, but a feature) of massive physician employment and "alignment" by hospitals has been to make nearly all medical specialties hospital-based, in that you stand to be bounced by the hospital in favor of a competitor.

In the classic fact pattern, something's led to the hospital's decision to enter into an, or change the existing, exclusive contract arrangement.

Perhaps our avatar group, let's call it "Your Group", has given pushback over quality issues. Perhaps some members of Your Group have complained about group leadership to the hospital's COO in order to obtain the contract for themselves. Perhaps Your Group is also working at a competing facility across town and that's pissed off the CEO.

As a result, the hospital's issued an RFP, and perhaps it's even hired a company that purports to manage the running of RFPs, one, even better, that's developed a report to show why choosing another group ("Group X") instead of Your Group is supported by evidence. Unfortunately, or there'd be no need for this article, Your Group loses the RFP in favor Group X.

Historically, courts have been extremely deferential to hospital governing board decisions regarding awards of exclusive rights, and therefore, to changes in who holds exclusive rights. Claims of breach of contract and of torts such tortious interference generally fail. Which brings us to a recent very interesting New Jersey appellate decision in *Comprehensive Neurosurgical, P.C., etc., at al. v. The Valley Hospital, et al.* ("Comprehensive").

First, it's important to note that the Comprehensive case is an unpublished decision, meaning that it does not have precedential value. The decision is highly fact specific, which, perversely, makes it highly informative for you.

Because the facts are long and complicated, I'm not going to set them all out. But here, in limited fashion, is what you need to start off today's discussion:

Comprehensive Neurosurgical, P.C. ("CompNeuro") is a neurosurgical group that provided services at several hospitals, including at The Valley Hospital ("Valley Hospital") and at Hackensack University Medical Center ("Hackensack").

For over a decade, CompNeuro physicians provided on-call coverage in the emergency department ("ED") at Valley Hospital and were instrumental in Valley Hospital acquiring specialized equipment, including biplane angiography and Gamma Knife equipment, that allowed stroke patients to receive treatment at Valley Hospital.

But then, in December 2015, Valley Hospital sent out a memo stating that after "almost a year of study" the Board of Trustees unanimously voted to have neuro coverage of the ED performed exclusively by another neurosurgery group providing services at the facility, the "Columbia Group".

CompNeuro sued Valley Hospital, its Board of Trustees, its president, and Columbia Group asserting breach of contract claims and tort claims, including breach of the implied covenant of good faith and fair dealing and tortious interference with prospective economic advantage.

Among other things, CompNeuro alleged that Valley Hospital and its president had a longstanding contentious rivalry with Hackensack. They asserted that that was the motivation to terminate CompNeuro physicians' long enjoyed clinical privileges at Valley Hospital: losing the ability to perform the services they had helped develop and create was punishment for their affiliation with Hackensack.

By the time the case reached appeal, Valley Hospital was the only remaining defendant – it appealed from the \$24.3 Million trial judgment entered against it. The only remaining claim was one pertaining to the allegations of breach of the implied covenant of good faith and fair dealing.

The parties squared off along these two, simplified lines of argument:

Valley Hospital: The Medical Staff Bylaws provide that the on-call schedule is not a right or a privilege, but a responsibility. We have conducted a year-long study (the "White Paper") including reviewing data from a quality score vendor and input from a large, nationally known consulting firm. The results were that Columbia Group, not CompNeuro, was the better choice in terms of quality and cost for an exclusive arrangement including participation in a major strategic initiative essential to advancing the goal of becoming a neuroscience center of excellence.

CompNeuro: Your argument sounds good, but you just put on a show to cover up for your lack of good faith and fair dealing. How do we know? Your own documents prove it!

What had CompNeuro found? Why did the court affirm the \$24.3 Million judgment?

CompNeuro argued that discovered emails showed that the White Paper wasn't an objective study but that its outcome was predetermined to favor Columbia Group. For example:

1. A 2012 email from the head of Valley Hospital's planning department ("Callandrillo") attached an article from Hackensack that highlighted a clinical trial on vaccines that one of CompNeuro's physicians was conducting there. The email stated that one of the physicians from the Columbia Group ("D'Ambrosio") was very concerned about CompNeuro's benefiting from Columbia Group's intellectual capital.

2. A 2013 email chain Included an e-mail forwarded from D'Ambrosio to a Valley Hospital vice president ("Bhavsar") and to Callandrillo complaining about a scheduling problem in the operating room and that, if true, it was an example of potentially dangerous physician communication, temperament, and judgment. Bhavsar responded to Callandrillo that he spoke with D'Ambrosio who was very passionate on how the other group, i.e., CompNeuro, was hurting Valley Hospital's reputation and that the Columbia Group is very available to be "THE Valley Neurosurgery group". D'Ambrosio had told Bhavsar that he hoped the email "would be a catalyst in moving us towards" the direction of Columbia group "tak[ing] it all on."
3. Callandrillo replied to Bhavsar that she had spoken with Valley Hospital's president ("Meyers"), who said that "moving to an exclusive contract really is the nuclear option," to which Bhavsar responded, "Kaboom." Callandrillo replied, "The day will come . . . believe me."
4. In another email chain with Callandrillo and Meyers, Callandrillo forwarded an email that showed one of CompNeuro's physicians ("Roth") was a guest speaker and the "Director of Neurosurgery" at Hackensack. Valley Hospital's general counsel ("Goldfischer") responded, "truly unbelievable. Unfortunately, the hospitalist strategy will not stop the out-migration of Roth's cases, given his title and ties to Hackensack."
5. An analyst in the planning department emailed Callandrillo informing her that the quality and utilization analysis doesn't show any glaring difference in costs or quality between the groups.
6. An email chain discussing Roth as a guest speaker and the director of neurosurgery at Hackensack included a response from Goldfischer that it was "truly unbelievable" and that their strategy would not stop the outmigration of Roth's cases given his title and ties to Hackensack.
7. Emails showed that Meyers asked Goldfischer if Valley Hospital could work on getting an exclusive contract after they heard that a Gamma Knife patient who "clearly came through our ED" and was a patient at Valley Hospital, then went to Hackensack. Goldfischer responded that there was "nothing we can do if they have privileges," and that "the only thing [they] could do is close the service" to [Columbia Group], and Goldfischer asked Meyers if Valley Hospital had "the appetite for this." Goldfischer asked that if the answer was yes, she wanted clarification if they would be "closing the entire service or only the ER?" Meyers responded, "Only the ER for unassigned patients. Be prepared for a lawsuit, so we need to may [sic] a strong case ahead of time." A later related email from Goldfischer notes that they would "need to paper this carefully."

Here's the real takeaway for you: Don't immediately think that if your group loses an exclusive contract, or if your group's physicians are pushed out from exercising what are currently their medical staff and/or clinical privileges, that there's not potentially something cooked up in advance that might, depending upon your applicable state's laws, amount to a violation of the implied covenant of good faith and fair dealing. That thinking netted CompNeuro \$24.3 million. Consider this another arrow in your quiver against potentially fraudulent and or impermissible hospital behavior that's been papered over with a patina of "board decisions that are entitled to deference", studies, consultants, and other rainbows and unicorns.

## How to Deploy the Secret Sauce of *Opportunistic Strategy* - Webinar On Demand



They say that COVID-19 has changed the world, creating the "new normal." Many of your colleagues and many hospital administrators are running scared.

Others, leaders like you, know that *crisis means opportunity*.

Let me provide you with the strategic tools and insights that you need in order to seize opportunities, whether they're in the context of your current business relationships, the expansion of your business activities, or the creation of new ventures.

You will learn:

- Defense as a defective default: It's necessary, but not sufficient.
- Exploiting weakness: Drop the guilt and identify opportunity.
- Flat line negotiation is fatal: Understand its myths and limitations.
- Negotiation reality: Learn to identify and deploy on multiple planes to affect the outcome.
- Maneuver: Harness the power of maneuver, both in overall strategy and in specific negotiation strategy.

Others see a crisis and freeze in fear. Learn how to see the opportunities and obtain the tools to increase your odds of obtaining them.

The price to attend is \$479. The cost of not attending is astronomical.

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### Newsflash: Business Life In the Time of Coronavirus - The Way Out

The coronavsaaairus crisis, especially as it has become politicized, raises a number of business issues and, quite frankly, business opportunities in regard to future disruptive events.

Check out our [mini-series](#), with actionable business lessons for medical group leaders.

Sooner or later this crisis will end. You can't allow yourself to be too busy, too occupied, too concerned with current events, to devote time and effort to strategizing for your future.



### Wisdom. Applied. 165 - Doctor Settles Allegations but Doesn't Admit She Can't Be Two Places at the Same Time

That's odd, because physicians sometime demonstrate that ability, at least on billing records.

## All Things Personal

It was going to be a tight connection between flights.

Of course, American Airlines knew that when they sent me the email about their new personalized “Five Star” on ground services. Someone would meet me at the gate and whisk me to my next flight.

I might not need it (I walk very quickly), but it might be an interesting experience. So, I ordered it up.

The only problem is that it is very difficult to actually arrange to pay for the service. In fact, it is work to get more service to alleviate the need for work.

There’s no “click this link to reserve and pay” – one must email or call in. For anyone put on interminable hold by an airline, email is easier. But the response to the email was basically, “thanks for signing up, now you have to call in to pay.”

What are you doing to make it easy for your patients to pay?

Beyond that, what are those to whom you refer doing to make it easy for your referred patients to pay? After all, their screwed-up business practices will come back to bite you.

It once took me close to a half hour to pay a pathology group using the only option other than mailing a physical check, a moronic dial-in and entry by phone button system. Heck, it probably only took them a minute to misdiagnose me, so why so long to pay?

In the end, American’s Five Star service was fantastic. Yet, I mostly remember how hard it was to pay for it.

Get it?

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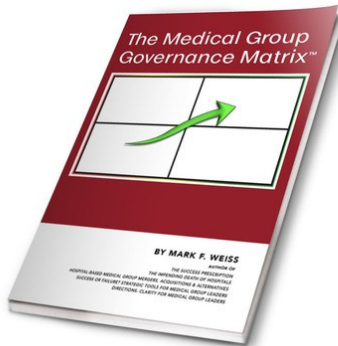
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## Published Articles

- [Anesthesia Services RFPs: Cognitive Biases and Hidden Opportunity](#), published in the Summer 2022 Issue of [Communique](#).
- [Popularity Contests and Disruptive Physicians: Avoiding the Death of Your Anesthesia Group](#), Fall 2021 Issue of [Communique](#).

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## Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy [here](#).

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- 1. Download a copy of The Success Prescription.** My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription [here](#).
- 2. Be a guest on “Wisdom. Applied. Podcast.”** Although most of my podcasts involve me addressing an important point for your success, I’m always looking for guests who’d like to be interviewed about their personal and professional achievements and the lessons learned. [Email me](#) if you’re interested in participating.
- 3. Book me to speak to your group or organization.** I’ve spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, [drop us a line](#).
- 4. If You’re Not Yet a Client, Engage Me to Represent You.** If you’re interested in increasing your profit and managing your risk of loss, [email me](#) to connect directly.