



# Taking Your Medical Staff Bylaws Back to the Drawing Board Are You Ready for Revisions?

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11:30 a.m. – 12:30 p.m. **CI**

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## Today's Presenters



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## No More Botox for the Bylaws?

- Time for a full face lift:
  - New JCS MS.01.01.01
  - Proposed Conditions of Participation changes for credentialing of telemedicine providers (likely to be finalized soon, with revised JCS to follow)
  - Existing Bylaws amended multiple times; need overall review
  - Multi-hospital systems seeking to achieve efficiencies and better integration



## MS.01.01.01

- Development of MS.01.01.01
- Allocation of information:
  - What must be in the **Bylaws**? (requires approval of organized medical staff as a whole and the governing body)
  - What may be placed in **Rules & Regs or Policies**? (requires approval of MEC, if so delegated, and governing body)
- Relative authority of governing body/medical staff
- Collaboration / Conflict Management



## What must be in the Bylaws?



## Elements of Performance 12-36

- Bylaws must address every requirement set forth in Elements of Performance (EPs) 12-36. (EP 3)
- If EP describes a process, bylaws must include, at a minimum, the basic steps of the process. (EP 3)



## Associated Details

- If details associated with EPs 12-36 are placed in a document other than the bylaws (such as Rules & Regs or Policies), the medical staff as a whole must determine and the bylaws must describe:
  - what constitutes associated details;
  - where such associated details will reside; and
  - whether the adoption or amendment of such associated details can be delegated to the MEC (adoption/amendment of details that reside in the bylaws cannot be delegated).



## JOINT COMMISSION STANDARD MS.01.01.01 – WHAT MUST BE IN THE MEDICAL STAFF BYLAWS?

### Credentialing / Privileging

- Qualifications for appointment to the medical staff (EP 13)
- Process for medical staff appointment and reappointment (EP 27)
- Process for credentialing and re-credentialing (EP 26)
- Process for privileging and re-privileging (EP 14)

### Adverse Actions

- Indications and process for automatic suspension of medical staff membership or privileges (EPs 28 and 31)
- Indications and process for summary suspension of medical staff membership or privileges (EPs 29 and 32)
- Indications and process for recommending termination or suspension of medical staff membership and/or termination, suspension, or reduction of clinical privileges (EPs 30 and 33)

### Fair Hearing and Appeals

- Composition of the fair hearing committee (EP 35)
- Fair hearing and appeal process, including process for scheduling and conducting hearings and appeals (EP 34)

### Medical Staff Structure

- Structure of the medical staff (EP 12)
- Statement of the duties and privileges related to each category of the medical staff (EP 15)
- Description of medical staff members who are eligible to vote (EP 17)
- Process for selection and removal of medical staff officers (EP 18)
- List of medical staff officer positions (EP 19)
- If there are medical staff departments, the qualifications, roles and

### Medical Executive Committee

- MEC's function, size, and composition, the authority delegated to the MEC, and how such authority is delegated or removed (EP 20)
- MEC includes physicians and may include other practitioners and any other individuals as determined by the organized medical staff (EP 22)
- Process for selection and removal of MEC members (EP 21)
- MEC acts on behalf of the organized medical staff between meetings, within the scope of its responsibilities as defined by the organized medical staff (EP 23)

### Bylaws, Rules & Regulations, Policies

- Process for adopting and amending the medical staff bylaws (EP 24)
- Process for adopting and amending the rules and regulations, and policies (EP 25)
- If details associated with EPs 12-36 are placed in a document other than the bylaws, the bylaws must describe:
  1. what constitutes associated details;
  2. where such associated details will reside; and
  3. whether the adoption or amendment of such associated details can be delegated to the MEC (adoption/amendment of details that reside in the bylaws cannot be delegated) (EP 3)

### History & Physical Examinations

- Requirement to complete and document medical histories and physical examinations (EP 16)



## Credentialing / Privileging

### ■ Bylaws must include:

- Qualifications for appointment to the medical staff (EP 13) (CoP 42 CFR § 482.22(c)(4))
- Process for medical staff appointment and reappointment (EP 27)
- The process for credentialing and re-credentialing (EP 26)
- Process for privileging and re-privileging (EP 14) (CoP 42 CFR § 482.22(c)(6))



## Credentialing / Privileging

### ■ Suggestions:

- Update to accommodate new rules for credentialing and privileging of telemedicine providers
- CMS Proposed Rule (May 26, 2010)
- Propose to revise two hospital CoPs:
  - 42 CFR § 482.12 (governing body)
  - 42 CFR § 482.22 (medical staff)
- Permit Originating Site (where the patient is) to rely on privileging recommendations of Distant Site's (where the provider is) medical staff, if certain requirements are met



## Credentialing / Privileging

### ■ Telemedicine Proposed Rule

- CMS Proposed Rule, May 26, 2010, 75 Fed Reg 29479-29487; available at <http://edocket.access.gpo.gov/2010/pdf/2010-12647.pdf>
- June 2010 Foley & Lardner LLP, Legal News Alert, *CMS Publishes Proposed Rules Regarding Privileging of Telemedicine Professionals*, available at <http://www.foley.com/abc.aspx?publication=7173>



## Credentialing / Privileging

### ■ Other Suggestions

- Refusal to provide application? (not recommended unless established pre-app process with purely objective criteria)
- Waiver of board certification? (many variables to consider)
- Include provision for self-disclosure of changes in qualifications
- Medical Staff must process applications within time periods specified in the Bylaws (see JCS MS.06.01.09)



# Adverse Actions & Fair Hearing and Appeals



## HCQIA Immunity

- Health Care Quality Improvement Act (42 U.S.C. § 11111 et seq)
- Provides immunity from damages for professional review bodies, members, and other individuals participating in professional review actions in certain circumstances
- “Professional review action” includes an action or recommendation of a professional review body:
  - taken or made in the conduct of professional review activity
  - based on competence or professional conduct of an individual physician
  - affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician



## HCQIA Immunity

- To be eligible for immunity, the professional review action must have been taken:
  - (1) in the reasonable belief that the action was in the furtherance of quality health care,
  - (2) after a reasonable effort to obtain the facts of the matter,
  - (3) after *adequate notice and hearing* procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
  - (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts.





## HCQIA Immunity

- HCQA describes elements necessary to be deemed to have provided adequate notice and hearing, including:
  - Notice of proposed action
  - Notice of hearing
  - Certain provisions related the conduct of hearing
- Does not preclude immediate suspension or restriction, subject to subsequent notice & hearing, where failure to take such an action “may result in an imminent danger to the health of any individual.”
- *Poliner v. Texas Health Systems*, 537 F.3d 368 (5th Cir. 2008) (jury award of more than 360 million, reduced to \$33 million by district court, 5<sup>th</sup> Circuit Court of Appeals overturns due to HCQIA immunity).



## Adverse / Corrective Actions

- Bylaws must include the indications and process for recommending termination or suspension of MS membership and/or termination, suspension, or reduction of clinical privileges (EP 30)



## Summary Suspension

- Bylaws must include indications and process for summary suspension of MS membership or privileges (EPs 29 & 33)
- Suggestions:
  - Avoid language that may encourage overuse
  - Ensure process meets elements necessary for HCQIA immunity
  - See e.g., *Stratienko v. Chattanooga-Hamilton County Hospital Authority*, E.D. Tenn., No. 1:07-CV-258, 9/8/08) (hospital denied HCQIA immunity for summary suspension)



## Automatic Suspension

- Bylaws must include indications and process for automatic suspension of MS membership or privileges (EPs 28 & 31)
- Suggestions:
  - To avoid indiscriminate enforcement and retroactivity issues, indications should be easily identifiable and objective: e.g., loss of license or professional liability coverage, exclusion from public programs, felony convictions
  - Not “Medical staff member will be automatically suspended for any material omissions or misrepresentations on his/her application.”
  - Keep process “automatic”



## Fair Hearing & Appeals

- Bylaws must include
  - Composition of the fair hearing committee (EP 35)
  - Fair hearing and appeal process, including process for scheduling and conducting hearings and appeals (EP 34)



## Fair Hearing & Appeals

### ■ Suggestions:

- Review requirements for HCQIA immunity (notice and scheduling, reviewers not in direct economic competition with practitioner, right to counsel, etc.)
- Ensure compliance with JCS MS.10.10.01, EPs 1-5 and MS.06.01.09.
- Hearing and appeal for adverse decisions re initial appointment and privileges?
- Hearing and appeal for Allied Health Professionals?



## Fair Hearing & Appeals

- Suggestions: (Temporary Privileges)
  - Not uncommon to include provision providing no hearing/appeal for denial/revocation of temporary privileges.
  - But see, *Hussein v. Duncan Regional Hospital*, W.D. Okla., No. 07-439, 5/1/09 (no HCQIA immunity for hospital that did not provide notice/hearing before revoking temporary privileges and reporting to NPDB).
  - See also, *Poirier v. Our Lady of Bellefonte Hospital Inc.*, Ky. Ct. App., No. 2004-CA-002335-MR, unpublished 2/17/06 (hospital did not act improperly in revoking temporary privileges; followed bylaws procedures, provided opportunity to appeal).
  - Remember to ensure compliance with JCS MS.06.01.13



## Medical Staff Structure

### ■ Bylaws must include:

- Structure of the medical staff (EP 12; 42 CFR § 482.22(c)(3))
- Description of medical staff members who are eligible to vote (EP 17)
- Statement of the duties and privileges related to each medical staff category (not clinical privileges) (EP 15; 42 CFR § 482.22(c)(2))

### ■ Suggestions:

- Do you really need 10 different categories?
- Use a table to map differences
- Voting rights for AHPs?



**Summary of Rights and Obligations**

	<b>Active</b>	<b>Associate</b>	<b>Courtesy</b>	<b>Telemedicine</b>	<b>Consulting</b>	<b>Honorary</b>	<b>Ind. AHP</b>
<b>Eligible for admission privileges</b>	YES	YES	YES	NO	NO	YES	YES
<b>Eligible for Clinical Privileges</b>	YES	YES	YES	Teled only	NO	YES	YES
<b>Eligible for access to Medical Records</b>	YES	YES	YES	YES	YES	NO	YES



## Department Chairpersons

- If there are medical staff departments, the bylaws must include the qualifications, roles and responsibilities of the department chair (EP 36)
- See qualifications and roles and responsibilities set forth in MS.01.01.01, EP 36.



## Medical Staff Officers

- Bylaws must include:
  - Process for selection and removal of medical staff officers (EP 21)
  - List of medical staff officer positions (EP 19)



## Medical Executive Committee

- Bylaws must include:
  - Function, size, composition, delegated authority, and how such authority is delegated or removed (EP 20)
  - Statement that the MEC acts on behalf of the organized medical staff between meetings, within the scope of its responsibilities as defined by the organized medical staff (EP 23)



## Medical Executive Committee

- **Bylaws must include:** (cont)
  - Process for selection and/or electing and removing MEC members (EP 21)
  - Includes physicians and may include other practitioners and any other individuals as determined by the organized medical staff (EP 22)
- **Suggestions**
  - See also JCS MS.02.01.01 (All members of the organized medical staff, of any discipline or specialty, are eligible for MEC membership; CEO or designee attend meetings, etc.)



## Other Committees

- JCS and the CoPs do not require that other committee structures/functions be described in the Bylaws.
- If no requirement under state law/regulation, consider moving out of the Bylaws.



## Bylaws (Adoption & Amendment)

- Bylaws must include:
  - Process for adopting and amending the medical staff bylaws (EP 24)
  - Medical Staff must have the ability to adopt and amend the bylaws and to propose them directly to the Governing Body (bypass of MEC) (EP 8)
- Remember:
  - Adoption and amendment of the Bylaw cannot be delegated to the MEC, and must be approved by the governing body (EP 2)



## Rules & Regs / Policies

- Bylaws must include:
  - Process for adopting and amending the rules and regulations, and policies (EP 25)





## Rules & Regs vs. Policies?

- Suggestions: Pick One!

- Both documents:

- may be adopted/amended with the approval of the MEC and the governing body (does not require vote of whole medical staff)
    - If the organized medical staff proposes to adopt or amend, the staff must communicate the proposal to the MEC first.
    - Medical staff must receive notice of changes approved by the governing body.



## Rules & Regulations

### ■ Rules & Regulations:

- Require an extra step in the adoption/amendment process: If proposal to amend from MEC, MEC must first communicate proposal to the medical staff. (EP 9)
- May be provisionally amended by the MEC (if authority delegated by medical staff) if urgently needed to comply with laws and regulations. (see specific provisions set forth in EP 11)



## Medical Staff Policies

### ■ Policies

- Do not require pre-notification of the medical staff by MEC
- JCS does not contemplate need for urgent amendment



## History & Physical Exams

- Bylaws must include a requirement to complete and document medical histories and physical examinations (EP 16)
- Suggestions:
  - Requirement added to JCS to ensure compliance with CoPs
  - Review CoP requirement: 42 CFR § 482.22(c)(5) and Interpretive Guidelines



## Conflict Management

- The organized medical staff must adopt and implement a process for managing conflicts between the organized medical staff and the MEC, including conflicts related to proposals to adopt a rule, regulation, or policy, or an amendment thereto (JCS MS.01.01.01, EP 10)
- Hospital must implement its conflict management process to address conflicts between the organized medical staff and the governing body (as set forth in TJC Leadership Standards)



## Conflict Management

### ■ Suggestions:

- Does not need to be set forth in the Bylaws
- Avoid triggering the use of formal conflict management processes to address every conflict that might arise
- Clearly identify those circumstances that will require formal conflict resolution



## Multi-Hospital Revisions

- Attempt to achieve consistency among:
  - Credentials verification
  - Medical staff categories (rights & obligations)
  - Committee structures
  - Peer review processes
- Complete uniformity not necessarily possible or desirable
- Simple tools can help



## Basic Drafting

- Make your life easier
  - Table of Contents (with page numbers)
  - Numbering
  - Section Headings
  - Annotations
  - Bookmarked pdf





## Next Steps

- Do not forget to check state statutes and regulations
- Do not underestimate the time needed to make necessary changes
- Involve interested parties early and often



# Questions and Answers



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