Medical Staff Bylaws Under the New Joint Commission Standards
Legal Strategies to Comply With MS.01.01.01

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
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Tuesday, September 21, 2010

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Medical Staff Bylaws

Adrienne E. Marting
Formerly known as Medical Staff Standard 1.20 (MS.1.20) 

**MS.01.01.01** addresses the medical staff’s self-governance and accountability to the governing body for the quality and safety of patient care in hospitals.

The revised standard is designed to support a well-functioning, positive relationship between a hospital’s medical staff and governing body, which is critical to the safety and quality of care provided to patients.

The standard recognizes that while a hospital’s governing body is ultimately responsible for the quality and safety of care, the governing body, medical staff, and administration must **collaborate** to achieve this goal.
According to The Joint Commission, the intent of the revisions to MS.01.01.01 is to help hospitals and medical staffs construct medical staff bylaws, rules, regulations, and policies that maintain the medical staff’s self-governance and enhance its collaboration with the hospital’s governing body, while optimizing the efficiency of maintaining the bylaws, rules and regulations, and policies.
Like previous versions, MS.01.01.01 still:

- Requires adoption and amendment of the medical staff bylaws by the organized medical staff (“OMS”);
- Requires compatibility between the medical staff bylaws, rules, regulations and policies and the governing body’s bylaws;
- Precludes delegation of bylaws adoption and amendment;
- Prohibits unilateral amendment of medical staff bylaws; and
- Provides that medical staff bylaws will be effective only if approved by the governing body.
EP 3 What Must Be in the Medical Staff Bylaws

- Every requirement set forth in EP12 through EP36 must be in the medical staff bylaws.
- These requirements may have associated details, some of which may be extensive, such details may reside in the bylaws, rules, regulations or policies.
- OMS adopts what constitutes the associated details, where they reside, and whether their adoption can be delegated.
- Adoption of associated details that reside in the bylaws cannot be delegated.
- For the EPs in 12 through 36 that require a process, the bylaws must include at a minimum the basic steps required for implementation of the requirement.
- OMS submits its proposals to the governing body for action.
- Proposals only become effective upon governing body approval.
EP 8 OMS has the ability to adopt medical staff bylaws, rules and regulations, and policies, and amendments thereto, and to propose them directly to the governing body.

Regardless of what authority, if any, the OMS has delegated to the medical executive committee (“MEC”) regarding adoption and amendment of rules, regulations and policies, the OMS still has the ability to propose them directly to the governing body without MEC approval.
EP 9* Communication Between OMS and MEC Regarding Proposals to Adopt or Amend Rules, Regulations or Policies

**OMS** proposal to adopt or amend a rule, regulation, or policy:

– Must be by voting members of the medical staff.
– Must first be communicated to MEC.

**MEC** proposal to adopt or amend a rule or regulation, if given this delegated authority:

– Must first be communicated to OMS.

*A Applies only when the medical staff has delegated authority over policies, rules and regulations to the MEC.*
EP 10 Conflict Management Process

• OMS has to adopt a process to manage conflict between the medical staff and MEC for all matters.

• Medical staff members, meaning anyone on the medical staff even if they have no voting rights, are free to communicate with the governing body on a rule, regulation or policy adopted by OMS or MEC.

• Governing body determines method of communication.
EP 11 Urgent Amendment Process

- If delegated to do so by voting members of OMS, MEC may "provisionally adopt" an amendment to rule or regulation necessary to comply with laws or regulations.

- Need for urgent amendment must be documented.

- Governing body may then provisionally approve amendment without prior notice to the medical staff.

- Medical staff must be immediately notified by MEC.
**EP 11 Urgent Amendment Process** (cont’d)

- Medical Staff has opportunity for retrospective review of and comment on the provisional amendment.
- If no conflict between the OMS and the MEC, the provisional amendment stands.
- If conflict does arise between OMS and MEC, process for resolving conflict between OMS and MEC must be followed.
- Any revisions to the amendment must be submitted to the governing body for final action.
• **EP 15** Statement of duties and privileges relating to each category of the medical staff must be included in the medical staff bylaws.

• **EP 16** Requirements for completing and documenting medical histories and physical exams in accordance with state law and hospital policy must be included in the medical staff bylaws.
In accordance with EP 3, the medical staff bylaws must include:

- **EP 17**  A description of those members who are eligible to vote.
- **EP 19**  A list of all medical staff officer positions.
- **EP 24**  The process for adopting and amending medical staff bylaws.
- **EP 25**  The process for adopting and amending rules, regulations and policies.
Next Steps

• Hospitals that use supplemental documents need to make sure that the medical staff bylaws contain all of the requirements set forth in EPs 12 - 36 as well as the basic steps of any process contained therein.

• Identify what, if any, authority will be delegated to the MEC regarding proposing, adopting and amending rules, regulations or policies, including any "urgent amendments"
Next Steps

• Develop a process for the OMS to make proposals regarding bylaws, rules, regulations and policies directly to the governing body.

• Formalize a conflict management process to resolve conflicts between the OMS and the MEC (identify what triggers the process).
MS 01.01.01

Some Implications
• Premises of TJC
  – Most Hospital Medical Staff Governing Documents will have a need for few if any changes
  – Organized Medical Staffs exist, meet and make decisions
  – The Standard will be generally self-enforcing in the absence of problems
  – No intentions to ‘fly-speck’ documents by reviewers
  – Quality and patient safety enhanced by changes
• Non-TJC Premises regarding MS 01.01.01
  – May stifle creative and needed restructuring of medical staffs
  – Potential to discourage MEC leadership
  – Challenges of the “one size” fits all approach
  – “Organized Medical Staffs” which exist and operate are historical anomalies
• Non-TJC Premises (continued)
  – Can further confuse Boards of Directors which already do not fully understand the medical staff organization and how it does/does not function.
  – Revision process will require significant time and expense
  – Inadequate explanation of any rationale for the changes and today’s real concerns about patient quality and safety, and costs of care
• Non-TJC Premises (continued)
  – Encourage disputes within medical staffs as well as between medical staffs, executive management and Boards
  – Highlights employed vis a’ vis independent practitioners’ interests
  – Increase the we/they thinking and relationships
Implementing Changes to Medical Staff Bylaws / Governing Documents

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Process of Revising Documents & Minimizing Administrative Burdens
Revising Documents

• Preface—Personal Perspectives
  – Early involvement in MS 1.20 dispute
  – Confusing, contradictory, disruptive, expensive
    = unnecessary
  – Directly engaged with TJC in disagreement and dialogue leading to the Task Force
  – Despite continuing reservations—necessary to live with it
• Realities:
  – Applies to Hospitals A-Z, i.e., 30 bed rural hospitals with 9 Active Staff, and 635 bed teaching facility flagships of health systems with 825 Active Staff members
  – All hospitals = required to have MS Bylaws and other governing documents
  – On paper, many documents similar
• Realities (continued)
  – In operation, significant differences exist regarding who does what, when, why and most importantly, how
  – Hospital A: 14 MS members, meet monthly and function as an OMS
  – Hospital B: 670 MS members, one annual meeting attended by 13 on average
How to Review and Revise

• In most hospitals, a discrete group of 5-10 persons exists who are familiar with MS documents:
  – MS coordinator; VPMA; legal counsel; some Bylaw committee members; CEO (perhaps); accreditation responsible staff person; etc.
  – Note absentees: Board Members; OMS members
• NB, however, in some hospitals, this is not the case, e.g.:
  – active and knowledgeable physicians on MEC or Bylaws committee
  – possible presence of an MD/Atty on the staff
  – An active and knowledgeable Professional Affairs Committee of the Board
  – A “recovering” hospital after four years of litigation involving bylaw issues, or two years of finalizing the last bylaw revision process
• For MS 01.01.01 revisions, a leader or two is needed
  – Committee work eventually needed but 1-3 initial crew of knowledgeable persons is needed
  – Review of the local scene
    • Might both MS and Hospital currently have separate legal counsel?
    • Are existing documents few and consolidated or numerous and only cross-referenced?
    • All need recognize—Hospital Accreditation and CoP compliance is at stake, so this is not ‘just’ a medical staff issue
• Leaders need to study and prepare MS Standards and MS 01.01.01 analysis in articles and programs

• Assign two/three sets of eyes to compare current documents with EPs 1-11, and 12-36

• Review or consider creating definitions:
  – Organized medical staff
  – Voting eligibility
• Bylaws Definitions (continued)
  – MS Bylaws vis a’ vis Governing Documents
  – Dispute
  – Dispute Resolution Process
  – Voting methods and process
  – Etc.
• Specialized parties develop initial drafts in redlined format with 01.01.01 rationale and explanatory comments

• Present to authorized committee—Bylaws or MEC or both
  – Ideally, knowledgeable Board member(s) involved early in the process
  – Hold a Special MEC meeting with revision drafts as the sole agenda
• MEC Circulates discussion draft to all eligible to vote via existing amendment process (PDF/email)
• Schedule an open meeting/forum for all OMS voting eligible members, conducted by MEC or MS Bylaw Committee
• Follow existing approval process at MS level, and submit to Board for its consideration and action
• If/when approved without a hitch,

Have a Party!!
Minimizing Administrative Burdens

• Favor delegation to MEC of all permitted actions under 01.01.01
• Establish and/or refine, communication and transparency to ALL members of OMS
• Examine expanded leadership and 2010 roles now expected of a MS, and/or required under PPACA, including
– Priority of quality and safety
– Required EMR and needed IT skills and equipment of OMS members
– Implementation of Evidence Based Medicine
– Expanded roles of AHPs
– Shared credentialing
– Authority of Medical Staff Coordinators
– Clinical and System Integration
– ACO developments
– Community Service Requirements of tax exempt hospitals
– Role of Hospitalists
– Call coverage and payment therefore
– Employed and independent practitioners
– Etc.
• Foregoing proposed revision process:
  – Idealistic
  – A (very) few may sail through in several months with no speed bumps.
  – Anticipates and plan for challenges
  – Can be administratively structured and/or done with assistance of counsel, but key and credible MS leadership needs to be in the forefront.
Conflict Resolution

Within Medical Staff Expressed

Between Medical Staff and Governing Body Implied

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The organized medical staff and governing body must work collaboratively, reflecting clearly recognized roles, responsibilities, and accountabilities, to enhance the quality and safety of care, treatment, and services provided to patients. The medical staff bylaws create a system of rights and responsibilities between the organized medical staff and the governing body, and between the organized medical staff and its members.
• EP 9. (HAP) If the voting members of the organized medical staff propose to adopt a rule, regulation, or policy, or an amendment thereto, they first communicate the proposal to the medical executive committee. If the medical executive committee proposes to adopt a rule or regulation, or an amendment thereto, it first communicates the proposal to the medical staff; when it adopts a policy or an amendment thereto, it communicates this to the medical staff.
Conflict Within Medical Staff

• Intent of EP 9 is to require communication between MEC and medical staff.
  – Hide-The-Ball administrations with tame or intimidated MEC have been known to effect major changes and limitations on self-governance by stealth.

• Communication process intended to avoid surprise attacks.

John D. Harwell, Attorney at Law
• Urgent changes may be retroactively approved.

– 11. (HAP) In cases of a documented need for an urgent amendment to rules and regulations necessary to comply with law or regulation, there is a process by which the medical executive committee, if delegated to do so by the voting members of the organized medical staff, may provisionally adopt and the governing body may provisionally approve an urgent amendment without prior notification of the medical staff. In such cases, the medical staff will be immediately notified by the medical executive committee. The medical staff has the opportunity for retrospective review of and comment on the provisional amendment. If there is no conflict between the organized medical staff and the medical executive committee, the provisional amendment stands. If there is conflict over the provisional amendment, the process for resolving conflict between the organized medical staff and the medical executive committee is implemented. If necessary, a revised amendment is then submitted to the governing body for action.
• EP 10. (HAP) The organized medical staff has a process which is implemented to manage conflict between the medical staff and the medical executive committee on issues including, but not limited to, proposals to adopt a rule, regulation, or policy or an amendment thereto.
Conflict Resolution Process Required

• Self Governing Medical Staff -
  – May have direct vote on issues;
    *(Do Bylaws allow for mail, email votes?)*
  – May eject MEC members;
  – May utilize conflict resolution services, mediators, counselors, etc.
Conflict Between Medical Staff and Governing Body

• MS.03.01.01: The organized medical staff oversees the quality of patient care, treatment, and services provided by practitioners privileged through the medical staff process. Rationale for MS.03.01.01:

  The organized medical staff is responsible for establishing and maintaining patient care standards and oversight of the quality of care, treatment, and services rendered by practitioners privileged through the medical staff process. The organized medical staff designates member licensed independent practitioners to provide oversight of care, treatment, and services rendered by practitioners privileged through the medical staff process. The organized medical staff recommends practitioners for privileges to perform medical histories and physical examinations; the governing body approves such privileges.

• LD.01.03.01: The governing body is ultimately accountable for the safety and quality of care, treatment, and services.
Conflict Between Medical Staff and Governing Body

- The tension between the Self Governing Medical Staff and the Governing Body often arises over the question of quality of care and the effectiveness of peer review.

  - “In a fight that could have wide-ranging implications, Los Angeles County supervisors are pushing to see confidential medical records used by county doctors to evaluate their peers to determine whether they have met accepted standards of care, saying they need the information to ensure patient safety and justify settling malpractice claims against the county. Molina said she learned from the board's experience closing troubled Martin Luther King Jr./Drew Medical Center not to trust medical staff to police themselves. She questioned whether there was enough state and county oversight of peer review.” LA Times, August 28, 2010.
Conflict Between Medical Staff and Governing Body

• California Law Defines the Relationship (Cal. Bus. & Prof. § 2282.5)
  
  – “The Legislature further finds and declares that the governing board of a hospital must act to protect the quality of medical care provided and the competency of its medical staff, and to ensure the responsible governance of the hospital in the event that the medical staff fails in any of its substantive duties or responsibilities. Nothing in this act shall be construed to undermine this authority. The final authority of the hospital governing board may be exercised for the responsible governance of the hospital or for the conduct of the business affairs of the hospital; however, that final authority may only be exercised with a reasonable and good faith belief that the medical staff has failed to fulfill a substantive duty or responsibility in matters pertaining to the quality of patient care. It would be a violation of the medical staff’s self-governance and independent rights for the hospital governing board to assume a duty or responsibility of the medical staff precipitously, unreasonably, or in bad faith.”
Conflict Between Medical Staff and Governing Body

• In Los Angeles, the statute has been widely interpreted by the County:
  – “In May, Supervisors Michael D. Antonovich and Gloria Molina sent a letter to John Schunhoff, interim chief of the county's Department of Health Services, requesting access to relevant peer review records at Olive View. They cited county counsel's advice that they had authority to review the documents ‘for the purposes of monitoring and oversight.’” LA Times, Op. Cit.
Conflict Between Medical Staff and Governing Body

- The Legislature Ducked:
  - “Finally, the Legislature finds and declares that the specific actions that would constitute bad faith or unreasonable action on the part of either the medical staff or hospital governing board will always be fact-specific and cannot be precisely described in statute. The provisions set forth in this act do nothing more than provide for the basic independent rights and responsibilities of a self-governing medical staff. Ultimately, a successful relationship between a hospital's medical staff and governing board depends on the mutual respect of each for the rights and responsibilities of the other.”
A Proposed Method

• Procedure for Governing Body to Determine in Reasonable and Good Faith That the Medical Staff Has Failed to Fulfil A Substantive Duty Or Responsibility in Matters Pertaining to the Quality of Patient Care in Peer Review.

• Medical Staff Leadership Review of Process

  – In the event the Governing Body should have concerns whether the medical staff has failed to fulfil a substantive duty or responsibility in matters pertaining to the quality of patient care in peer review, the Governing Body will send a request to the President of the medical staff for information regarding the peer review activities, with a specific physician or event (or events) identified.

  – The President, or his/her designee, shall meet with the Governing Body or its designee, describe the process involved in the peer review and respond to questions regarding the process and outcome of peer review. The President will report on such procedural events as:
    • Complaints received;
    • Whether investigations took place;
    • Whether cases were reviewed;
    • Whether departmental, section or MEC meetings considered the issues; and
    • The outcome of the peer review process.
A Proposed Method

- Review of Substance of Peer Review Activities

  - In the event that the Review of Process does not resolve the question of whether the Governing Body has concerns whether the medical staff has failed to fulfill a substantive duty or responsibility in matters pertaining to the quality of patient care in peer review, an independent review is proposed.

  - This independent review would be performed by an individual acceptable to both the Governing Body and the medical staff, shall be a physician licensed to practice medicine in California, shall have experience in peer review and shall obtain temporary medical staff privileges in the affected medical staff. The reviewer would be provided access to the medical staff peer review files.

  - The reviewer would then report to the Governing Body in the same manner and with the same limitations as the medical staff leadership. Specifically, the report would be limited to a discussion of the process, response to questions about the process and an opinion as to whether the medical staff has failed to fulfil a substantive duty or responsibility in matters pertaining to the quality of patient care in peer review.
A Proposed Method

• Actions by Governing Body in the Event Medical Staff Has Been Found to Have Failed to Fulfil A Substantive Duty Or Responsibility in Matters Pertaining to the Quality of Patient Care in Peer Review.

  – Should the medical staff be found by this process to have failed to fulfill a substantive duty or responsibility in matters pertaining to the quality of patient care in peer review, the Governing Body shall act in conformance with California Business and Professions Code Sections 809.05(c) and 2282.5 (Stats 2004 ch 848, Section 1(B)).
– (See Memorial Hospital of San Buenaventura vs. Community Memorial Hospital of San Buenaventura (Ventura County, California Sup. Ct., 2003.). In that case, the hospital administration and board of directors engaged in concerted activities to undermine the medical staff’s self-governance in the following ways:

• Took over the medical staff bank account.
• Tried to oust duly elected medical staff officers and replace them with administration appointees.
• Adopted a conflict of interest policy without medical staff consent or input.
• Unilaterally amended the medical staff bylaws.
• Bypassed the medical staff credentialing process.
• Refused to turn over charts for regular departmental peer review
Sometimes Its Just a Powergrb.

• In these cases, conflict resolution is by way of Warren Zevon:
  – “Send Lawyers, Guns and Money.”
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