Medical Staff Challenges for Counsel: Latest Developments
Best Practices for Addressing Peer Review, Medical Staff Bylaws, Hospital Board Governance, and Other Complex Issues

WEDNESDAY, NOVEMBER 7, 2012
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Elizabeth A. (Libby) Snelson, Esq., Legal Counsel for the Medical Staff, St. Paul, Minn.

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Key Issues for Today’s Medical Staffs

- Effective Peer Review
- Negotiated Medical Staff Bylaws
- Ready for Employed MDs
- Built–in Code of Conduct
- Active Hospital Board Relationship
- Independent Medical Staff Counsel
- Flexible Emergency Call Solutions
- Working Conflict Management
Best Practices for Effective Peer Review
Best Practices for Effective Peer Review

Maximize State Law Protections
Best Practices for Effective Peer Review

- Immunity
- Confidentiality
Immunity

“The members of a medical staff committee who conduct a retrospective medical review have absolute immunity from civil liability for the following:

1. Communications made in committee meetings.
2. Reports and recommendations made by the committee arising from deliberations by the committee to the governing board of the hospital or another duly authorized medical staff committee.”

IC 16-21-2-8
Confidentiality

All findings and conclusions, interviews, reports, studies, communications and statements procured by or furnished to the peer review committee in connection with a peer review are confidential …

ORS 441.055
Best Practices for Effective Peer Review

Meet HCQIA Notice & Hearing Standards
Best Practices for Effective Peer Review

- **Action notice**
  The physician is to be given notice stating
  (i). That a professional review action has been proposed to be taken against the physician;
  (ii). Reasons for the proposed action;
  (iii). That the physician has the right to request a hearing on the proposed action;
  (iv). Any time limit (of not less than 30 days) within which to request such a hearing, and a summary of rights in the hearing.

- **Hearing notice**
  If a hearing is requested, the physician must be given notice stating
  a. The place, time & date of the hearing, which date shall not be less than 30 days after the date of the notice; and
  b. A list of the witnesses (if any) expected to testify at the hearing on the part of the professional review body.

- **Hearing body**
  If a hearing is requested, the hearing shall be held (as determined by the hospital)
  i. Before an arbitrator mutually acceptable to the physician and the hospital;
  ii. Before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved; or
  iii. Before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.

- **Hearing rights**
  In the hearing, the physician involved has the right
  i. To representation by an attorney or other person of the physician's choice,
  ii. To have a record made of the proceeding, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,
  iii. To call, examine and cross-examine witnesses,
  iv. To present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
  v. To submit a written statement at the close of the hearing.

- **Hearing completion**
  Upon completion of the hearing, the physician has the right
  i. To receive the written recommendation of the hearing body, including a statement of the basis for the recommendation, and
  ii. To receive the written decision of the hospital, including a statement of the basis for the decision.
Best Practices for Effective Peer Review

COMMON OMISSIONS

- **Hearing body**
  ...Before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.

- **Hearing rights**
  In the hearing, the physician involved has the right
  i. To representation by an attorney or other person of the physician's choice,
  ii. To submit a written statement at the close of the hearing.
Best Practices for Effective Peer Review

Minimize Conflicts of Interest
Best Practices for Effective Peer Review

Screen Financial Affiliations
- With competitors
- With hospital
Best Practices for Effective Peer Review

CORRECTIVE ACTION
Best Practices for Effective Peer Review

Summary Suspension

LIMITED
Summary Suspension

☐ to prevent imminent danger to health *only*

☐ imposed by clinicians *only*
Best Practices for Effective Peer Review

Screen For Wellness. Repeat. Repeat. Repeat. Repeat.
Best Practices for Effective Peer Review

Keep PEER in PEER Review

1. OPPE/FPPE
2. SUPPLY DATA
3. GET OUT OF THE WAY
Best Practices for Negotiated Medical Staff Bylaws
Best Practices for Negotiated Medical Staff Bylaws

Negotiated
Current Compliance? Check these Revisions

- Joint Commission MS 01.01.01—2011
- Medicare Conditions of Participation – 2012
No “Organization and Functions” Manual

No “Fair Hearing Plan”

No “Credentialing Manual”
NO “COMPACTS”

NO “PHYSICIAN ADVISORY GROUP”

NO “SYSTEM LEADERSHIP COUNCIL”

NO GIMMICKS
Medical Staff Documents Inventory

1. Bylaws
2. Rules & Regulations
3. Medical Staff Policy

Establish order of subrogation
Best Practices for Negotiated Medical Staff Bylaws

Medical Staff Documents Adjuncts

1. Applications
2. Attestations
3. Agreements

Coordinate with Medical Staff Documents
Ready for Employed Physicians
Best Practices
Ready for Employed Physicians

- Uniform Qualifications
- Uniform Standards
- Eligible for Medical Staff Office
- Eligible to Vote
- Hearing/Appeals for Reportable Actions
- Job Protection against Retaliation
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MEDICAL STAFF BYLAWS
Built-in Code of Conduct
RECURRING PROBLEMS in CODES

- “Hospital Operations”
- “In or Outside of the Hospital”
- Defining Disruptive Behavior
  - “lying”
  - “immorality”
  - “actions that add to the work of the staff”
Current Compliance?

Check these Revisions

Joint Commission
LD 03.01.01
July 1, 2012
“The Joint Commission decided to use the term disruptive behavior because it was commonly used in the literature and recognized by most individuals in the workplace. However, Joint Commission staff have since learned that the term disruptive behavior is not viewed favorably by some health care practitioners and is even considered ambiguous for some audiences. For example, some physicians have expressed that strong advocacy for improvements in patient care can be characterized as disruptive behavior. Also, the phrase disruptive behavior may be used in the context of a care environment that has become temporarily unsettled by the behavior of a patient, a resident, or an individual served.”
Best Practices

Built-in Code of Conduct

- Eliminate “Disruptive”
  - Convert to “Climate of Safety”

- Build In To Bylaws
  - Coordinate with Corrective Action

- Eliminate Dueling Codes
  - Medical Staff members under Medical Staff Bylaws
Best Practices
Built-in Code of Conduct

Screen For Wellness. Repeat. Repeat. Repeat. Repeat.
Flexible Emergency Call Solutions
Hospitals must maintain a list of physicians, including specialists and sub-specialists, who are on call to evaluate and treat patients in the emergency department.

**HOWEVER...**

- EMTALA does not require physicians to serve on call.
SOLVING THE HOSPITAL’S EMTALA OBLIGATIONS

- Voluntary – Entire Staff
- Voluntary-Departmental
- Compensated Coverage
- Contracted Coverage
- Employed Coverage
- Coverage Category
- Mandatory Coverage
- Mandatory Coverage for Some Categories
- Department-Determined Coverage
- Years of Service/Age Exemption from Coverage
- Combination of One or More of The Above or Others
Active Hospital Board Relationship
Standard for the Industry

- **Element of Performance 8.** The governing body provides the organized medical staff with the opportunity to participate in governance.

- **Element of Performance 9.** The governing body provides the organized medical staff with the opportunity to be represented at governing body meetings (through attendance and voice) by one or more of its members, as selected by the organized medical staff.

- **Element of Performance 10.** Organized medical staff members are eligible for full membership in the hospital’s governance, unless legally prohibited.

*JC Standard LD 01.03.01*
Best Practices
Active Hospital Board Relationship

- Maintain Independent Majority
- Apply Conflict of Interest Policy
  - Single Policy
  - Uniformly Applied
- Medical Staff Selects
Condition of Participation Mandate
Each Board include 1 Medical Staff Member
WITHDRAWN
Independent Medical Staff Counsel
The medical staff’s right of self-governance includes “the ability to retain and be represented by independent legal counsel at the expense of the medical staff.”

California Business & Professions Code §2282.5(a)(5)
### BYLAWS DATABASE
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<table>
<thead>
<tr>
<th>Issue</th>
<th>Bylaws language</th>
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<tbody>
<tr>
<td>of dept</td>
<td>In the event the chair and vice-chair of any Division or the chief and vice-chief of any Section are not available, the President and President-elect of the Medical Staff can perform the duties of the chair or chief of any Division or Section.</td>
<td>Business &amp; Professions Code §2282.5(a)(5)</td>
</tr>
<tr>
<td>of tee</td>
<td>An absentee ballot may be used only for election or removal of officers of the Medical Staff. Such ballot must be cast via a signed and sealed envelope signed by the voting staff member or received in person from the voting staff member by the Medical Staff Office or Secretary of the Medical Staff prior to 5 p.m. on the last business day before the election.</td>
<td>Memorial</td>
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<td>of table</td>
<td>MEC is Account to the Board and to the Staff for the overall quality and efficiency of patient care in the Hospital</td>
<td>General</td>
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<td>modat</td>
<td>A recommendation by the MEC, or a decision by the Board, to deny Medical Staff membership, a department/section affiliation or Medical Staff category assignment, or particular clinical privileges, on the basis of the Medical Center's present inability, as supported by documented evidence, to provide adequate facilities or supportive services for the applicant and his/her patients, on the basis of patient care needs for additional Medical Staff members with the applicant's skill and training, and in either case, shall not entitle the applicant to the procedural rights as provided in Article 10.</td>
<td>Long Branch</td>
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**Independent Medical Staff Counsel**
Working Conflict Management
MS//MEC CONFLICT

“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.

…”

Joint Commission standard MS 01.01.01, Element of Performance 10

MS// BOARD CONFLICT

“Senior managers and leaders of the organized medical staff work with the governing body to develop an ongoing process for managing conflict among leadership groups.”

Joint Commission standard LD.02.04.01, Element of Performance 1
Best Practices
Working Conflict Management

- Place process in medical staff bylaws
- No Board Default
- Cannot supplant mandatory process of bylaws adoption & approval
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