Greeley Medical Staff Institute Symposium

Preconference Workshops

Greeley | MEDICAL STAFF INSTITUTE

Medical Staff Bylaws: How to create documents that are clear, compliant, and fair

Jonathan H. Burroughs, MD,MBA,FACPE, CMSL
The Greeley Company

Michael R. Callahan, Esq.
Katten Muchin Rosenman

How did we get here?

- Ernest Codman, MD, and the American College of Surgeons (1913)
- Minimum Standards for Hospitals (1919)
- Joint Commission on the Accreditation of Hospitals (1951)
- Medicare and the Conditions of Participation (COPs) (1965)
- Democracy to representative republic

Erosion of “the club”

- Audits (1970s)
- DRGs (1983)
- EMTALA (1986)
- Corporate compliance (1990s)
- Patient safety and practice variation (1990s)
- Managed care and capitation (1990s)

More erosion

- HIPAA (1996)
- Balanced Budget Act with sustainable growth rates (SGRs) (1997)
- Pay-for-performance (value-based reimbursement)
- Hospital-physician competition
- Withdrawal from the public sphere
- Advocacy vs. corporate model
- The splintering of medical staff's "self interest"

Why an “organized” medical staff?

- Oversee and improve the quality of care on behalf of the governing board
- Ensure accountability to the organization and community
- Required to participate in federal and state health reimbursement programs (Medicare/Medicaid)
- Required for accreditation or certification (Joint Commission, CMS)

Why bylaws?

- Binding contract/compact with the governing board to ensure mutual accountability
  - Bylaws as a contract is a double-edged sword
- Defines the purpose of the medical staff
- Specifies the duties and obligations of members and leaders

Why bylaws? (cont.)

- Enhance quality through good credentialing, privileging, and peer review processes
- Set expectations for professional conduct
- Define relationship between organized medical staff and medical executive committee (MEC)

Bylaws components

- Purpose
- Organization name
- Appointment/reappointment process
- Medical staff categories
- Medical staff officers and leaders

Bylaws components (cont.)

- Organizational/committee structure
- Investigations and corrective action
- Fair hearings
- Meetings, quorum, attendance
- Method of adoption/modification
- Confidentiality/immunity provisions

Commonly encountered bylaws weaknesses:

- Anti-trust issues
  - MEC or clinical department taking final action without independent board decision
- Lack of due process for application
  - Previously denied
- Performing consultations without clinical privileges
  - Honorary staff
- Department chair determining qualifications and competence of staff/personnel

Weaknesses (cont.)

- Department shall determine “its own criteria for clinical privileges” (anti-trust)
- Granting privileges within a department without oversight
- Corrective action by MEC without board approval

Weaknesses (cont.)

- HCQIA issues
  - Not offering due process for summary suspension or other potential triggers to state licensing board or National Practitioner Data Bank
- Unnecessary triggers for fair hearing
- Corrective action for potential impairment and peer review

Conflict of interest

- Duty to disclose (not recuse)
  - What information is to be disclosed?
  - What actions are taken if there is a conflict?
  - Can information be used to screen out direct competitors?
- Duty of “body” to appropriately manage

- Mitigate bias and economic/political conflict

Member’s rights

- Be realistic
- Don’t implement if you cannot enforce
- Leaders vs. busy practitioners
- Right to appear before MEC, challenge MEC rule/policy, recall an officer/leader
- Vote
- Serve on committees

Medical staff prerogatives/rights

- Fair process
- Audience with peer review committees and MEC
- Initiate a recall election of a leader
- Call a special meeting of the medical staff
- Challenge a rule/policy
- Call department meetings
- Give and remove authority of MEC
- Bypass MEC and make bylaws/rules/policy recommendations directly to the board

Mission/purpose statement

- Make it short and sweet
- Don’t promise anything you cannot deliver!
- Incorporate Joint Commission language

Membership

- Licensed independent practitioners
  - Physicians
  - Podiatrists
  - Dentists
  - Oral/maxillofacial surgeons
  - Psychologists
  - Advanced practice providers
- Depends on state law limitations

Membership requirements

- Criteria for membership
  - Training, background, experience, current clinical competency, professional conduct, ethics, health status
- Optional: “unrestricted license,” ABMS/AOA boards, certification, and re-certification

Membership requirements (cont.)

- ED call
- Maintain required insurance
- Complete records
- Report certain events

Medical staff categories

- Active
- Associate
- Honorary
- Affiliate
  - Membership but no clinical privileges

Categories (cont.)

- Miscellaneous
  - Consulting, courtesy, provisional, managed care, non-physician
    - But how do you measure quality if there's no activity?
    - Do you require utilization standards as a condition of reappointment?
- Beware of loop holes for call requirements!
- Credentialing vs. privileging
  - FPPE and OPPE requirements

Medical staff officers

- Officers
  - President, president-elect, secretary/treasurer, past president
- Chairs
  - Department
  - Credentialing committee
  - Peer review committee
    - Elected or appointed?
- Term/duties of office

Medical staff officers (cont.)

- Qualifications/selection criteria
- Nomination committee
- Election of officers
  - Elected/appointed/ratified by medical staff or board?

Leadership development

- Leadership succession planning
  - Background, training, and experience
- Supportive resources
  - Compensation, administrative support, protected time and practice, ongoing training

Credentialing and privileging

- Credentials committee succession plan
  - Who serves on your credentials committee?
  - What about a board member?
- Eliminate unnecessary “denials”
  - Pre-application letter with comprehensive eligibility requirements for membership and privileges
- Core privileging, competency clusters, or laundry list?

Pre-application letter

- Criteria for completed application
- Criteria for eligibility for membership
- Criteria for eligibility for privileges

Pre-application letter (cont.)

- Grounds for termination of the application process
  - Inaccuracy, omission, misrepresentation, etc.
- Use as a screening device
  - No application for closed departments
  - No application if eligibility criteria are not met
  - No application if purpose is to join a managed care plan
- No hearing if a pre-application is not completed due to ineligibility

Special issues

- Low-volume/no-volume
- New privileges/technology
- Advanced practice professionals
- Telemedicine
- Credentialing by proxy with privileges
- Contracted services

Special issues (cont.)

- Emergency privileges
- Leave of absence
- Aging physicians
- Employed physicians
- Direct competitors
- Evaluation of profiling data,
  - Morbidity, mortality, outcomes, and utilization information

Overall committee structure

- MEC
  - Must have
- Credentials, peer review
  - Should have
- Cancer, trauma, CME, IRB
  - May need to have
- PIC= pharmacy & therapeutics, IC, ethics, medical records, OR, UR, RM

Committee structure (cont.)

- Ad hoc = bylaws, physician health, judicial
- Dispute resolution committee
  - When organized medical staff disagrees with MEC (MS.01.01.01)
  - As required under Joint Commission leadership standards (at least in corporate bylaws)

Medical staff departments vs. clinical services

- Note Joint Commission medical staff department director responsibilities!
- Who will do this job?
- No longer a political appointment
- Create a leadership structure that is realistic and sustainable
- Paid or not and by whom?
- Should there be eligibility criteria?
  - No pending quality investigation, no direct competition, no officer position at another medical staff?

MEC

Required by Joint Commission to meet accreditation standards:

“The organized medical staff delegates authority to the MEC to carry out medical staff responsibilities.”

MS.02.01.01

MEC

- Key roles
  - Governance, recommend appointment, monitor and improve quality
- Members
  - Department chairs, at large, officers, specialty balance, management as ex officio non-voting
- Optimum size
  - 7-12 members
- Represents the interests of the entire medical staff, not political constituencies!
- New MS.01.01.01 standard

Investigations (clear-line definition)

- Carried out by organization, not an individual
- “Investigation” is a NPDB buzzword regarding reportability
- Inform individual and give him/her the opportunity to respond
- Address concerns about competence or conduct
- Precursor to professional review action
- Clearly specified in bylaws
  - When, by whom, what grounds, documentation, obligation to report, difference from routine peer review

Corrective actions/fair hearing

- Eliminate unnecessary triggers
  - Automatic relinquishment, monitoring, proctoring, mandatory consultations, and other actions that are not reportable to the NPDB or state
- Precautionary suspension prior to summary suspension but hearing still required
- Administrative “time outs”
  - Behavioral issues, failure to comply with policies, etc.
- Pre-hearing conference
  - Maintains collegial environment and reduces red tape
- State and federal requirements

Corrective actions/fair hearing (cont.)

- Consider language that treats hearing as an “intra-professional conference” to de-legalize the process
- Consider limiting the role of legal counsel to that of advisors
- Summary suspensions should be limited to those situations where there is an imminent threat to patients, employees, and/or the general public
- Consider using hearing officers

Criteria for peer review: bylaws or procedure manual

- External
  - Lack of expertise, irreconcilable conflict, potential governance action/fair hearing, irreconcilable difference of opinion, audit
  - Physicians should have opportunity to review and comment on any external review
- Internal
  - Sentinel events, critical threshold for rates and rules

Precautionary suspensions

- By whom
  - Chief of staff, CEO, department chairs?
- Not reportable unless >30 days
- Concern about competence or conduct
- Result from professional review action
- Provider resigns while suspended (under investigation)
- Medical staff should grant hearing/appeal rights unless waived
- Consider a “voluntary relinquishment” pending review

Administrative suspension

- Often called “automatic relinquishment”

- Common triggers
  - Medical records
  - Lack of current DEA/liability policy/license
  - Sanction by OIG
  - Failure to pay dues/maintain certification/attend special appearance
  - Felony indictment/conviction

Administrative suspension (cont.)

- Hearing or no hearing? Limited scope is given hearing rights (i.e., did you complete your records?)

Avoid unnecessary triggers for fair hearings

- Failure to meet eligibility for privileges or membership
- Administrative lapses
- Failure to complete an application or produce all required information
- Misrepresentation on an application
- Denial of LOA
- Closure of specialty opening
- Proctoring/monitory/consultations

Avoid unnecessary triggers for fair hearings (cont.)

- Voluntarily reduce privileges
- Expiration of membership/privileges
- Grant of conditional appointment for a limited period
- Denied application unless reportable
- Denial or termination of ED call
- Denial of requested privileges

Hearings

- Adequate notice and circumstances to trigger
  - List of witnesses
- Right to review and have copies of all information relied on by medical staff/hospital when imposing corrective action
- Who appoints the hearing committee?
- Consider using hearing officer
- Waiver of hearing
- Impartial participants
  - Arbitrator, hearing officer, hearing panel

Hearings (cont.)

- Time frames
- Burden of proof required
  - Give right to abject preponderance on substantial evidence?
- Presentation and admissibility of evidence
  - Rule of relevance
- Role of attorneys
- Consider de-legalizing the hearing process
- Committee should issue findings and explanation of decision

Appellate review by board

- Mandated by Joint Commission (MS.10.01.01)
- Appeal right should be given to all parties
- Limited to new or relevant evidence; otherwise focus on fairness of hearing and compliance with bylaws
- No report to NPDB until all due process remedies are exhausted
- Should affirm hearing committee recommendation unless “arbitrary and capricious”

Peer review (OPPE) manual

- Peer review charter/policy
- Performance framework
- Procedure for creating measurable indicators with benchmarks from performance expectations
- Peer review procedure
- Performance improvement plan procedure
- Triggers and criteria for FPPE

Quorum/attendance/meetings

- How often?
  - MEC, credentials, peer review, PIC, and clinical departments often
  - Medical staff quarterly
  - Ad hoc infrequently as needed
- Quorum
  - MEC, credentials, peer review = some
  - Medical staff/departments = present and voting with proxy

Quorum/attendance/meetings (cont.)

- Attendance
  - MEC, credentials, peer review = 50-75%
  - Medical staff/departments = ?
- Voting process
  - Proxy or not for general meetings?
  - Secret ballots?

Amendment process

- Bylaw committee, MEC, medical staff, board of trustees
  - Must pass by full medical staff
- Voting process
  - 20-25% required to vote “no”

Operational issues

- Confidentiality/immunity/releases
- Special appearance requirement
- Contract?
- Affect of Patient Safety Act and PSOs

Corporate negligence

- Any deviation in practice from that detailed in the bylaws, rules, regulations and policies; accreditation standards; peer practices; Medicare Conditions of Participation; clinical pathway; etc.

Critical principle

“FORM FOLLOWS FUNCTION.”

(Horatio Greenough/Louis Sullivan)

- Constitutional document with associated manuals
  - Credentials, peer review, fair hearing, etc.
  - MS.01.01.01

Communication of change strategy

- MEC input
  - In sequence or as a package?
- Full medical staff input
  - Town hall meeting?
- Newsletter from chair?
- Individual discussions with covert leaders?

Questions?

Thank you for joining us!