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Key Bylaw Provisions in an Era
of Health Care Reform

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Overview

- Medical Staff Bylaws are the primary governance document for the Medical Staff
- Bylaws must contain key provisions in order to comply with:
 - Medicare Conditions of Participation
 - Accreditation Standards
 - New York State Laws
 - Health Care Quality Improvement Act

Overview (cont'd)

- Bylaws are viewed as a “standard of care” by the courts
 - Must “substantially comply” with the Bylaws in credentialing and peer review actions and fair hearings.
 - A breach of the Bylaws could be viewed as a breach of contract.
 - Following the Bylaws is important in order to avoid or limit liability exposure under Doctrines of Corporate Negligence and Respondeat Superior (employer/employee).

Overview (cont'd)

- Bylaw amendments must follow a very deliberate process and cannot be unilaterally revised by either the Medical Staff or the Board of Directors.

Key Bylaw Provisions

- Definitions
 - Peer Review
 - Peer Review Committee
 - Patient Safety Evaluation System
 - Patient Safety Work Product (See Example Provisions)
- Qualifications/Responsibilities
 - Physicians have no legal right to Medical Staff membership

Key Bylaw Provisions (cont'd)

- Courts do not review initial application disputes
- ED coverage requirement
- Compliance with Medical Staff and Hospital Bylaws, Rules, Regs & Policies
- Must provide back-up coverage
- Utilization requirement

Key Bylaw Provisions (cont'd)

- Pre-Application Process
 - If you have one, you should describe in the Bylaws.
 - Offers a way to screen out unqualified applicants and to implement needs assessment or Medical Staff development plans.
 - Decision to not give an application or to deny an application should never be vested in a physician or Medical Staff Committee – they can only make recommendations.

Key Bylaw Provisions (cont'd)

- Appointment/Reappointment Process
 - Denial of appointment should not trigger hearing process unless decision is reportable to Data Bank.
 - Applicant has burden of providing any and all information which is needed to process appointment/reappointment. If not provided, application is considered withdrawn and no hearing is provided.

Key Bylaw Provisions (cont'd)

- Denial/termination based on false, misleading or incomplete information is reportable to the Data Bank.
- Consider using absolute waiver requirement in application and the Bylaws, or at least refer to “wilful and wanton” standard of immunity protections (see example language).

Key Bylaw Provisions (cont'd)

- Must update information during the pendency of the application.
- Should include requirement to disclose any of the following events within five days as required under Illinois law.
 - Loss of license
 - Conviction of a felony
 - Medicare/Medicaid sanction

Key Bylaw Provisions (cont'd)

- Loss or reduction of malpractice coverage
- Termination, suspension or reduction of medical staff membership/clinical privilege
- Should require quality scorecard from other facilities and authorize sharing (also within a system).
- Consider requirement to disclose whether applicant is employed, under contract, has a financial or economic interest, or is a Medical Staff officer, Department Chair, or member of the Board of Directors of a competing facility.

Key Bylaw Provisions (cont'd)

- Remedial (Corrective) Action
 - Consider adding a “collegial action” section to promote resolution of quality and behavioral issues before needing an investigation or seeking to impose disciplinary action (See example provision).
 - Clearly distinguish between collegial/peer review action from the “investigation” process.

Key Bylaw Provisions (cont'd)

- Resignation during peer review process is not reportable but resignation during an investigation arguably is reportable
- Describe what conduct can trigger remedial action including violation of Medical Staff/Hospital Bylaws, rules, regs and policies, including Code of Conduct.

Key Bylaw Provisions (cont'd)

- Allow physician to receive any and all information on which peer review/investigation process is requested in advance of a direct meeting with Department Chair/Committee.
- “Reasonable suspicion” language for impaired physician. Can be disciplined if refuses to be evaluated.

Summary Suspensions

- Summary suspensions should rarely be utilized.
 - Physician's continued practice constitutes an "immediate danger" to public, patients and employees.
 - Decision must be based on actual documentation or other reasonable information which exists at the time the suspension is imposed. (See example provision)

Summary Suspensions (cont'd)

- Suspensions over 30 days are reportable.

Precautionary Suspension

- Get rid of this provision if in your Bylaws.

Fair Hearing Procedures

- Consider limiting hearings to actions which are reportable, i.e., suspensions, terminations, involuntary non-reappointment, involuntary reductions in clinical privileges and mandatory consultations requiring prior approval.
- Where there is a hearing, the prospect for subsequent litigation increases exponentially.

Fair Hearing Procedures (cont'd)

- Reduce role and legal counsel to acting as an advisor but cannot direct or cross-examine witnesses.
- Use hearing officers.
- Burden of proof should be reasonable. A standard which requires affirmance of adverse decision if there is any evidence to support it could be considered unfair and subject to reversal by a court of law.

Fair Hearing Procedures (cont'd)

- Scope of review is whether hospital substantially complied with its bylaws and whether the process was fair.
- Keep in mind HCQIA standards.
- Both sides should be allowed to appeal to the Board.

Exclusive contracts

- Should include a section in the Bylaws regarding ability to use exclusive contracts and waiver of hearing rights if waiver is included in the agreement.
- Provision should set forth a physician's hearing rights if being terminated by an exclusive contract which is being utilized for the first time.
- Should also reference the legal requirement that the hospital must consult with the Medical Staff before implementing an exclusive contract for the first time but Medical Staff cannot veto.

Physician Employment

- Hospitals are employing more physicians.
- Important to determine the impact of employment and termination on a physician's rights and privileges as Medical Staff members.
- Bylaws should include a provision which states that if there is a conflict between the Bylaws and the contract, the contract prevails.

Physician Employment (Cont'd)

- Employed physicians should be able to serve as Department Chairs, Committee Chairs, Medical Staff Officers and Board members.
- If employed, and physician is terminated for quality of care reasons, will the Hospital report him or her?
- If reported but no hearing is provided because these rights are waived under the contract, you will not be able to claim HCQIA immunity protection or arguably the protections under the Licensing Act.

Immunity Provision

- Should include an absolute immunity provision in Bylaws for any adverse actions taken and a requirement to exhaust all administrative remedies.
- Courts have upheld these provisions.

Urgent Amendment Provision

- Joint Commission standard MS.01.01.01 standard allows the MEC and Hospital to adopt an urgent amendment to rules, regs or policies, but not the Bylaws, if required to comply with a law or regulation.



How to Manage an Investigation and Fair Hearing

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How to Manage an Investigation and Fair Hearing

- Do's and Don'ts of Effective Investigations and Corrective Action
- “Investigations” connote the need to review cases, a pattern of care, or unacceptable behavior in more depth because identified issues were not sufficiently addressed or resolved through the normal process.
 - Keep in mind that under Data Bank reporting obligations, a physician who resigns or relinquishes privileges while “under investigation” or “in lieu of corrective action” must be reported to the Data Bank.

How to Manage an Investigation and Fair Hearing (cont'd)

- An investigation is not terminated until final action is taken. Therefore, Bylaws should clearly describe what is truly considered an investigation as opposed to normal, preliminary peer review.
- Better to use an independent or ad hoc investigating committee when corrective action is requested, instead of full MEC, that can be appointed by either the Department Chair or the MEC.
 - Need at least one or more members on Committee who are of the same specialty and, ideally, are not a direct competitor.
 - Use physicians who are knowledgeable, respected and who will “do the job”.

How to Manage an Investigation and Fair Hearing (cont'd)

- Prior to Committee's recommendation, all relevant information should be shared with physician and physician should have the right to an informal meeting with Committee to discuss identified problems.
- Meetings are informal – attorneys not allowed.
- Committee should prepare a report with findings to support recommendation to the MEC – physician's comments should be reflected in report.
- If some kind of remedial action is recommended, try to find a balance between protecting patients while avoiding decisions that will trigger hearing rights.

How to Manage an Investigation and Fair Hearing (cont'd)

- If using outside reviewers, make sure you develop paper trail to maximize confidentiality protections under state peer review statutes. Also, reviewers should not make any recommendations on what remedial action, if any, to take.
- Should attempt to perfectly comply with Bylaw procedures although only “substantial compliance” is required.
- Evaluation of physician should be based on existing policies, criteria and other known and communicated standards.

How to Manage an Investigation and Fair Hearing (cont'd)

- Investigation and recommendations need to be fair, reasonable and consistent. Questions to ask include “how did we handle these issues or problems in the past?” and “do we have enough information on which to base an informed decision?”
- Some hospitals and medical staffs attempt to get the adversely effected physician to come up with an acceptable action plan which they must follow.

How to Manage an Investigation and Fair Hearing (cont'd)

- Strategies for Avoiding the Need for a Hearing
 - Become familiar with what recommendations do and do not trigger a physician's hearing rights under the Bylaws.
 - As a general matter, try and limit hearings to decisions which, if final, require a report to Data Bank or to the State, i.e., summary suspensions, terminations, involuntary reductions in clinical privileges and mandatory consultations requiring prior approval.

How to Manage an Investigation and Fair Hearing (cont'd)

- Bylaws should identify what kinds of remedial measures can be taken, such as monitoring, proctoring, re-education, OPPE, FPPE, probation, that will not result in a hearing.
- These lesser remedial measures should be widely used and encouraged as a means of working with a physician to get them back on track.
 - Authority to utilize these measures should be vested in Department and Committee Chairs as a way to avoid formal investigations or requests for corrective action.

How to Manage an Investigation and Fair Hearing (cont'd)

- Sends a more positive message to the Medical Staff and is more consistent with “just culture” approach under Patient Safety Act and Patient Safety Organizations (“PSOs”).
- Consider informal one-on-one discussion with physician.
- Utilization of these measures will improve quality, limit denials of responsibility and finger pointing and will limit the need for hearings.
- “Doing nothing” is not a proper response. Doing something also will help defend against corporate negligence claims.

How to Manage an Investigation and Fair Hearing (cont'd)

- If efforts to work with a physician ultimately fail, you will have an excellent paper trail of being reasonable in the event there is a hearing and subsequent litigation.
- If you expect that an investigation is likely to lead to some reportable action but an investigation or corrective action has not yet been requested, consider approaching physician about this possibility as a professional courtesy. Resignation at this point in time is not reportable.

How to Manage an Investigation and Fair Hearing (cont'd)

- Keys to an Effective Fair Hearing
 - Remember, your ultimate audience may be a judge. The hearing procedures and administrative record should be clear enough for Board members and judges to understand.
 - Follow your Bylaw and Hearing Procedures.

How to Manage an Investigation and Fair Hearing (cont'd)

- Bend over backwards to reasonably accommodate the physician even if this means giving them more rights than is provided under the Bylaws.
 - Scope of court's jurisdiction generally is whether a hospital has substantially complied with its Bylaws and if the proceedings were fair.

How to Manage an Investigation and Fair Hearing (cont'd)

- Make sure that physician is given copies of all minutes, records and documentation on which the adverse decision is based.
 - You are not required to respond to interrogatories or a request to produce documents – this is not a court hearing.
 - Do not provide confidential peer review information about other physicians.

How to Manage an Investigation and Fair Hearing (cont'd)

- Make sure you have a well qualified physician representative to present the case on behalf of the Medical Staff.
 - It is preferable to have someone who has been actively involved in the investigation and is of the same or similar specialty.
 - Person should be well qualified, respected and able to engage with the physician and the Hearing Committee.

How to Manage an Investigation and Fair Hearing (cont'd)

- Another key issue is the composition of the Hearing Committee.
 - No direct competitors.
 - Try to get at least one member in same or similar specialty.
 - Try to avoid members who are employed by or have a contract with the hospital in order to avoid allegation of conflict of interest.
 - Consider adding someone who might be seen as friendly to or supportive of the physician.

How to Manage an Investigation and Fair Hearing (cont'd)

- Give physician an opportunity to object to Hearing Committee members but only consider removal if based on credible information identifying a conflict or other reasonable basis for removal.
- Identify key witnesses who can:
 - Explain procedures followed in reaching adverse recommendation and how these steps complied with Bylaws and related policies.

How to Manage an Investigation and Fair Hearing (cont'd)

- ❖ If hospital varied from these procedures, explain why.
 - ❖ Make sure to utilize documents in the administrative record.
- Review the medical records/policies at issue to explain the substantive basis for the adverse recommendation.

How to Manage an Investigation and Fair Hearing (cont'd)

- Explain the nature of the discussions during the relevant Department and/or Committee meetings at which the recommendation was made so that Hearing Committee can understand the rationale.
- Role of Presenter/Legal Counsel
 - Must review Bylaws to decide whether legal counsel for Medical Staff and the physician is limited to acting as an advisor or if they will be allowed to ask direct and cross examination questions of the witnesses.

How to Manage an Investigation and Fair Hearing (cont'd)

- Hearings should be treated as an intraprofessional conference and not a three ring adversarial circus and therefore you should consider limiting the role of counsel with the option of expanding based on Hearing Committee's discretion.
- The less expansive the role given to legal counsel, the more time needs to be spent preparing the presenter and scripting opening and closing statements and direct and cross examination questions.

How to Manage an Investigation and Fair Hearing (cont'd)

- Outside counsel should represent Medical Staff. In-house counsel should represent Hearing Committee on procedural issues.
- Bylaw procedures need to follow HCQIA and state requirements.

How to Manage an Investigation and Fair Hearing (cont'd)

- Need to make sure administrative record is complete and includes all relevant information that has been collected and introduced as part of the investigation, corrective action and hearing process.
 - Goal should be to introduce record as only documents which court needs to review in order to determine if Bylaws were followed and proceedings were fair.
 - Should have court reporter transcribe the hearing.

How to Manage an Investigation and Fair Hearing (cont'd)

- Consider use of independent hearing officer to run the meeting and make procedural rulings – is not typically a decision maker.
 - Needs to have health care experience as well as having served as a hearing officer in other matters.
 - Avoid arbitrations.
- All procedural issues or disputes should be addressed and ruled on prior to commencement of hearing – helps hearing to proceed more smoothly.

How to Manage an Investigation and Fair Hearing (cont'd)

- Should allow each side to submit a pre-hearing and/or post-hearing memo in support of their respective arguments and positions.
- Should impress on Hearing Committee members the need to read materials in advance.
- Hearing Committee can ask questions during the proceedings but should avoid comments or criticisms which reflect member's opinion or position about the merits of either party.

How to Manage an Investigation and Fair Hearing (cont'd)

- Hearing Committee should meet in executive session to deliberate and then must prepare a report which reviews the requested corrective action and then decide whether to affirm, modify or reject the recommendation. Report should include findings to support the recommendation.



Can I Be Sued?

Legal Protections for Medical Staff
Leaders Who Make the Tough Calls

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Can I Be Sued?

Areas of Risk

- Denial of applications
- Denial of appointments
- Denial of reappointments

Can I Be Sued?

- Imposition/recommendation of a reportable disciplinary action
 - Summary suspension
 - Suspension
 - Termination
 - Denial of appointment/reappointment
 - Reduction in clinical privileges/membership

Can I Be Sued?

- Mandatory consultations requiring prior approval
- Resignations in lieu of corrective action
- Resignations while under investigation
- Reporting physician impairment
- Imposition of non-reportable remedial actions

Can I Be Sued?

Types of Legal Claims Filed

- Breach of contract
- Violation of bylaws
- Antitrust (group boycott, monopoly)
- Discrimination (age, race, sex, religion, ADA)

Can I Be Sued?

- Tortious interference
- Infliction of emotional distress
- Defamation
- Fraud/conspiracy
- Interference with physician/patient relationship
- RICO

Can I Be Sued?

Legal Defenses and Protections

- Rule of non-review
 - Courts do not exercise jurisdiction over the denial of initial applications by private hospitals
- Courts defer to judgment of medical staff and hospital
- No constitutional, legal or other right to obtain medical staff membership and privileges

Can I Be Sued?

- Substantial compliance with bylaws
- Proceedings were fair
- Hospital has fiduciary obligations to make reasonable decisions based on quality and financial considerations
- Disciplinary actions were based on compliance with state licensing, federal COPs, accreditation and other regulatory requirements

Can I Be Sued?

- Courts have ruled that independent physicians are not employees under Title VII
- Only one or two federal circuit court has held that independent physicians can seek ADA protection
- In most jurisdictions, medical staff leaders and committees which only make recommendations subject to final review and decision of the board, are seen as agents of the hospital and therefore are unable to conspire or enter into group boycotts for antitrust purposes

Can I Be Sued?

- State immunity protections
 - Most states provide that if action challenged qualifies as peer review activities, as defined under the statute, then all peer review participants are immune from civil liability unless conduct was made “in bad faith or with actual malice” or was “willful and wanton”
 - These standards are very difficult to prove

Can I Be Sued?

- HCQIA immunity protections
 - Peer review actions taken in compliance with hearing and other HCQIA requirements are immune from civil liability
- Most medical staff bylaws contain an immunity provision applied to all p activity which courts have relied on to dismiss lawsuits HCQIA immunity protections
 - Although initially applicable only in federal proceedings, most states opted into the HCQIA protection which therefore allows a hospital to assert both immunity protections

Can I Be Sued?

- State confidentiality statutes
 - State peer review confidentiality protections have an immunity – like protection because peer review information is not subject to discovery and is not admissible into evidence
 - The effect is to force a court to dismiss state claims because the physician cannot introduce any proof
 - Only applies to state claims and not federal claims

Can I Be Sued?

- Patient Safety Act/Patient Safety Organization
 - Provides even broader confidentiality and privilege protections in both state and federal proceedings
- Existing Case Law
 - 99% or more of all cases filed in state or federal court or dismissed on a motion to dismiss or motion for summary judgment (Poliner case)
 - Hospitals have insurance protections for peer review and similar activity which covers all peer review participants

Can I Be Sued?

- Defensive Measures to Consider in Order to Avoid/Limit Risk
 - Follow your bylaws, rules, regs and policies
 - Decisions to deny an application should be administrative
 - Department chairs or other practicing physicians or a medical staff committee should never be allowed to veto or unilaterally decide whether or not a physician gets an application

Can I Be Sued?

- Physician and medical staff committee are best protected when only making recommendations rather than a final decision
- Use absolute waiver of liability form for pre-applications and applications for appointment and reappointment
- Incorporate into bylaws an immunity provision for pre-app, appointment and reappointment procedures and decisions which include obligation of physician to pay hospital's legal fees

Can I Be Sued?

- Peer review procedures should:
 - Comply with legal and accreditation requirements
 - Allow for early involvement of physician if issues/problems are identified so as to avoid repeated behavior
 - Comply with OPPE/FPPE
 - Try to resolve issues at lowest level possible or in a one-on-one meeting with Department/Committee Chair

Can I Be Sued?

- Document/Document/Document
- If problem not resolved initially, emphasis should be on use of lesser remedial measures by Department/ Committee Chairs which are not reportable to state or Data Bank such as:
 - Monitoring
 - Direct observation
 - Proctoring
 - Retrospective/concurrent reviews

Can I Be Sued?

- Mandatory consultations that do not require prior approval
- 29 day suspensions
- Re-education/re-training
- Voluntary relinquishment of privileges
- Rarely, if ever, should you impose a summary suspension
- If possible, try to resolve prior to imposition of formal investigation or corrective action because resignation at this point in the process is reportable to Data Bank

Can I Be Sued?

- Consider use of outside reviewers when
 - There is a clear internal conflict of interest
 - No real internal experts to review
 - Want to be abundantly fair
 - Physician should be allowed to review and comment on report

Can I Be Sued?

- Should make sure hearing procedures comply with state law and HCQIA
- Bend over backwards to be fair and accommodating to physician

Can I Be Sued?

- Burden of proof at the hearing stage should not be whether recommendation leading to a hearing is arbitrary or capricious
 - Instead, use a “preponderance of the evidence” or a “substantial weights of the evidence” standard which is more fair
 - Hearing Committee decisions should include specific findings and conclusions to support the recommendation

Can I Be Sued?

- Know the language of your confidentiality and immunity statutes and comply with same
- Seek assistance of in-house or outside legal counsel
- Avoid allowing physicians with conflicts of interest to participate
- Make sure that Board of Directors makes the final decision
- Make sure your actions are covered by hospital's insurance including a decision which holds a peer review participant individually liable for damages

Can I Be Sued?

- Always consider allowing a physician to resign anywhere along the process
- Get a covenant not to sue
- Resignation is likely reportable but can negotiate Data Bank language