The Joint Commission

Date: August 30, 2007

To: AHLA Members

From: Harold J. Bressler, General Counsel, The Joint Commission

Subject: Preliminary Response to the Open Letter

I have reviewed the document titled "An Open Letter to the Joint Commission Regarding MS.1.20" dated August 22, 2007 ("the Open Letter") signed by an eminent group of American health care lawyers for whom I have great respect. For reasons that I think will be clear from the discussion below, at this time, I am not responding in detail to that letter. However, it is appropriate for me here to make certain brief comments focused on the context of the standard and on certain assumptions I believe are either explicit or implicit in the Open Letter. Also, let me say upfront that The Joint Commission has scheduled a national audio conference with its accredited organizations on this subject on October 24, and we want to make sure we miss none of your issues during that call. Dr. Paul Schyve, The Joint Commission's Senior Vice President, and I will participate in the September 5 AHLA call on MS.1.20, but only to a limited degree. We see the AHLA faculty and members primarily engaging in that call, and our role primarily to listen.

With regard to context and assumptions, first please understand MS.1.20 must be considered in the context of and as part of the new comprehensive leadership standards also going into effect in 2009. Those standards deal with roles, responsibilities, and accountabilities of the leadership entities of the hospital (the governing body, organized medical staff and management) to each other and patients with regard to quality and safety. They do not undercut the legal authority of the governing body. They do contemplate joint efforts and good working relationships to enhance quality and safety. They also deal with conflict management.

Second, pursuant to very explicit Joint Commission Board policy and the nature of the Joint Commission, itself, all Joint Commission standards are promulgated, interpreted, and applied solely for purposes of helping enhance quality and safety. There should be no assumption otherwise. Thus, MS.1.20, just as is the case of the leadership standards and all other standards, has been promulgated with the view that it will help improve quality and safety. The question has been raised as to what problem it is intended to cure. Perhaps the better question is whether organized medical staffs are working across this country with governing bodies and management in the best ways to enhance quality and safety as contemplated by not only Joint Commission standards but also law and regulation.

I know that one or more authors of the Open Letter (and I will not identify that person or persons) believe the historical perspective reflected in those standards, laws, and regulations of the role of an organized medical staff is unrealistic. But putting that view aside, MS.1.20 and the leadership standards, in part, put a focus on what organized medical staffs are or are not doing with regard to their organized quality and safety role, as opposed to any other interests the members of those medical staffs might have unrelated to quality or safety. Those other interests are, of course, not the subject of Joint Commission standards, nor with what the relevant laws and regulations are concerned.

The discussions generated by MS.1.20 and the leadership standards should be directed at analysis of quality and safety enhancing mechanisms and activity. I hope you will help encourage discussion along those lines, even if you also lead discussion on other issues about which you have concern. I question whether the authors of the Open Letter think there is no need for discussion of these quality and safety enhancing issues as they relate to the relationship of the organized medical staff and governing body, even if in a given hospital there is no confrontational controversy.

Third, the Open Letter appears to contain an implicit assumption that the Joint Commission may interpret and apply MS.1.20 in a highly prescriptive manner, as opposed to recognizing the need, as is the case with most Joint Commission standards, for considerable flexibility consistent with the purpose of the standard. Such flexibility in deferring to reasonable judgments by accredited organizations would also contemplate The Joint Commission empathetically dealing with the resource expenditure issue.

Fourth, there is the assumption that MS.1.20 undercuts the effectiveness of the Medical Executive Committee, contrary to quality and safety needs, by recognizing that the whole organized medical staff could go to the Governing Body and ask it to reconsider any previous delegation of authority to the MEC jointly approved by the organized medical staff and the Governing Body. I will be very interested in hearing on the September 5 call more about how that is so.

Fifth, as an additional context point, the final MS.1.20 was influenced to some degree by the CMS Conditions of Participation. You might want to look at those.

Finally, I want to stress, again, my respect for the authors of the Open Letter and my awareness of their vast practical, first-hand experience in the field on these issues. I think they and you can provide advice to help The Joint Commission apply MS.1.20 in a way most likely to enhance quality and safety and minimize concerns raised in the Open Letter. Again, we will discuss all this in more depth on October 24.