Medical Staff
Bylaws: The Basics

Peter S. Johnston and Jacob E. Peterson
CLARK, MIZE & LINVILLE, CHARTERED
SALINA, KANSAS
www.cml-law.com
This outline is prepared for general informational purposes only. It is not intended and should not be used for specific legal advice in a specific factual situation. Questions about the legal issues discussed in these materials should be presented to knowledgeable legal counsel with respect to any given factual situation before deciding on a specific course of action.

All materials are copyrighted © 2016 by CLARK, MIZE & LINVILLE, chartered, all rights reserved.
1. Background on Medical Staff Bylaws
2. Broad Overview of Medical Staff Bylaws
3. Select Topics
   1. Credentialing, Privileging, and Appointment
   2. Claims, Suits and the National Practitioner Data Bank
   3. Fair hearings
Background: Medical Staff Relationship to Hospital

• **Inherent Tension:**
  • The Governing Board is ultimately responsible for the success of the Hospital, but needs Medical Staff to administer the care.
  • The Medical Staff directs the care, but needs the Hospital facilities to do so.
Background: Why Do We Need Medical Staff Bylaws?

• **CMS:**
  • CMS Conditions of Participation ("COP") require an organized medical staff with written bylaws. (42 C.F.R. 482.22)
  • COP requires that the Medical Staff Bylaws be approved by the Hospital Governing Body.

• **Accrediting Bodies:** Private Accrediting Bodies, such as Joint Commission or HFAP, likewise require written Medical Staff bylaws.
Background: Why Do We Need Medical Staff Bylaws? (Cont’d)

Health Care Quality Improvement Act of 1986 (“HCQIA”)

• Generally, HCQIA:
  • Provides immunity for peer review activities;
  • Requires certain reports to the Data Bank; and
  • Requires certain requests of info from the Data Bank.
**Background:** Why Do We Need Medical Staff Bylaws? (Cont’d)

**HCQIA**

- Credentialing, privileging and corrective action activities can provide legal immunity, if:
  1. Reasonable belief that action in furtherance of quality health care;
  2. Reasonable effort to obtain facts leading to action;
  3. Adequate notice & hearing procedures afforded to physician or other fair procedures given to physician under specific circumstances; and
  4. Reasonable belief that action warranted

- Hospital is presumed to have satisfied those elements until physician shows otherwise.
Serve an important purpose.

Bylaws state:

- Rights and responsibilities of providers.
- Rights and responsibilities of the hospital relating to the providers.
- Hierarchy of medical staff.
Background:
Hospital Bylaws v. Medical Staff Bylaws

- Hospital bylaws govern the hospital, generally.
- Medical staff bylaws specifically govern providers.
- The governing body confers powers on the medical staff through the medical staff bylaws.
- Thus, medical staff is subordinate to governing body.
- Hospital bylaws control if there’s a conflict.
**Overview:**
Preliminary Matters

- **Preamble and Definitions**
- **Purpose and Responsibilities of Medical Staff:**
  - **Goals:**
    - Promote good care
    - Confer membership
    - Provide input to governing body
  - **Responsibilities:**
    - Quality assurance
    - Evaluate and make recommendation regarding applicants
    - Maintain bylaws
    - Ensure adequate staffing
Overview: Membership, Credentialing, and Privileging

- **Types of Members:**
  - Active
  - Consulting
  - Locums

- **Credentialing:** Who gets in?
  - Medical Staff Bylaws should list detailed, objective criteria.
  - Medical Staff Bylaws should call for release & authorizations by applicant for the gathering of information.
Overview: Membership, Credentialing, and Privileging

Privileges:
- Membership *does not* confer right to treat.
- “Privileges” are specific rights to administer certain treatments.
- Evaluated based upon a set of written criteria and physician experience.
Overview: Medical Staff Committees

Governing Body

- Medical Executive Committee
- Credentialing
- Quality Assurance/Peer Review
- Department Committees
- Administrative Committees
Overview: Confidentiality and Immunity Provisions

- Those provisions to keep matters secret and attempt to provide lawsuit immunity.
- Bylaws, much of the time, go beyond what is permitted under law.
Overview: Amendments to Bylaws and Rules and Regulations

- Medical Staff may approve and propose amendments to Bylaws.
  - Must be approved by Board of Directors.
- Rules and regulations are more specific protocols that govern general matters in Bylaws.
Credentialing: Should we accept an applicant as a member of the medical staff?

Privileging: What do we want this member of the medical staff to be able to do?

Why do we have such detailed procedures?
  • Fairness: it’s difficult for many physicians to practice without a hospital
  • Liability: HCQIA Immunity
  • CMS Compliance
  • Accreditation
Credentialing Procedure

1. **Pre-application procedure**
   - Addresses threshold questions of eligibility: board certified, licensed, Medicare eligible, etc.
   - Rejection based upon objective criteria alone avoids report to the Data Bank.

2. **Application**
   - Determination of competence.
   - Must gather verification of information.

Again, the emphasis is upon *objective* qualifications.
Credentialing Procedure:
Specific Information to Evaluate

- DEA & licensure status
- Relevant training & experience
- Present & prior health care facilities where applicant has practiced
- History of professional liability insurance coverage & claims
- Any criminal record
- Peer or faculty recommendations
- Professional practice evaluation data
- Health status
- History of claims, actions, settlements, challenges to licensure, suspensions, corrective actions, etc.
- Data Bank and OIG/DOJ excluded provider lists
Credentialing Procedure (Cont’d)

3. Input from Medical Staff Executive Committee

4. Ultimate decision for Governing Body

So now what?
Privilege Determinations

• Usually made by the Credentials Committee during the credentialing process.
• Based upon objective criteria to render treatment.
• Requests are submitted to department heads and eventually evaluated by the governing body.
Membership Issue: Telemedicine

- Must be properly credentialed & privileged.
- Should receive “consulting” or a separate special category of membership.
- Telemedicine providers must be licensed in Kansas.
- Radiologists from a different state must be licensed both in Kansas (where the patient is located) and in state where the radiologist is located.
- CMS Conditions of Participation now mirror Joint Commission requirements.
Credentialing, Privileging, and Appointment (Cont’d)

Credentialing Issue: Criteria

- **Geographic Proximity Requirements**: lawful.
- **On-Call Participation Requirements**: lawful.
- **Board Certification Requirements**: lawful, if board certification is not the sole criteria used for evaluating membership.
- **Economic Credentialing**: lawful, if justified by connection to quality of patient care in the hospital. (e.g., number of admissions in the hospital).
- **Hospitalist Phenomenon**: special category for primary care physicians no longer practicing “hospital medicine”? How to evaluate?
- **Age-based Termination Provisions**: problems under Age Discrimination Act.
Credentialing Issue:
“Negligent Credentialing”

- A legal cause of action not recognized in Kansas – but recognized elsewhere.

- *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008):
  - Physician in Louisiana terminated by his group, LAA, for alleged substance abuse.
  - His hospital privileges later expired without formal action.
  - Kadlec, in Washington state, made inquiries for prospective employment by physician there.
  - Louisiana Hospital provided only dates of appointment and practice area.
  - LAA sent several responses praising physician’s skill and touting him as an asset to any group.
Credentialing Issue:
“Negligent Credentialing” (Cont’d)

- Shortly after the move, the physician admitted on duty use of narcotics after patient he treated suffered extensive brain damage and went into a permanent vegetative state, allegedly due to gross negligence of the physician.
- Under Louisiana law, the hospital and the group had a duty to avoid affirmative misrepresentations.
- Court found the group, LAA, had breached this duty by making statements about the physician that were “materially misleading”.

Credentialing, Privileging, and Appointment (Cont’d)
Credentialing Issue:
Responding to Credentialing Inquiries

- Feel free to disclose:
  - Dates of Appointment;
  - Staff membership category; and
  - Clinical privileges granted.

- Do not disclose further information without:
  - Authorization of the physician at issue; AND
  - The physician’s release of liability of the Hospital and the Medical Staff.

- Avoid affirmative misrepresentations or misleading statements.
Re-appointment Procedure

- Use generally the same procedure for re-appointment as initial appointment and credentialing.

- However, additional information should be considered about the physician’s performance as a member of the Medical Staff:
  - Attendance at Medical Staff functions;
  - Charting compliance;
  - Medical record completion;
  - General behavior;
  - Peer review of care at hospital;
  - General practice review; and
  - Compliance with objective criteria for membership (e.g., admission thresholds, etc.)
Re-appointment Issue: Charting Compliance

- Governing bodies less and less tolerant of late, incomplete charting by Medical Staff.
- Self-policing by the Medical Staff is part of a solution.
- Increasingly, once-routine requests for re-appointment of physicians who are chronically behind in charting become controversial at the Governing Body level.
- Medical Staff bylaws, too, can establish minimum expectations for charting.
Re-appointment Issue:
Disruptive Physicians

- Disruptive physicians impact patient care.
- May wish to include difficult physician provisions in qualifications for membership.
- May include as basis for corrective action.
- May include reservation that the Governing Body reserves the right to take unilateral corrective action under the hospital’s bylaws.
· **Medical staff-related suits:**
  · Medical malpractice
  · Bylaw procedure suits
  · Discrimination/harassment

· **What do you really know if Dr. ______ “has been sued”? Not much:**
  · Someone filed a document with accusations that haven’t been proven; and
  · Paid a filing fee.
  · That’s it.
What does a claim against a member of the Medical Staff mean for the Hospital?

- Hospitals are not responsible for the acts or omissions of doctors, PAs, and nurse midwives, generally. (K.S.A. 40-3403(h)).
- In other words, no “vicarious liability“, even if the provider is employed, so long as the provider is eligible for coverage under the Fund.
- But... hospitals are often sued independently of a provider, and vice versa.
What does a suit mean for physicians?

- Criticisms of professional competence – difficult to hear.
- Monetary consequences if claim in excess of insurance.
- Potential “report” to the National Practitioner Data Bank.
What is the National Practitioner Data Bank?

- Created by HCQIA.
- The Data Bank holds information about payments made as a result of treatment-related claims.
- Meant to provide a tracking system so that healthcare entities can make informed decisions about physicians.
What types of information are reported to the Data Bank?

- Payments as a result of a malpractice claim.
- Adverse clinical privileges or medical staff actions.
- Adverse licensure actions.
- Peer review actions resulting in sanctions.
What do Hospitals report to the Data Bank?

- Professional review actions based on reasons related to professional competence or conduct adversely affecting clinical privileges for a period longer than 30 days.
- Also, voluntary surrender or restriction of clinical privileges while under, or to avoid, an investigation.
- **DEADLINE:** Reports must be submitted to the NPDB and appropriate State Licensing Board within 30 days of the action.
- *See also:* www.npdb.hrsa.gov
What do Hospitals report to the Data Bank? (Cont’d)

- For self-insured hospitals, medical malpractice payments made for the benefit of a health care practitioner resulting from a written claim or judgment.

- **DEADLINE:** Reports must be submitted to the NPDB and appropriate State Licensing Board within 30 days of the action.
Sanctions for Failure to Report to Data Bank

- Substantial failure to report will result in:
  - Name of entity published in Federal Register; AND
  - The entity will lose its immunity from liability with respect to professional review activities for a period of 3 years, commencing 30 days from the date of publication in the Federal Register.
Who can search the Data Bank?

- Every hospital *must* search upon receiving a physician application for membership.
- State and federal licensing and law enforcement agencies, among others.
Three basic types of corrective action:
Corrective Action and Fair Hearings (Cont’d)

Summary Suspension:
- Conduct threatens life, health or safety of any patient, employee or other person at the Hospital such that the failure to investigate and act would lead to imminent danger.
- Specify who may order a summary suspension (e.g., Chief of Medical Staff, hospital CEO, Medical Staff Exec Cmt).
- Triggers Right to Fair Hearing.

Automatic Termination:
- Usually where Physician no longer meets minimum, objective criteria for medical staff membership.
- E.g., loss of license; loss of insurance.
- Sometimes tied to chronically late chart completion.
- No Right to Fair Hearing under HCQIA.
Corrective Action and Fair Hearings (Cont’d)
HCQIA Immunity & Fair Hearing Requirements

1. Notice containing following information:
   - That a professional review action has been proposed;
   - The reasons for such professional review action; and
   - An outline of her right to request a hearing, applicable time limits (not less than 30 days), and her rights in the hearing.

2. If a hearing is requested, a notice containing:
   - The date, time & place of the hearing (not less than 30 days hence); and
   - A witness list from the professional review body.
HCQIA Immunity & Fair Hearing Requirements (Cont’d)

3. Hearing officer:
   • Hearing must be held before an arbitrator mutually agreed upon by the physician and the professional review body; or
   • A hearing officer appointed by the hospital and not in competition with the physician.

4. Hearing procedure:
   • Physician has right to counsel or other person of her choosing at the hearing;
   • Physician has right to a record made of the hearing;
   • Physician has right to call, examine, and cross-examine witnesses;
   • Physician has right to present evidence, including submission of documentation and a written statement;
   • Physician has right to receive the written recommendations of the arbitrator or hearing officer and healthcare entity, as applicable.
Corrective Action and Fair Hearings (Cont’d)

Fair Hearings and Medical Staff Bylaws

• Medical Staff Bylaws must be followed down to every dotted “i” and crossed “t”.
• Medical Staff Bylaws should specifically state when there is a right to a hearing and when there is not.
• Bylaws should spell out that Physician has right to one hearing & one appellate review.
Thank you!

Peter S. Johnston and Jacob E. Peterson
CLARK, MIZE & LINVILLE, CHARTERED
SALINA, KANSAS
www.cml-law.com