Medical Staff Bylaws: Compliance Gaps and Best Practices

Part 1

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Background

- Hospitals and their affiliated entities are participating in one of the most heavily regulated industries in the country

- Some of the relevant regulatory standards that apply to medical staff professionals include:
  - Medicare/Medicaid Conditions of Participation
  - Hospital Licensing Act
  - Medical Practice Act
  - Nurse Practice Act
  - Acts applicable to all other credentialed practitioners
  - State Peer Review Statute
  - Patient Safety and Quality Improvement Act of 2005
  - HIPAA/HITECH
  - EMTALA
• ADA, Title VII and other discrimination statutes
• HCQIA
• Data Bank
• The Joint Commission, HFAP, DNV, NCQA
• Accountable Care Act – ACOs/Medicare Shared Savings Program, Value Based Purchasing
• CMS standards on never events, hospital acquired conditions, readmissions
• County and city statutes and ordinances
• Applicable case law
Failure to comply with these standards can have the following adverse implications:

- Loss or restriction of licenses
- Accreditation watch or loss of accreditation
- CMS determination of “immediate jeopardy” or loss of Medicare eligibility
- Professional liability under respondeat superior, apparent agency and corporate negligence theories
- Civil, criminal fines
- Loss of insurance or significant increase in premiums
- Loss of managed care contracts, MSSP and other performance based payments
- False Claims Act liability
- You lose your job
Evidence of compliance is largely demonstrated in corporate and medical staff governance documents including:

- Corporate Bylaws, Rules, Regs and Policy
- Medical Staff Bylaws, Rules, Regs and Policies
- Code of Conduct/Disruptive Behavior Policy
- Appointment/Reappointment applications
- Peer review policies
- Credentialing manual
- Fair hearing procedures
- Medical staff development plan
Background (cont’d)

- Impaired physician/allied professional policy
- Leave of absence and reinstatement policy
- Conflict of interest policy
- Anti-harassment policy
- ED Call Policy
- Department policies

A single set of Medical Staff Bylaws cannot demonstrate compliance with all relevant requirements
Definitions

Compliance Gaps

- Definitions inconsistent when referenced in Bylaws
- Definition of “medical staff” not consistent with state law
  - Podiatrist considered an allied health professional and not a physician

Best/Evolving Practices

- Include definitions for “peer review” and “peer review committee” consistent with state confidentiality protections in order to maximize confidentiality/privilege protections (see attached examples)
Definitions (cont’d)

• If participating in a PSO, consider adding definitions for “patient safety evaluation system” and “patient safety work product” (see attached examples)

• Definitions of “adverse” decisions should be limited to actions that require a state or Data Bank report or limited to what triggers a hearing under the Bylaws
Purposes/Preamble

- Compliance Gaps
  - Should reflect accreditation standard which references ultimate board authority
- Best/Evolving Practices
  - Medical Staff should be required to comply with Hospital Bylaws, Rules and Policies (which do not conflict with Medical Staff Bylaws)
Nature of Medical Staff Membership

- Best/Evolving Practices

  - Physicians, as a general matter, have no legal, statutory, constitutional right to medical staff membership/privileges. Therefore, hospitals can develop initial screening/eligibility criteria on front end to deny applications/appointment to “non-qualifying practitioners” including decisions based on economic factors such as whether physician is employed by a competitor or has a financial interest in a competing facility, i.e., surgicenter. See comments re: Pre-Application Process.
Nature of Medical Staff Membership (cont’d)

- Aside from the standard language which states that licensure does not guarantee Medical Staff membership, many hospitals are requiring a higher degree or evidence of loyalty or demonstrated history of meeting quality/utilization standards consistent with hospital standards.

- Bylaws should not limit Hospital’s discretion and authority to develop Medical Staff Development/Needs policies which establish areas of need or which limit access to membership.
Qualifications for Membership

- Compliance Gaps

  - Should reference obligation to comply with applicable Code of Conduct/Disruptive Behavior Policies

  - Should reference requirement to comply with reporting requirements concerning malpractice suits, sanctions, loss of privileges, licensure, and other regulatory requirements

- Board certification/recertification
  - Board certification is not a regulatory condition of membership although required by managed care organizations
Qualifications for Membership (cont’d)

− Do the Bylaws refer to re-certification?
− Are privileges and membership revoked/reduced?

Best/Evolving Practices

• Board can grant board certification exceptions where physician filling specialized need

• Consider granting an extension of time
  − Consider reducing membership category instead of termination albeit under some form of continuous review
  − Consider grandfathering option

− Need to justify any exception and apply standard uniformly
Insurance Requirements

- Compliance Gaps
  - Privileges to admit/treat automatically suspended – should not be allowed to co-admit
  - Physician should report reductions or loss of coverage
Insurance Requirements (cont’d)

- Best/Evolving Practices
  - Obtain coverage schedule in addition to certificates of insurance – includes limits and exclusions
  - Obtain five (5) year coverage history
  - Find out if coverage schedule applies at multiple hospitals and if claims made/occurrences
  - Get insurance company rating and make sure company is certified by the State
  - Consider requiring tail or prior acts coverage if they leave Medical Staff
  - Require report if coverage reduced to explain basis of reduction
ED Coverage

- Compliance Gaps
  - Bylaws, Rules and Regs do not reflect ED response times and on call responsibilities consistent with EMTALA, trauma center and other statutory requirements
  - Physician does not identify back up coverage if not available
  - Transfer standards
ED Coverage (cont’d)

- Post ED obligation to provide follow up care – patient abandonment issue
- Non-compliance can lead to EMTALA violations with resulting fines and possible litigation against the hospital and therefore violations need to result in remedial action

Best/Evolving Practices

- Need to decide what Medical Staff categories have ED coverage responsibilities
- Place requirement in Bylaws
- Delegate coverage schedule to Department Chair BUT subject to MEC review and approval
ED Coverage (cont’d)

• Remember that ED call is a duty and **not** a privilege. Can be removed without triggering hearing rights

• If patients who are admitted or are referred out of hospital for no justifiable reason, ED call duty can be revoked – no hearing rights

• ED call can be provided to an exclusive group for pay consistent with regulatory standards

• Make sure that physician identifies back up in advance of going out of town
Ethical Standards

- Best practices
  - Remember to include reference to all professional associations
Ability to Work with Others/Health Status

- Compliance Gaps
  - Need to have a Code of Conduct/Disruptive Behavior Policy in place that applies to physicians/practitioners as well as Board members and all hospital employees
  - Physician Wellness Committee cannot recommend or impose disciplinary action

- Best/Evolving Practices
  - Establish separate Physician Wellness Committee
  - Avoid use of corrective action/disciplinary procedures
  - Be mindful of reporting requirements re: state and Data Bank
Ability to Work with Others/Health Status (cont’d)

- Implement progressive remedial action standards
- Implement a Bylaw standard to require evaluation if there is a reasonable suspicion of impairment
- Refusal to be evaluated can result in recommendation for remedial action
- Consider adding a requirement for physical/fitness for duty evaluation for practitioner 65 years or older on yearly basis
Compliance with Quality/Utilization Metrics

- Metric Standards
  - ACO, P4P, Value Based Purchasing, ACE
  - Has a direct impact in liability, compliance and reimbursement standards
  - Standards need to be incorporated into privileging/credentialing standards as a condition of appointment/reappointment on Medical Staff and/or ACO/CIN
Compliance with Quality/Utilization Metrics (cont’d)

- Best/Evolving Practices
  - Ask for quality/utilization scorecard at time of appointment/reappointment
  - Prepare and send quarterly reports which compare physician’s practice to peers based on utilization and quality metrics standard but make sure reports are created in a way to maximize confidentiality and privilege protections under state and/or federal law
Medical Record Completion

• Compliance Gaps
  
  • Medicare CoPs require that Bylaws include standard for conducting histories and physicals
  
  • Medical Record completion requirement not followed or is not enforced
  
  • Physician not trained in or is not compliant with EMR standards and policies
Medical Record Completion (cont’d)

- Best/Evolving Practices
  - Physician not reappointed and privileges lapse if records not completed – has to reapply
  - Repeat offenders will be reported to Data Bank
  - Where incompletions relate to lack of H&P, discharge summary, treatment plan or other substantive portion of record, as opposed to a missing signature, physician can be reported according to the Data Bank
Medical Staff Categories

- Compliance Gaps
  - Wrong treatment of podiatrists as allied health practitioners
  - Utilization requirement as a condition of Active Staff membership is not defined or uniformly enforced or is out of date
  - Credentialing process not the same for all categories
  - Standard on geographic distance or response time to treat patients not uniformly enforced or is overly restrictive
Medical Staff Categories (cont’d)

- Best/Evolving Practice
  - Creation of new category where physician is a Medical Staff member but has no clinical privileges – need not go through formal appointment/reappointment process
  - Creation of Telemedicine Staff
  - Creation of Hospitalist Staff
  - Adding APN, PAs to medical staff if permitted by state law and Board
Telemedicine

Compliance Gaps

- Under CoPs, hospital and distant site hospital where telemedicine physician is credentialed and privileged fail to enter into a formal written agreement that satisfies all requirements
  - Provide list of credentials at distant site hospital
  - Applies internal peer review process to practitioner and informs hospital of any adverse events and complaints
  - Appointment/reappointment process not consistent with Medicare CoPs or accreditation requirements

- Telemedicine practitioner must be licensed in your state

Best/Evolving Practices

- Don’t rely on credentialing by other hospital or accredited entity
Allied Health/Advanced Practice Professionals

- Compliance Gaps
  - Practicing outside scope of license/certification
  - Not utilizing collaborative agreement when required
  - Physicians not letting them practice to full extent of license
  - Not reporting impaired or disciplined professional to the state – reporting to Data Bank is optional

- Best/Evolving Practices
  - Let them practice within full scope
  - Query Data Bank for all who obtain clinical privileges
Pre-Application Process

- Compliance Gaps
  - Process not reflected in Bylaws as required
  - Failure to provide written explanation for denying an application including whether decision was based on economic factors
  - Physician or physician committees are improperly given the right to decide who is given or not given an application
Pre-Application Process (cont’d)

- Best/Evolving Practices
  - Require signed waiver form
  - Include in pre-app form whether they are employed by or had their practice purchased by a competitor or have a financial interest in a competing entity
  - Require disclosure of whether they are an officer, director, medical staff leader, department chair in a competing hospital, ACO, ACE or other competing or similar entity.
  - Include other questions the answers to which will decide whether or not to give them an application or to appoint them
Appointment

- Compliance Gaps
  - Giving veto authority to a Department Chair or physician committee over who does or does not receive an application
  - “Sitting on” applications
  - Processing before all information received and/or not following up on incomplete or “red flag” responses
  - Relying on outdated information on older application used by physician for another hospital
  - Use of waiver of liability forms and Bylaws language which uses “in good faith and without malice” standard
Appointment (cont’d)

• Not reporting to Data Bank when required
• Health status information not updated

Best/Evolving Practices

• Language which places burden on applicant to produce any and all information requested at any time during the process
  – Failure to produce information results in withdrawal of application
  – No hearing rights
  – Cannot reapply for one year
• No hearings for denied applicants unless decision reportable to State or Data Bank

• Use “absolute waiver of liability” standard in Bylaws and waiver forms (see attached example)
  – Fall back is reference to the state standard

• Require physician to attest that information provided is current and accurate – “my assistant prepared the application” is not acceptable

• Peer references should include physicians who are not partners or members of group practice
Appointment (cont’d)

- Department chair
- CMO/VPMA
- Other?

• Criminal background checks becoming more common
Reappointment

- Compliance Gaps
  - Failure to have Department Chair/Credentials Committee review all relevant peer review, quality information generated over the past two years
Reappointment (cont’d)

• Failure to update eligibility criteria when reviewing “current competency”
• Failure to apply “current competency” standard to all existing/requested privileges
• Failure to query Data Bank
• Having Department Chairs serve on Credentials Committee
• Allowing physicians to “accumulate” privileges
• Failure to obtain health status information, especially for physicians older than 65 years
• Failure to follow up with all facilities where physician has membership and/or clinical privileges
Reappointment (cont’d)

- Failure to query Data Bank when physician requesting new privileges
- Reappointment exceeds two year standard

**Best/Evolving Practices**

- See Appointment Best Practices
- Required disclosures through conflict of interest forms or activities with competitors
- Request Quality/Utilization Scorecard
- Request information on loss of membership in ACO, PHO, IPA, professional societies
Exclusive Contracts

- Compliance Gaps
  - Failure to give required notice of hearing opportunity and hearing
  - Failure to review impact on privileges of existing Medical Staff member
  - Failure to support with Board review and approval which cites to benefits for exclusive arrangement
Exclusive Contracts (cont’d)

- Best/Evolving Practices
  - Incorporate right to enter into exclusive contracts and applicable hearing rights into Bylaws
  - Incorporate a provision which states that when Bylaws conflict with exclusive/employment contract, then contract prevails
  - Determine whether to include a “clean sweep” provision, i.e., no hearing rights if contract terminated
Exclusive Contracts (cont’d)

• Consider adding the ability to offer a hearing if termination decision should be reported to Data Bank
  – Joint Commission has taken the position that termination based on quality/competence/conduct issues requires a hearing even if employed
  – Providing a hearing gives you HCQIA immunity protections
  – Fairness dictates that if reporting a physician they should be offered a hearing opportunity

• Provide advance notice to MEC regarding the proposed exclusive arrangement and Board’s reasoning
Expedited Credentialing

- Compliance Gaps
  - Committee delegated with the authority to grant membership/privileges at appointment/reappointment must have at least two Board Members
  - Application must be completed
  - If MEC makes an adverse recommendation or places limitations, it cannot be expedited
  - Bylaws have to identify situations where applicant is ineligible
    - Adverse licensure decision
    - Termination, suspension from another medical staff
Temporary Privileges

- Compliance Gaps
  - Failure to obtain verification in all required areas before granting privileges
  - Failure to identify and/or enforce time limitations – cannot exceed 120 days
  - Failure to have both the President/CEO and Medical Staff President or their designees approval privileges

- Best/Evolving Practices
  - Include language that termination of temporary privileges does not entitle physician to a hearing unless decision is reportable
QUESTIONS?