

# **MAMSS 2009 Fall Educational Conference**

## ***How Your Bylaws Will Be Affected By MS.01.01.01***

**Michael R. Callahan**

Partner

Katten Muchin Rosenman LLP

[michael.callahan@kattenlaw.com](mailto:michael.callahan@kattenlaw.com)

Telephone: 312.902.5634

Fax: 312.577.8945

Materials: [www.kattenlaw.com/callahan](http://www.kattenlaw.com/callahan)

# Impact of MS.01.01.01 on Medical Staff Bylaws

- Background
  - The proposed August, 2006, Medical Staff standards, which addressed which substantive provisions could be in the bylaws versus rules, regs and policies, largely deferred to medical staff and hospital.
  - Standard also allowed the organized medical staff (“OMS”) to make direct recommendations to the Board under certain circumstances
  - The Standard was generally found acceptable, at least to the hospital industry, and adoption as final was expected.

## Impact of MS.01.01.01 on Medical Staff Bylaws (Cont'd)

- In June, 2007, TJC took everyone by surprise when it published a substantially different standard as part of MS.1.20.
  - Standard was very prescriptive yet confusing over what provisions must be in bylaws versus “supplemental” documents.
  - Bylaw amendment process and who could amend was not clear.
  - “Organized medical staff”, an undefined term, was given the authority to overturn or reject MEC recommendations, reduce MEC authority, remove MEC members and recommend bylaw changes directly to the Board and bypass the MEC.

## Impact of MS.01.01.01 on Medical Staff Bylaws (Cont'd)

- Changes would require substantial time and expense.
- AMA, on the other hand, was very supportive of the changes and was largely responsible for getting the 2006 proposal pulled.
- Because organizations such as the AMA, FAH, NAMSS and various other state hospital and medical staff professional organizations expressed detailed and vocal opposition to the standards, TJC appointed a multi-disciplinary Task Force to evaluate.
  - Goal of the Task Force was to develop a “consensus” standard.

## Impact of MS.01.01.01 on Medical Staff Bylaws (Cont'd)

- Met 12 times over 15 months to develop and recommend to TJC the most current version.
- Has been accepted as a compromise standard by all organizations.
- Standard being submitted to TJC Board in November.
- If adopted, they will be sent out for a limited field review.
- If adopted, even with minor changes the final standard most likely would not become effective until Spring of 2011.

## **Impact of MS.01.01.01 on Medical Staff Bylaws (Cont'd)**

- So why review now?
  - Based on support of trade associations, the odds favor TJC adoption.
  - No matter whether your hospital has incorporated all substantive provisions into a set of bylaws, versus a separate fair hearing plan, credentials manual, etc., bylaws will need to be amended
  - Nature of the changes may take some time to digest and to develop language given the re0ordered relationship between the MEC and the organized medical staff.
  - Bylaw amendments always take longer than you think.

# Comparison of Existing MS.01.01.01 to “Consensus Standard”

## Make up of Medical Staff

### Current Standard

- Arguably limited to physicians as defined under State law (M.D.s, D.O.s, dentists and podiatrists).

### Consensus Standard

- Has been expanded to include M.D.s, D.O.s and “other practitioners [who] are organized into a self-governing medical staff. . . who are privileged through a medical staff process.” (See state law to determine if there are any limitations on membership).

# Comparison of Existing MS.01.01.01 to “Consensus Standard”

## Self Governing Medical Staff

### Current Standard

- Medical Staff is self-governing but subject to ultimate authority of governing body.

### Consensus Standard

- No changes to this important legal principle although, consistent with Leadership Standards, there is a clear emphasis on the collaborative relationship that is expected by and among the Board Hospital management and Medical Staff leadership.

# Organized Medical Staff (“OMS”) and Voting Members

## Current Standard

- Current OMS organized medical staff is the self-governing entity.

## Consensus Standard

- No change, but “only those who are identified in the bylaws as having voting rights can vote to adopt and amend the Medical Staff Bylaws”, rules, regulations and policies.

# Elements of Performance

## Current Standard

### **EP1**

- The OMS develops bylaws.

## Consensus Standard

### **EP1**

- OMS develops bylaws, rules and regulations and policies.

## Elements of Performance (Cont'd)

### Current Standard

#### **EPs 2, 3 and 4**

- Bylaws are adopted and amended by the Medical Staff.
- Governing Body approves and Medical Staff and Governing Body comply.

### Consensus Standard

#### **EP2**

- OMS adopts and amends bylaws which cannot be delegated to the MEC.
- Bylaws become effective only upon governing body approval.
- EP cites to requirements regarding governing body authority and conflict management process as well as to EP 17 which states that medical staff determines through its bylaws who can vote.

## Conflict Management Standards

- LD.02.04.01 provides that “the hospital manages conflicts between leadership groups to protect the quality and safety of care.”
- Process must be ongoing.
- Process is to be approved by the governing body.
- Individuals involved are skilled in conflict management.

# Conflict Management Standards

(Cont'd)

- The process should include the following:
  - The parties should meet as early as possible to identify the conflict.
  - Must gather information regarding the conflict.
  - Hospital implements the process when a conflict arises that, if not managed, could adversely affect the patient's safety or quality of care.

# Elements of Performance

## Current Standard

### **EP 5**

- Medical Staff Bylaws, rules and regs and policies and Hospital Bylaws do not conflict.

## Consensus Standard

### **EP4**

- Medical Staff and Hospital Bylaws, rules, regs and policies are “compatible” with each other and with the law.

# Process for Amending Bylaws, Rules, Regs and Policies

## Current Standard

- No process described.

## Consensus Standard

### **EPs 8 and 9**

- OMS has ability to adopt Bylaws, rules and regulations and policies and amendments and propose them directly to the Governing Body.

# Process for Amending Bylaws, Rules, Regs and Policies

## Consensus Standard

- Manner of proposing or amending a rule, regulation, or policy or amendments:
  - Must be by voting members of the Medical Staff.
  - Must first communicate proposal to MEC.
- Method of proposing rule or regulation by MEC
  - If MEC proposes to adopt a rule or regulation, it first communicates the proposal to the Medical Staff.

# Process for Amending Bylaws, Rules, Regs and Policies (Cont'd)

## Consensus Standard

- Method of adoption of policy by MEC.
  - MEC can adopt a policy or amendment simply by communicating this to the Medical Staff.
  - MEC can only propose rules, regulations or policies if given this authority by approval of the OMS and the Governing Body.

# Medical Staff Conflict With MEC

## Current Standard

- No defined process.

## Consensus Standard

### **EP 10**

- OMS has to adopt a process to manage conflict between the Medical Staff and MEC for all matters.
- Medical Staff members are free to communicate directly with the Governing Body on a rule, regulation or policy adopted by the OMS or the MEC.

# Medical Staff Conflict With MEC

(Cont'd)

## Current Standard

- No defined process

## Consensus Standard

### **EP 11**

- Exception for Urgent Need to Amend
  - If delegated to do so by voting members of OMS, MEC may “provisionally adopt” an amendment to rule or regulation necessary to comply with laws or regulations

# Medical Staff Conflict with MEC

## Consensus Standard

- Governing Body may then provisionally approve amendment without prior notice to the Medical Staff.
- Medical Staff will be immediately notified by MEC.
- Medical Staff has opportunity for retrospective review of and comment on the provisional amendment.
- If no conflict between the OMS and the MEC, the provisional amendment stands.
- If conflict does arise, process for resolving conflict between OMS and MEC must be follow
- Any revisions to the amendment must be submitted to the Governing Body for action.

# What Provisions Must be in the Bylaws

## Current Standard

### EP 5

- Bylaws must include EP 6 through 8 which address definition of medical staff structure, criteria and qualifications for appointment, a listing of clinical departments and a definition of the qualification and role and responsibilities of the Department Chair.

### EPs 9 – 18

- These EP's generally address the following:
  - The description, function, size and composition of the MEC and methods of removal of members and Medical Staff officers.

# What Provisions Must be in the Bylaws

(Cont'd)

## Current Standard

- The ability of the MEC to act on behalf of OMS between meetings.
- Description of the indications for and the procedures relating to automatic and summary suspensions and the mechanism for recommending these actions, as well as terminations in reductions of privileges.
- Description of the mechanism for a fair hearing and appeal process.
- Description of the credentialing and privileging process.
- Description of the appointment process.

# What Provisions Must be in the Bylaws

(Cont'd)

## Current Standard

### EP 19

- When an administrative procedure, associated with processes described in the Medical Staff Bylaws or corrective actions, fair hearing and appeal, credentialing, privileging, and appointment, are described in Medical Staff governance documents that supplement the Bylaws (i.e., rules and regulations and procedures)
  - The mechanism for the approval of the administrative procedures, which may be different from that for adoption and amendment of the Medical Staff Bylaws, is described in the Medical Staff Bylaws.

# What Provisions Must be in the Bylaws

(Cont'd)

## Current Standard

- Criteria to identify those administrative procedures that can be in the supplementary documents are described in the Bylaws.
- The administrative procedures are approved by both the Medical Staff and the Governing Body through the Bylaws.

**THIS EP IS NOT EFFECTIVE AT THIS TIME**

# What Provisions Must be in the Bylaws

## Current Standard

### EP 3

- Every requirement set forth in EPs 12 through 36 is in the Bylaws.
- Requirements may have “associated details” which may reside in the Bylaws, rules and regulations or policies.
- The OMS adopts what constitutes the associated details, where they reside, and whether their adoption can be delegated.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- Adoption of associated details that reside in the Bylaws cannot be delegated.
- For EP 12 through 36 that require a “process”, Bylaws must include, at a minimum, basic steps required for implementation of the requirement as approved by the OMS and the Governing Body.
- OMS submits its proposals to the Governing Body for action.
- Proposals become effective only upon Governing Body approval.
- If there is a conflict, the Hospital must follow conflict management procedures under Leadership Standards.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

The basic steps required for implementation of required processes are to be determined by the medical staff and by the governing body. “The intent of flexibility here is that the hospital and its medical staff determine where the procedural or associated details relate to an element of the bylaws reside resides, whether in the bylaws or in the rules or regulations or policies.”

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- **EP 12** – Structure of the Medical Staff
- **EP 13** – Qualifications for Appointment
- **EP 14** – Process for privileging and re-privileging LIPs and other practitioners
- **EP 15** – Statement of duties and privileges relating to each category of the Medical Staff
- **EP 16** – Requirements for completing and documenting medical histories and physical exams in accordance with state law and hospital policy
- **EP 17** – Description of those members who are eligible to vote.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- **EP 18** – The process, as determined by the OMS and approved by the Governing Body by which the OMS elects, selects and removes Medical Staff officers.
- **EP 19** – A list of all officer positions for the Medical Staff.
- **EP 20** - MEC function, size, composition, the authority delegated to the MEC to act on the Medical Staff's behalf and how such authority is delegated or removed.
- **EP 21** – Process for selecting and/or electing and removing MEC members.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- **EP 22** – MEC includes physicians as well as other practitioners as determined by the OMS.
- **EP 23** – MEC acts on behalf of Medical Staff between meetings of the OMS within the scope of its responsibilities as defined by the OMS.
- **EP 24** – Process for adopting and amending Bylaws.
- **EP 25** – Process for adopting and amending rules, regulations and policies.
- **EP 26** – Process for credentialing and recredentialing LIPs and other practitioners.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- **EP 27** – Process for appointment and reappointment.
- **EP 28** – Indications for automatic suspension of a practitioner's Medical Staff membership or clinical privileges.
- **EP 29** – Indications for summary suspension.
- **EP 30** – Indications for recommending termination or suspension of membership or termination or suspension or reduction of clinical privileges.
- **EP 31** – The process or automatic suspension of membership or privileges.

# What Provisions Must be in the Bylaws

(Cont'd)

## Consensus Standard

- **EP 32** – The process for summary suspension of membership or privileges.
- **EP 33** – The process for recommending termination or suspension of membership or privileges.
- **EP 34** – The fair hearing or appeal process which, at a minimum shall include:
  - The process for schedule hearings and appeals;
  - The process for conducting hearings and appeals.
- **EP 35** – The composition of fair hearing committee.
- **EP 36** – If departments exist, the qualification and rules and responsibilities of the department chair.

## Recap of What Lies Ahead

- If standard receives general support of constituents, will be sent out for field review.
- If adopted, hospitals can expect reasonable time to implement.

## Summary of Key Changes

- Hospitals that use supplemental documents will need to review and assure that the bylaws adequately address they key elements and the basic steps of the “processes” required to be in the bylaws.

## Summary of Key Changes

- Most hospitals will need to add or revise:
  - Rulemaking/policy adoption processes
  - Process for MS to propose amendments
  - Conflict management processes (MS/MEC and MS/GB)
  - Clarification of MEC's [delegated] responsibilities [and how delegation may be changed]

## What Benefits?

- Retains significant discretion for individual medical staffs to organize and operate as best suits their needs.
- Generally balanced approach that can help minimize and manage differences of opinion that can and do arise.