

# Evaluating the Alternatives to JCAHO's New Periodic Performance Review Requirement

Oct 01 2003

Practice Area: Health Law

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In the fall of 2002, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") announced its new accreditation process, entitled "Shared Visions-New Pathways." This new process is intended to shift the focus from survey preparation and organization-specific accreditation scores, to continual standards compliance. The process includes various initiatives, including the addition of a Periodic Performance Review (PPR) requirement mid-way through the accreditation cycle. This new PPR requirement contemplates reporting of the results to JCAHO. The required report to JCAHO will include information that is shielded from discovery by most states (although to differing degrees), commonly referred to as "peer review" information. Because of the risk that disclosure of peer review information to JCAHO, even in connection with the PPR process, will open the information to discovery, JCAHO has identified alternatives to submission of the results of a facility's PPR to JCAHO via its restricted web site access.

## **Alternatives to Periodic Performance Review**

The PPR process requires each accredited organization to conduct a mid-cycle self-assessment of its compliance with applicable JCAHO standards. It also requires each organization to develop a plan of action to address identified areas of non-compliance, and to identify measures of success for validating resolution of the identified problem areas when the organization undergoes its complete on-site JCAHO survey 18 months later.

The PPR requires that all information developed through the PPR process be shared with JCAHO. Various healthcare organizations have voiced concerns about legal and risk management issues involved with such disclosures. In particular, healthcare providers have cited the potential discoverability of information gathered in compliance with this new requirement. Some are concerned that a regularly performed PPRs will not qualify for protection from disclosure under their state laws in the first place. Others are concerned that their state law shields will be lost following the disclosure to JCAHO.

JCAHO has responded to these concerns by announcing the following two options that a provider may choose if the provider attests, on the advice of counsel, that it is unable to submit the standard PPR:

**Option 1.** Under Option 1, the organization completes a PPR, but does not submit the results, any plans of action, or measures of success to JCAHO. The organization attests to the fact that it has completed a PPR, and measures of success are made available to the on-site surveyors at the time of the triennial survey.

Option 2. Under Option 2, the organization need not conduct a mid-cycle self-assessment and develop a plan of action. Instead, a surveyor assesses compliance with the relevant JCAHO standards by conducting a fee-based, condensed on-site survey (approximately one-third the length of the typical triennial survey). Plans of action and measures of success are to be completed and submitted to JCAHO by the organization for all areas in which the organization is found to be in noncompliance.

JCAHO recognizes that neither of these options fully addresses the issues that have been identified by provider associations. Since PPR will start for some eligible organization by the end of October, JCAHO is urging accredited facilities to contact their state hospital association legal counsel or their own legal counsel to discuss the risks and benefits of completing the PPR or using one of the available alternatives.

### **Recommendation**

Shared Visions-New Pathways is scheduled to go into effect on January 1, 2004, with certain components being phased in later for some accreditation programs. Given this timeline, it is imperative that providers assess the standard PPR and the options above. JCAHO has not announced a preferred method for accreditation, but has stated that the full PPR and Option 1 have the additional benefit of helping to ensure consistency in accreditation.

Wisconsin's peer review protections protect the records of the investigations, inquiries, proceedings and conclusions of organizations reviewing or evaluating the services of health care providers. In interpreting this law, Wisconsin courts take a very narrow view of what qualifies as a review organization. The courts have rejected the position that the entire hospital qualifies as a review organization, so a PPR conducted by administration may not be shielded at all under Wisconsin law. Wisconsin does recognize JCAHO as a review organization, and it does not consider the peer review privilege to be one that can be waived, so disclosure to JCAHO is not as risky as undertaking self-evaluation unless the self-evaluation is done entirely by a committee that courts uniformly will recognize as a "review organization." This will depend upon whether the hospital bylaws or its medical staff bylaws identify a formally-constituted committee that has quality reviews as a primary function, such as a quality assurance committee, and upon whether the entire PPR process is undertaken as a proceeding of that committee. Even then, a risk remains that the information shared with JCAHO could be accessed by regulatory agencies. Moreover, once disclosed to JCAHO, patients with homes in other states may argue their state laws control, which may consider disclosure to JCAHO as a waiver of the protections.

Based on these facts, we recommend that providers participate in the new JCAHO accreditation process under either Option 1 or 2. Option 1 addresses "waiver of confidentiality" concerns that could arise if an organization shares sensitive performance information with JCAHO, while still providing consistency in accreditation. Option 1 also does not require the provider to incur additional survey costs. This option does not, however, address concerns that the self assessment conducted by the facility itself may not be deemed protected in the first place under Wisconsin law. Only Option 2 addresses this risk. While it carries an additional cost, it is the least risky alternative for Wisconsin organizations of the three options available.

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