JCAHO Medical Staff Proposal to Force Choice Between Accreditation and Appropriate Corporate Governance

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Practice Area: Health Law

The Joint Commission on Accreditation of Healthcare Organizations is currently proposing a change in accreditation requirements affecting the content of medical staff and corporate bylaws that could negatively affect hospital governance and its compliance efforts. If finalized, the proposal would potentially require hospitals to choose between accreditation and compliance with the law. JCAHO has invited comment on its proposal by August 8, 2003. We recommend that hospital executives and board members submit comments by this deadline, opposing the proposed change.

The proposal applies to existing JCAHO Medical Staff Standard 2.1 which states, "Neither the organized medical staff nor the governing body may unilaterally amend the medical staff bylaws or rules or regulations." JCAHO is proposing to adopt a required element of performance that expressly states that neither the governing body bylaws nor the medical staff bylaws have language that provides for unilateral amendment of the medical staff bylaws or rules and regulations.

Existing standards, while stating the general principle against unilateral amendment, do not prohibit language that would allow unilateral amendment of the medical staff bylaws or rules and regulations. Indeed, on the advice of legal counsel, medical staff and corporate bylaws often contain a provision that allows the hospital board of directors to amend bylaws on its own action, after giving the medical staff an opportunity to act and comment, and taking the medical staff view into account. Under the law of most states, including Wisconsin, hospital boards have a non-delegable duty to assure the quality of health care provided and to assure compliance with the various laws. In cases where physicians oppose a newly enacted law (or even an existing law), hospitals can find themselves facing a Hobson's choice of having bylaws that prevent it from complying with the law or passing a unilateral amendment.

Since bylaws are the hospital's contractual commitment to the members or persons responsible for approving the bylaws in the first place, once established, they govern the actions of those entities and individuals who agree to be part of the organization. If they prohibit unilateral action by the hospital board of directors, then the hospital will have no recourse if the medical staff refuses to pass an amendment that is necessary to the operation of the hospital. Thus, hospitals have usually included language in their corporate bylaws and medical staff bylaws that give them an option to amend without action by the medical staff. To our knowledge to date, JCAHO has not held any hospital out of compliance that has a bylaw like the one described above.

JCAHO's proposal, if finalized, however, does not seem to allow the type of provision mentioned above. In setting forth the proposed new element of performance (formerly called a scoring element), JCAHO rationale is that the hospital and medical staff have "evidenced a breakdown in required collaborative relationship" if they cannot agree on amendments. Since JCAHO requires hospitals to have a collaborative relationship between a hospital and its medical staff, it would consider such a breakdown to warrant a finding of non-compliance.

If this proposal is adopted, the impact could be disastrous for hospital governing boards. Medical staff could use this to their advantage to block amendments that may be required by law. As a result, the hospital board would have to risk violating the law to meet accreditation standards. For example, the Caregiver Background Check Law requires background checks on employees and bars individuals that committed certain offenses from working in direct patient care. If the medical staff bylaws do not allow for the suspension of a medical staff member as required by this law, the hospital would be forced to choose between violating the law or its bylaw. This conflict could arise whenever bylaws were not in compliance with federal and state laws or amendments.

Another example of how a hospital may have its hands tied if the JCAHO proposal is adopted, is if it is seeking to limit the ability of physicians with financial interests in competing facilities from wreaking havoc on the hospital for their own personal gain. Under these circumstances, the hospital may attempt to adopt a conflict of interest rule or regulation or set limits on the participation of such competitors in medical staff governance decisions. Where the competing physicians hold a significant position in the community, hospitals, with bylaws that require two-thirds approval, may be blocked from amending the bylaws by a minority of the medical staff.

Although most modifications to the medical staff bylaws may be agreeable to both the medical staff and the governing board, that may not always be the case. We note that a recent issue of the American Medical News highlighted recent disputes between hospitals and their medical staffs in California, where one medical staff has actually sued its hospital over the issue of self-governance. The American Medical Association will lobby JCAHO to finalize its recent proposal, so that hospitals cannot move to adopt codes of conduct or conflict of interest policies without medical staff approval. Since such policies may be critical to the survival of some hospitals, we recommend that individual directors and hospital executives write or e-mail JCAHO to oppose its proposal.

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