

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Final Accreditation Standard MS.1.20: The Joint Commission Does an About-Face

November 19, 2007

On July 10, 2007, the Joint Commission (the "JC") released revisions to hospital accreditation standard MS.1.20, which addresses medical staff bylaws, rules and regulations, and policies. According to the JC, the intent behind the final version of MS.1.20 is to support and reinforce "a productive working relationship between the organized medical staff and the governing body" while attempting to minimize disruptions to hospitals.¹

However, the final version of MS.1.20 appears to provide significantly less flexibility for hospitals and their medical staffs than the previously proposed revisions to MS.1.20. In addition, members of the hospital industry have voiced concerns that the final rule decreases the authority of the medical executive committee.² The final version of MS.1.20, which is summarized in this Health Law Update, takes effect on January 1, 2009.

Background

On September 29, 2004, and October 21, 2004, the JC, via "email blasts", issued changes to MS.1.20 that hospitals were required to implement by January 1, 2006.³ These email blasts revised MS.1.20 by adding Element of Performance (EP) 19, which delineated certain required contents of the medical staff bylaws. The hospital industry criticized the new EP 19 as restricting the ability of hospitals and medical staffs to organize the medical staff bylaws, rules and regulations, and other policies.

In response to this criticism, the JC issued a revised proposed rule in August 2006, which essentially afforded more latitude to the hospital and medical staff with respect to determining the content of the

¹ The Joint Commission, Revisions to Standard MS.1.20 Approved, *available at* http://www.jointcommission.org/AccreditationPrograms/Hospitals/revisions_std_ms120_approved.html

² The Joint Commission on Accreditation of Healthcare Organization, Standard MS.1.20 teleconference, November 1, 2007, Paul M. Schyve, M.D., Robert A Wise, M.D., Harold J. Bressler (the "JC November Teleconference").

³ See The Joint Commission on Accreditation of Healthcare Organization, Corrections to 2005 Requirements for Hospitals, September 29, 2004, *available at* <http://www.jcrinc.com/8187>, and The Joint Commission on Accreditation of Healthcare Organization, Clarification to Hospital Requirements for MS.1.20, EP 19, October 21, 2004, *available at* <http://www.jcrinc.com/8187>

medical staff bylaws, rules and regulations and other policies. This revised proposed rule was much better received by the hospital industry.⁴

To the surprise of many observers, the final revisions to MS.1.20 issued in July of 2007 represent a marked departure from the August 2006 proposed revisions. The final standard, as discussed below, reinstates more onerous requirements on hospitals and their medical staffs with respect to the content of medical staff bylaws, rules and regulations and other policies.

Key Revisions to MS.1.20

The JC has made several significant changes to MS.1.20. With the intention of creating a more efficient process, the final standard sets forth exactly what "processes" and "procedural details," as outlined in thirty-three separate EPs for the final rule, need to appear in the medical staff bylaws. The JC describes a "process" as a series of steps taken to accomplish a goal, and distinguishes a "process" from a "procedural detail," which describes how each step in the process is to be carried out.⁵ The JC gives the example of a process as credentialing a physician, which involves various steps such as collecting information on a physician and evaluating the information. The "procedural details" related to this credentialing process include who collects the information and who needs to be contacted to obtain the information.

Briefly stated, all "processes" must appear in the medical staff bylaws, as well as most of the "procedural details" associated with those processes. Only a few "procedural details" can appear in documents such as rules and regulations or policies and procedures.⁶ The specific requirements of the final rule are that both the processes and the procedural details associated with EPs 9 through 25 must appear in the medical staff bylaws.⁷ As respects EPs 26 through 33, the processes must appear in the bylaws, but the procedural details can appear either in the medical staff bylaws or in rules and regulations or policies.⁸

Since all processes and procedural details contained in the medical staff bylaws must be adopted and amended by the "whole of the medical staff"⁹ and approved by the governing body, the final version

⁴ See, e.g., American Hospital Association, Letter to Joint Commission on Accreditation of Healthcare Organizations, October 23, 2006, available at <http://www.aha.org/aha/letter/2006/061023-cl-staffstandardms120.pdf>, which praises the revised proposed rule and contrasts it with the "uniform prescriptive standards" embodied in the former proposed rule.

⁵ *Id.*

⁶ *Supra* note 1.

⁷ The Joint Commission, Revisions to Standard MS.1.20 Approved, available at http://www.jointcommission.org/AccreditationPrograms/Hospitals/revisions_std_ms120_approved.html

⁸ *Id.*

⁹ In the JC November Teleconference, the JC representatives noted that industry representatives had voiced concern about the meaning of the term "whole of the medical staff," especially in hospitals with large numbers of physicians who have only courtesy privileges and who might be able to "hold hostage" a medical staff bylaws amendment process. JC representatives responded informally that "whole of the medical staff" should commonly be understood to mean the active medical staff of the hospital or whichever other group is designated in the medical staff bylaws as having the power to approve medical staff bylaws. Robert A. Wise, M.D., the JC's Vice President, Division of Standards and Survey Methods, advised that generally the medical executive committee would be viewed as too small to make decisions regarding the medical staff bylaws on a regular basis; however, the JC is also aware that there are medical staff members who are not actively involved in the organization and would not be the appropriate individuals to make decisions on the content of the medical staff bylaws. The JC believes that it is up to each organization to devote time to decide which group is most appropriate to vote on the medical staff bylaws.

of MS.1.20 narrows the range of items that can be approved by the medical executive committee acting on its own (as opposed to the whole of the medical staff) before going to the governing body. Only the procedural details associated with the processes listed in EPs 26 through 33 can be adopted by the medical executive committee acting on its own, and only then when the whole of the medical staff so delegates these tasks to the medical executive committee.¹⁰

The JC also addresses situations in which the medical staff believes the medical staff executive committee is not adequately representing the medical staff's views on issues of patient safety and quality of care. In doing so, the revised standard requires the medical staff bylaws to include a description of the authority that the medical staff has delegated to the medical staff executive committee, and how that authority can be delegated or removed.¹¹ In addition, the revised MS.1.20 now permits the medical staff to adopt medical staff bylaws, rules and regulations, and policies and propose them directly to the governing body without going through the medical executive committee. This rule would still apply even if the subject matter had been delegated to the medical staff executive committee.¹²

Other Changes to MS.1.20

The JC has also incorporated two new EPs into the final version of MS.1.20 to bring it into alignment with the Centers for Medicare and Medicaid Services' Conditions of Participation requirements relating to medical staff bylaws. These EPs require the medical staff bylaws to include the roles and responsibilities of each category of practitioner on the medical staff (active, courtesy, etc), and the requirements for performing medical histories and physical examinations.¹³

Response to MS.1.20 Final Revisions

In an open letter sent to the JC in August of 2007, several healthcare attorneys expressed their concern regarding the final MS.1.20, which they view as "significantly flawed."¹⁴ In the open letter, they argued that the final version of MS.1.20 will result in confusion regarding the content of the governing medical staff documents, result in costly and time consuming revisions to medical staff bylaws and other governing documents, and cause uncertainty regarding the role of medical staff

¹⁰ *Id.* Any such details approved by the medical executive committee on its own appear in the rule and regulations or policies and procedures.

¹¹ *Supra* note 1, EP 20, 21.

¹² *Id.*, at EP 4. During the JC November Teleconference, Robert A. Wise, M.D., the JC's Vice President, Division of Standards and Survey Methods, stated in response to the concern regarding the decrease in authority of the medical executive committee that the medical executive committee is primarily the voice of the medical staff, and the revised MS.1.20 allows the medical staff to access the medical executive committee in the rare occasion where the medical staff believes the medical executive committee is no longer adequately representing their interests. Under all other circumstances, according to Dr. Wise, the work of the medical executive committee should continue as usual.

¹³ *Supra* note 1, EP 16, 17.

¹⁴ Adelman, Allan et.al, Open letter to the Joint Commission Regarding MS.1.20, August 22, 2007, pg. 1, available at http://www.healthlawyers.org/Template.cfm?Section=HLW_Archive&CONTENTFILEID=17990&TEMPLATE=/MembersOnly.cfm (members access only).

management.¹⁵ The open letter requested that the JC withdraw the final version of MS.1.20 and adopt the draft submitted for field review in August of 2006.¹⁶

Harold J. Bressler, General Counsel for the JC, responded to the open letter with a statement that he would not address the open letter in detail.¹⁷ Mr. Bressler did, however, provide some brief comments to the open letter in his response. Mr. Bressler asserted that the primary purpose of MS.1.20 is to assist with the enhancement of quality and safety and that, therefore, the MS.1.20 should be implemented with this purpose in mind.¹⁸ In addition, Mr. Bressler observed that the assumption that the JC would apply MS.1.20 in a "highly prescriptive manner" is inconsistent with the JC's general application of its accreditation standards.¹⁹

Conclusion

The final version of MS.1.20 has been interpreted by members of the industry as reverting to more onerous requirements on hospitals with respect to the content of the medical staff bylaws, rules and regulations and other policies. Furthermore, the revised standard is seen to shift authority from the medical executive committee to the medical staff.

Hospitals have until July 1, 2009 to ensure compliance with the new standard, and should ensure that, if necessary, the relevant medical staff bylaws, rules and regulations, and policies are revised by that date. If you have any questions regarding this Health Law Update, please contact any of the attorneys in our Healthcare Practice Area listed below.

¹⁵ *Id.*

¹⁶ *Id.*, at 8.

¹⁷ The Joint Commission, Harold J. Bressler, General Counsel, Open Letter to AHLA Members, August 30, 2007, available at http://www.healthlawyers.org/Template.cfm?Section=HLW_Archive&CONTENTFILEID=17995&TEMPLATE=/MembersOnly.cfm (members access only).

¹⁸ *Id.*

¹⁹ *Id.* at 2.

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