



California Medical Association

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Joint Commission on Accreditation of Healthcare Organizations
One Renaissance Blvd.
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Re: COMMENTS FOR PROPOSED CHANGES TO MS.1.20

Dear Ms. Berry:

We appreciate this opportunity to address proposed changes to hospital accreditation standard MS.1.20. As a preliminary matter, California Medical Association joins in and concurs with the comments submitted by the AMA. In addition, we submit our own comments herein.

The primary issue in proposed MS.1.20 regards the possible placement of significant medical staff structural and operational requirements in rules, regulations or policies of the medical staff, rather than retaining them in the medical staff bylaws. (Proposed EP No. 3.)

For the reasons set forth below, proposed EP No. 3 should be deleted. In addition, JCAHO should not adopt the proposed EP No. 4, and should not delete current EP No. 7.

- 1. JCAHO does not explain the benefits, if any, of proposed EP No. 3 which permits placing the requirements of proposed EP Nos. 8-27 in documents external to the medical staff bylaws.**

JCAHO does not provide sufficient information to field reviewers as to why key requirements regarding the structure and operation of the medical staff should be permitted to be moved out of the medical staff bylaws and placed in rules and regulations, or medical staff policies (referred to herein as "external documents"). This is a major JCAHO transparency issue. JCAHO should do more than merely set forth a proposed standard or EP, and do more than simply providing an introduction

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to a proposed standard that says what the general medical staff and MEC can and cannot do. JCAHO must explain in detail *why* it recommends such changes for review in the first instance. Field reviewers should not be required to guess the purposes of a proposed change to JCAHO standards or EPs. For this reason, JCAHO cannot obtain sufficient and reliable Field Review of this proposed change, since the reasons for the proposed change are unstated and cannot be addressed.

Further, without the clarity and transparency just mentioned, JCAHO cannot realistically expect individual medical staff physicians who are not administrators or VPMAs to have sufficient understanding of the interplay of the various proposed changes to provide meaningful input. Simple "yes" or "no" answers in an online field review from physicians who do not follow the history of changes in JCAHO standards, and are unable to understand the import of the proposed changes due to their opacity and complexity hardly makes for a reliable field review system for physician input (or input from anyone else for that matter).

- 2. Permitting external documents to contain the requirements of proposed EPs 8-27 may sacrifice legal protections for the medical staff, without the medical staff's understanding of such a sacrifice.**

A number of states provide that the medical staff bylaws are a contract which is enforceable against the governing body by the medical staff and/or individual physicians on the medical staff. The legal recognition of the medical staff bylaws as a contract assures both the hospital's and the court's respect for the structure of the organized medical staff, the medical staff's self-governance to the degree permitted in any state, its processes for peer review, credentialing, privileging and appointment, and the processes that permit amendment to the bylaws. If the processes and requirements under EPs 8-27 (covering those listed aspects of medical staff structure and operations) are placed in documents external to judicially recognized contractual medical staff bylaws, it is entirely likely that the contractual nature of the external documents either will not be recognized under the law of a state, or would require significant resources on the part of the medical staff or individual physicians to litigate in order to establish contractual rights as to those "external" documents.

JCAHO materials fail to advise medical staffs of this potential consequence to implementing EP No. 3. This lack of transparency should make clear to JCAHO that physicians who are unaware of this potential loss of contractual rights, and who are uninformed of this point by JCAHO, will not be able to provide informed input to JCAHO on the proposed change. JCAHO's lack of transparency in providing a clear explanation of the purpose and implications for the proposed change invites results on Field Review that can only be considered unreliable. Further, sacrifice of the protections under various state laws provided by contract remedies in court on issues related to the medical staff operations invites degradation of the ability of the medical

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staff to effectively oversee quality of care in the hospital. Because of this (presumably) unintended consequence of this proposed change, i.e., that proposed EP No. 3 may cause medical staffs to unintentionally sacrifice legal rights upon implementing it that may have implications for the quality of care, JCAHO should not adopt this EP. JCAHO should not permit key aspects of medical staff structure and operations to be embodied in documents external to the medical staff bylaws.

3. **Proposed EP No. 3 misleads the reader into believing that the organized medical staff will retain control over requirements that are "externalized" to rules and regulations or medical staff policies. The proposed changes do not make clear that key medical staff structures and operations now typically contained in medical staff bylaws and subject to change only upon vote of the medical staff, would be removed from general medical staff control and placed solely in the hands of the MEC.**

Proposed EP No. 3 states that if the requirements of EPs 8-27 are placed in documents external to the medical staff bylaws, that "[the requirements] or their amendments, are adopted by the organized medical staff and approved by the governing body." This is misleading. Two other provisions of the proposed changes show that, if EPs 8-27 are "externalized" from the bylaws to the rules and regulations or medical staff policies, the *MEC* would be permitted to change the written requirements for medical staff structure and operations, *without general medical staff approval*, and subject only to governing body approval.

To see this point, one notes that the introduction to the proposed revisions to MS.1.20 contradict proposed EP no. 3:

In developing its bylaws, the medical staff may include within the scope of responsibilities of the medical staff executive committee (MEC) the authority to adopt medical staff rules and regulations and policies on behalf of the entire organized medical staff.

This paragraph only hints at the fact that if proposed EP No. 3 were implemented by a medical staff, that control over those key medical staff provisions placed in external documents would be divested from the medical staff, and ceded solely to the MEC, subject only to governing body approval. Proposed EP No. 16 likewise contradicts proposed EP No. 3 in requiring a provision in either the bylaws, the rules and regulations or the medical staff policies that:

. . .the medical staff executive committee is empowered to act for the organized medical staff between meetings of the organized medical staff.

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If the MEC is permitted to "adopt medical staff rules and regulations and policies on behalf of the entire organized medical staff" (Introduction to proposed changes) and may "act for the organized medical staff between meetings of the organized medical staff" (proposed EP No. 16), then EP No. 3 should be clear that the MEC obtains total control to modify the "externalized" provisions. This outcome, derived only by "connecting the dots," illustrates how misleading the proposed EP No. 3 is.

The wording of proposed EP No. 3 easily brings a conclusion, contrary to the proposed Introduction and proposed EP No. 16, that the general medical staff would retain control over provisions removed from the medical staff bylaws. Connecting the dots, however, confirms the potential for a medical staff to abdicate its power to control structural and operational requirements by placing those requirements in documents over which the MEC has total control. If JCAHO adopts EP No. 3, its wording should be clarified so each medical staff will clearly understand that by "externalizing" fundamental structural and operational provisions governing the organized medical staff under proposed EP No. 3, it is abdicating to the MEC and governing body the power to modify those provisions. At the very least, because EP No. 3 is misleading as to MEC control of the externalized provisions, and seems to indicate medical staffs as a whole will retain such control, the EP should not be adopted, should be reworded accordingly, and should be sent out for Field Review another time. We strongly urge JCAHO to not adopt proposed EP No. 3 in the first instance.

4. In its online Field Review Survey, JCAHO expresses the vague concern that there are MECs that "have acquired a level of authority that is no longer appropriate for the organization." Proposed EP No. 3 would facilitate a grant of power to the MEC that dramatically increases the potential in many hospitals for MECs to "acquire a level of authority that is no longer appropriate for the organization."

If JCAHO is to address a concern, without apparent connection to any quality of care issue, that some MECs may have "inappropriate authority," it should be consistent and transparent in its views of the scope of "authority" of the MEC. On the one hand, through proposed EP No. 3, JCAHO may permit MECs to obtain sole control over key structural and operational provisions governing medical staff operations. On the other hand, JCAHO expresses a vague and unspecified concern about MECs that have an "inappropriate" level of authority. There is no explanation from JCAHO how these two views may be reconciled, and these two views do not clarify where JCAHO draws the line for "appropriate" or "inappropriate" levels of authority for MECs.

In our view, any and all proposed JCAHO standards and EPs should *always*, *expressly*, and *clearly* be rooted in improving the quality of care in the hospital. JCAHO's proposed changes which are the subject of this field review permit

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modification of the role of the MEC in ways that appear to have no clear connection to quality or patient safety issues. *Without justification for these changes based on quality or patient safety issues, current MS.1.20 and its current EPs should not be changed.*

- 5. Proposed EP No. 4 creates a double standard as to the binding effect of the medical staff bylaws. There is no rational basis, nor any rationale provided, as to why the governing body should "act in accordance," instead of "comply with," medical staff bylaws, rules and regulations for which it has given its approval.**

We approve the intent behind the additions to the current EP No. 3 as seen in proposed EP No. 4 to include "rules and regulations, and policies that are adopted by the organized medical staff and approved by the governing body." However, the phrase "rules and regulations and policies," should be changed to "rules, regulations, policies and procedures," to more accurately reflect the scope and type of information found in the associated administrative medical staff governance documents.

We strongly object to substituting the phrase "acts in accordance with" for the phrase "comply with" however. *The hospital board should be held to comply with the provisions contained in the listed documents.* JCAHO provides no rationale for the suggested change in this regard to current EP No. 3 (proposed EP No. 4). This lack of transparency prohibits field reviewers from understanding the purposes of the proposed change, and provides no foundation for JCAHO to obtain review comments directly addressing its intent in proposing the change. Field reviewers should not be required to guess the purposes behind a proposed change to JCAHO standards or EPs. JCAHO must explain in detail why it recommends such changes for review in the first instance. For this reason alone, JCAHO should not adopt the proposed EP.

The medical staff bylaws are approved by the governing body. Rules and regulations, in some states and in some hospitals, are also approved by the governing body. As to any provisions of a medical staff document to which the governing body has given its formal approval, the governing body should be held to comply with them and nothing less.

- 6. The rationale for deletion of proposed EP No. 7 set forth in question number 14 of the JCAHO online field review survey makes no sense. Hospitals should not be permitted to create provisions in corporate documents that conflict with the medical staff governance documents.**

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JCAHO suggests deleting current EP No. 7,¹ which requires that the medical staff governing documents and the governing body bylaws do not conflict. Question no. 14 of the online field review survey states that this deletion is warranted because it is "redundant to EP 2 [requiring governing body approval of any medical staff bylaw] in that a governing body would not approve a medical staff bylaw with which it would not comply." While we appreciate tremendously JCAHO's effort to provide some sort of background as to the purpose of this proposed change (though it should do so within the document embodying the proposed changes, and not separately online), *the explanation is utterly bewildering, and completely misses the point of EP No. 7.*

Deletion of EP No. 7 would be very bad for medical staffs. As an example, the medical staff's lawsuit against the Board of Directors of Ventura Community Memorial Hospital ("VCMH") clearly shows that the rationale quoted above is simply wrong. Hospitals can change their corporate bylaws to conflict with medical staff bylaws. This is precisely the scenario which occurred in the litigation filed by the medical staff of VCMH against the CEO and board of the hospital. In that case, the hospital changed its corporate bylaws in two respects: it changed the corporate bylaw provision setting forth the composition of medical staff representation on its board of directors so that those physicians are hand-picked by the hospital board, and changed the provision setting forth the composition of the Joint Conference Committee to add the "administration" as a third "member" of the JCC (in addition to the medical staff and governing body). It then instructed the medical staff to modify the corresponding provisions in its bylaws accordingly, and later did so unilaterally when the medical staff refused, on the grounds that JCAHO does not permit a conflict between the governing body bylaws and the medical staff governing documents.

Another example is even more extreme. In *Lawnwood Medical Center v. Lawnwood Medical Center Medical Staff* (Leon City., Fla. Circuit Court), a case in which the AMA Litigation Center is participating, the hospital in that case repeatedly attempted to remove medical staff officers elected pursuant to the medical staff bylaws and to suspend physicians on the medical staff under procedures contrary to those authorized by the medical staff bylaws. Each time, the medical staff was able to defeat these attempts in court. Nonetheless, the hospital actually went to the *Florida Legislature* and obtained passage of a law declaring that, *in that county only*, "in the event of a conflict between bylaws of a hospital corporation's board of directors and a hospital's medicals staff bylaws, the hospital board's bylaws shall prevail" The law has since been struck down, but the hospital is appealing.

¹ Despite the proposed deletion of current EP No. 7, we note that the remaining proposed EPs have not been renumbered accordingly.

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Clearly, there should be no delusions on JCAHO's part that somehow a hospital's approval of a medical staff governing documents means it would never set up a conflict between the medical staff and corporate governing documents as a means to act contrary to the medical staff bylaws it had previously approved. *EP No. 7 should not be deleted.*

CONCLUSION

For the foregoing reasons, proposed EP No. 3 should be deleted. In addition, JCAHO should not adopt the proposed EP No. 4, and should not delete current EP No. 7.

We thank you for giving consideration to our comments on proposed MS.1.20.

Sincerely,



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GMA/pm