

Preliminary CMS-CHA Agreement on Model Medical Staff Bylaws  
Involving Allegations of Anticompetitive Conduct

CMS Policy adopted by the HOD and agreed to by CHA:

When a physician believes a final action taken by a hospital governing board against the physician is a result of anticompetitive conduct, and the physician believes that mediation or non-binding arbitration may resolve their concerns, the physician may request, and the hospital shall participate in, mediation or non-binding arbitration. The mediation or non-binding arbitration shall be conducted within a reasonable period of time and be focused solely on the issue as to whether or not anticompetitive conduct was involved in the hospital's decision. The cost of these processes is to be borne by both parties, thus limiting the incentive to bring cases without merit. The question of whether this process would be documented in the medical staff bylaws is a determination that will be left up to each hospital and its medical staff.

There will be a joint effort by CMS and CHA to provide information to all Colorado hospitals and their medical staffs on what may constitute anticompetitive conduct and on dispute resolution processes, such as mediation or non-binding arbitration. This joint effort will include the development of model – medical staff bylaw amendments and best practices. CMS and CHA will survey CHA-member hospitals and health systems at six months and 12 months post-educational effort to assess the extent to which the proposed practices and recommended procedures approved by CMS and CHA have been adopted.

Summary of Model Medical Staff Bylaws – Preliminary Agreement with CHA

1. Adoption of the model bylaws are voluntary
2. Includes a non-binding dispute resolution process that shall be granted at the request of a physician in one or more of the following circumstances
  - a. Denial of initial appointment or reappointment to the Medical Staff.
  - b. Denial of an initial or renewed request for Clinical Privileges.
  - c. Revocation, restriction or reduction of Clinical Privileges.
  - d. Involuntary imposition of mandatory concurrent consultation requirements that restrict the Physician's Clinical Privileges.
  - e. Summary suspension [***or precautionary suspension***] of Medical Staff membership and/or Clinical Privileges for longer than [***fourteen (14) OR thirty (30)***] days.
  - f. Reduction or denial of requested advancement in Medical Staff membership category/status.
  - g. Any other disciplinary action or recommendation that must be reported to the State or federal government.
3. Does not apply to individual employment or other contract disputes or administrative disputes between a Physician and the Hospital, or for

automatic rejections, suspensions or terminations under the Medical Staff Bylaws, Rules and Regulations (such as automatic rejection of an application based on a Physician's failure to maintain Colorado licensure or professional liability insurance).

#### 4. Request for Dispute Resolution Process

- a. The Physician shall have **[? ]** days following the date of receipt of written notice of a Professional Review Matter to request Dispute Resolution.
- b. The Physician must submit his or her request for Dispute Resolution in writing to the Chief Executive Officer, either by certified mail, return receipt requested, or hand delivery.
- c. The Chief Executive Officer will provide the request to the other Party (the Hospital, its Medical Staff, its Medical Staff committees that participated in the Professional Review Matter, and the Governing Board).
- d. The request may include (i) the name, address and telephone number of any attorney retained by the Physician, if known, and (ii) must include a brief statement of the factual basis for the Physician's belief that the Professional Review Matter resulted from anticompetitive conduct.
- e. If the Physician does not request Dispute Resolution within the timeframe and in the manner described above, the Physician will be deemed to have waived any right to Dispute Resolution.
- f. Submission of a complete and timely request for Dispute Resolution temporarily suspends any hearing-related [or appeal-related] timeframe under the Medical Staff Bylaws, Rules and Regulations.
- g. In the event of a continued summary suspension [or precautionary suspension] of the Physician's Medical Staff membership or Clinical ***Privileges, however, the timeframe for a hearing [or appeal] is not suspended, unless agreed upon in writing by the Parties, in which case, the hearing [or appeal] may be scheduled after conclusion of the Dispute Resolution.***

#### 5. *The Mediator*

- a. A mediator shall be selected to conduct the Dispute Resolution process, who shall be an attorney at law experienced in medical staff and professional review matters and antitrust who does not otherwise serve as counsel for the Hospital, the Medical Staff, or the Physician (the "Mediator").
- b. The Mediator will be selected by mutual agreement of the Parties, which shall not be unreasonably withheld.
- c. The Mediator shall assure an orderly and timely Dispute Resolution process.

6. Notice of Dispute Resolution

- a. Following receipt of a timely request for Dispute Resolution and selection of the Mediator, the Mediator shall promptly schedule the Dispute Resolution conference and pre-conference meeting.
- b. The Dispute Resolution conference will occur no later than **[30]** days following the Hospital's receipt of the Physician's written request for Dispute Resolution.
- c. The Mediator shall give written notice to the Parties of the time, place, and date of the Dispute Resolution conference and the pre-conference meeting.
- d. The Dispute Resolution conference shall occur either at the Hospital or the Mediator's office, and shall be limited to 2 1/2 day(s), unless otherwise mutually agreed by the Parties.

7. Representation

- a. Each Party shall have the right, at his or her or its expense, to representation by an attorney or other representative (collectively, an "attorney") at the Dispute Resolution.
- b. Each Party will provide written notice to the other Party and the Mediator of the name, address and telephone number of the Party's attorney no later than five (5) days before the pre-conference meeting.

8. Pre-Conference Meeting

- a. Unless otherwise agreed by the Parties, the pre-conference meeting will be held at least five (5) business days before the Dispute Resolution conference.
- b. The Physician (and his or her attorney, if represented by counsel) and a Hospital representative (and the Hospital's attorney, if represented by counsel) will attend the pre-conference meeting.
- c. The Mediator will advise the Parties on the exchange of documents and the conduct of the Dispute Resolution conference.

9. Exhibits: The Parties will exchange all exhibits intended to be presented to the Mediator during the Dispute Resolution conference at least three (3) business days before the Dispute Resolution conference.

10. Dispute Resolution Process

- a. The Dispute Resolution process under the Medical Staff Bylaws, Rules and Regulations is part of the professional review process of the Hospital and its Medical Staff.
- b. The Mediator will conduct the Dispute Resolution in an expedited manner. If no resolution is reached within **[30]** days of the Dispute

Resolution conference, the Dispute Resolution process will end, unless extended by mutual written agreement of the Parties.

- c. The Mediator may conduct separate or ex-parte meetings with each Party or their attorney, by telephone, in person or in writing.
  - d. The Mediator may request the exchange of memoranda on the issue of whether the Professional Review Matter resulted from unreasonable anticompetitive conduct and may impose a page limit on the memoranda. For purposes of this Dispute Resolution process, anticompetitive conduct shall be defined by reference to applicable State and federal laws and case law.
  - e. The Dispute Resolution process shall be non-binding. The Mediator does not have the authority to make factual findings or impose any resolution on the Parties.
  - f. The Mediator may make oral or written recommendations for resolution to each Party privately, or if the Parties agree, to both Parties jointly.
  - g. Any resolution is reached during Dispute Resolution process is not binding and final until approved in writing by the Chief of Staff, the Chairman of the Hospital's Governing Board and signed by the Physician.
  - h. Under no circumstances will the Dispute Resolution process require the Hospital, the Medical Staff or the Physician to take any action not permitted by law, or require the Hospital or the Medical Staff to take any action that would violate any applicable accreditation standards or reporting obligations.
  - i. The Dispute Resolution process will conclude no later than [ ] days following Physician's initial request for Dispute Resolution, regardless of whether the Parties have reached a resolution. ***[Any suspended timeframes for a hearing [or appeal] shall resume on the date the Dispute Resolution process concludes.]***
  - j. A Physician is entitled to request Dispute Resolution only once for each professional review process that results in one or more Professional Review Matters under the Medical Staff Bylaws, Rules and Regulations.
11. Costs: The Physician and the Hospital will share the costs of the Mediator equally. Each Party will pay for his/her/its own costs relating to the Dispute Resolution process (including any expert witnesses and attorneys' fees and costs).
12. No Waiver of Other Due Process Rights: A Physician who requests or declines the Dispute Resolution process under this Rule does not waive his or her rights to notice, hearing and appeal, as applicable, under the Medical Staff Bylaws and Rules.

### 13. Confidentiality

- a. All documentary information and statements disclosed to the Mediator and exchanged by the Parties shall be kept confidential and shall not be disclosed or used by the receiving Party for any purpose not related to the professional review process.
- b. The information disclosed to the Mediator or exchanged by the Parties constitutes privileged and confidential professional review records under applicable laws. The disclosure of documentary or other information under this rule is not intended to waive any confidentiality or privilege under applicable law.
- c. Neither Party will introduce as evidence in any judicial or other proceeding any of the following:
  - i. The views of either Party with respect to any resolution offer.
  - ii. Any admissions by either Party.
  - iii. Any proposals or views of the Mediator.
  - iv. The fact that either Party indicated willingness to accept or reject a resolution proposal made by the Mediator or the other Party.
- d. Any statements made during the Dispute Resolution process will not be offered to show liability or lack of liability for the underlying claim of anticompetitive conduct in any subsequent judicial or other proceeding between the Parties or involving any witness or other participant in the professional review process.
- e. Within 30 days of conclusion of the Dispute Resolution process (through resolution or conclusion of the process), the Mediator will return all documents (whether written or in electronic format) or other exhibits to the Party that produced the material, or will certify for the Parties that the material have been destroyed.
- f. The Dispute Resolution conference will not be recorded by either Party.

14. Immunity: Nothing in this Dispute Resolution process is intended to or shall be deemed to compromise or limit the immunities available under Federal or Colorado professional review laws, or set forth in the Medical Staff Bylaws, Rules and Regulations.

*[Drafting Notes:*

*DN1: The Task Force initially recommended that the Dispute Resolution process occur after final Governing Board action. Hospitals and Medical Staffs may consider the most effective timing for Dispute Resolution, such as (i) before the hearing, (ii) after the hearing but before the appeal to the Governing Board, or (iii) after an adverse recommendation of the Governing Board without an underlying adverse recommendation by the Medical Executive Committee.*

*DN2: The Task Force recommended Dispute Resolution for allegations of anticompetitive conduct only (along the lines of a private, confidential non-binding substitute for the former Committee on Anti-Competitive Conduct). Alternatively, the Hospital and its Medical Staff can consider expanding the scope of the Dispute Resolution Process to include other allegations raised by the affected Physician.*

*DN3: References to “suspensions” should reflect whether the Hospital’s Medical Staff Bylaws, Rules and Regulations allow for a precautionary suspension or only a summary suspension and the time frame that triggers the Physician’s hearing rights. References to a change in Medical Staff category should be included only if such a change otherwise triggers the Physician’s hearing rights and NPDB report if the Physician is not successful.*

*DN5: The Hospital and its Medical Staff should consider the duration of the conference. The former Committee on Anti-Competitive Conduct limit*