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Quality Assessment & Performance Improvement Committee Information & Its Privileged Status

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The new proposed Hospice CoPs are in the last stages of review prior to becoming effective. These new CoPs will impact the way Hospices approach continued quality assessment and improvement efforts. Two important pieces of the development of your (QAPI) programs will be determining how you will demonstrate compliance with the requirements and how you will protect certain records created by or at the direction of the QAPI committee or subcommittees from unauthorized disclosure to others, including surveyors. This article explains the legal concept of "privilege" and offers tips for protecting from unauthorized disclosure critical documents reflecting the discussions that occur within QAPI programs.

What is a "privilege" with regard to written and oral communication?

When communication (verbal or written) is "privileged" under the law, it is generally protected from release to others, unless the person or party holding the privilege consents to its release. The public policy behind legal privileges is to encourage full disclosure and frank discussions between the parties so the person(s) providing professional advice or direction has relevant and pertinent information upon which to base the advice. For example, legal privileges commonly protect the private communications occurring between lawyers and their clients, physicians (and registered nurses) and their patients, domestic abuse and sexual assault advocates and victims, husbands and wives, psychologists and patients. Under the physician-

patient privilege, if the patient wishes to disclose to another the content of a communication with the physician, the patient may do so or the patient may authorize the physician to do so. Once the patient discloses the content of the communication to another, the privilege is considered "waived".

Legal privileges are found in each state's laws. Some states protect from disclosure certain activities conducted by a health services review committee. The public policy behind this protection is similar to that discussed above. Health services review committees are encouraged to critically examine and evaluate incidents, trends, and patterns occurring in certain health care facilities to seek ways to improve health care, treatment and services provided.

Although there are some common privileges across states, each state differs. If a privilege is not specified in state or federal law, the communication is generally not protected.

How does the "privilege" apply to a Hospice's QAPI process?

Federal regulations and many states' laws require health care providers, including hospices, to have quality assurance committees. The purpose of these committees is to improve the quality of care, treatment or services of the patients. Under the proposed Hospice Quality Assessment and Performance Improvement (QAPI) CoP, each hospice is required to have documentary evidence of its QAPI program and must be able to demonstrate its operation to CMS. The QAPI program must be effective, ongoing, hospice-wide and data-driven. It must reflect the complexity of the organization and services, involve all hospital services (including those who are under contract or other arrangement with the hospice), focus on areas indicating the quality of care and services provided, and indicate the action taken to demonstrate improvement.

Surveyors often collect information about a hospice's QAPI program through interview. They corroborate the information provided in an interview about the QAPI program through record review. For example, a hospice may explain to a surveyor that pain management has been an area that has been addressed in the QAPI process. The surveyor may then conduct a record review to determine whether the QAPI process (1) existed as reported; (2) addressed pain

management; (3) identified areas in pain management which could benefit from improvement; (4) implemented actions toward improvement; and (5) measured the effectiveness of the actions taken. Surveyors would evaluate the hospice's compliance with the QAPI and other regulations based on the information obtained through interviews and record reviews.

Records that are evidence of a hospice's QAPI process include the following types of documents. These documents could be provided upon a surveyor's request as evidence that the hospice is complying with the proposed QAPI CoP:

- A QAPI program description
- QAPI policies and procedures showing how the QAPI process works, who participates, how members are selected, the length of time that each member serves on a committee, how items are brought forward for consideration and action, and how information is shared with others in key roles
- Calendars or notices showing dates of QAPI committee meetings
- QAPI committee meeting agendas showing attendees and topics addressed
- Reports to the governing body on quality assessment projects and data
- Governing body meeting minutes reflecting the discussion of QAPI data or projects
- Performance improvement reports showing the results of QAPI action
- Education and training records on remedial and preventative measures
- Assessment tools that contain data elements used for care planning, outcome management and measurement of progress toward identified goals

Under the applicable federal regulations and the laws of your state, many documents may be required to be produced to surveyors upon request or in response to a subpoena. Some documents may be protected from access by surveyors in any context; still others may be protected from access by plaintiff's attorneys in malpractice lawsuits.

If a state has a law protecting from disclosure information of a quality assurance, quality assessment or peer review committee, surveyors or others could not compel the production of documents generated by a committee engaged in *bona fide* quality improvement activities. In order for the information to be protected from disclosure, courts in several states have held that certain common, but critical components must be present in the activity. The decisions provide guidance for states without laws protecting records of such activities.

The commonly found required or critical components of a *bona fide* quality improvement process include the following:

- Written bylaws or policies and procedures identifying the role and responsibility of the person or committee to review, evaluate and improve quality, the procedures to be followed, when meetings are held, the committee's composition, how members are selected and how information is shared with other key individuals;
- Regular, scheduled meetings (e.g., at least quarterly each year);
- More or less constant members (e.g., Administrator, Medical Director, Director of Nursing, others with the responsibility to oversee and direct patient care and services);
- Agendas and Meeting minutes;
- Officers

QAPI committee (or subcommittee) discussions, data, analysis or other documents generated by such activity may be protected from disclosure. To be protected from disclosure, courts have generally ruled that the documents, data or other material must be generated as part of a formal quality improvement activity or peer review process. The formalities of a *bona fide* quality improvement process listed above must be adhered to.

Documents that are otherwise available outside of the QAPI process (for example, infection control records) or are generated outside of the QAPI process will not fall under the protections, even if reviewed as part of the QAPI process or labeled as QAPI documents after the fact. Any document or record that is specifically required by state law or federal regulations to be produced or completed will not be protected from disclosure to surveyors, even if produced, completed or reviewed during the QAPI process.

A hospice may choose to disclose to surveyors or others certain data, records or other material that would otherwise be protected. Once disclosed, the protections from further disclosure to others may be considered "waived".

The decision to disclose material that may be protected should be made carefully. It is wise to consult with your attorney in making this important decision.

Reinhart Boerner Van Deuren's Hospice and Palliative Care Practice Group serves hospices across the country in a variety of areas, including: regulatory compliance; survey and certification; accreditation; licensing; HIPAA; caregiver misconduct investigations; due diligence, mergers and acquisitions and other corporate matters; labor and employment; criminal and civil investigations by state or federal government agencies; litigation; contracts and daily operational issues.



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Hospices are encouraged to contact their legal counsel.

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