Resources for Podiatrists Seeking Hospital Staff Membership and/or Privileges

In addition to ACFAOM’s document *Criteria for Evaluating Podiatrists for Hospital Staff Privileges*, the following resources may be helpful to those seeking privileges and/or to those who have been denied:

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*Code of Federal Regulations, 42CFR482 – Medicare Conditions of Participation (COPs) for Hospitals*

This section prohibits discrimination on the basis of certification credentials at 42CFR482.12(a)(6) and (7) which is excerpted below:

Sec. 482.12 Condition of participation: Governing body.

(a) Standard: Medical staff. The governing body must:

(6) Ensure the criteria for selection are individual character, competence, training, experience, and judgment; and

(7) Ensure that under no circumstances is the accordance of staff membership or professional privileges in the hospital dependent solely upon certification, fellowship, or membership in a specialty body or society.

A copy of the full text of 42CFR482.12 is available at [www.access.gpo.gov/nara/crf/index.html](http://www.access.gpo.gov/nara/crf/index.html) by entering the citation 42CFR482.12.

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*Hospital Accreditation Standards*, published by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), includes Section 5 related to medical staffs. These standards (MS.1.1.1.) provide that the medical staff includes:

“fully licensed physicians and may include other licensed individuals permitted by law and by the hospital to provide patient care services independently in the hospital (both physicians and these other individuals are referred to as ‘licensed independent practitioners.’)”

The standards define “licensed independent practitioner” as “any individual permitted by law and by the organization to provide care and services without direction or supervision, within the scope of the individual’s license and consistent with individually granted clinical privileges.”

These standards also detail the credentialing process. They require

- (MS.5.4.) That mechanisms provide for professional criteria that are specified in the medical staff bylaws and uniformly applied to all applicants.
• That (MS.5.2.) a fair hearing and appeal process be provided for addressing adverse decisions.

They state specifically (MS.5.15.2.) that “Board certification is an excellent benchmark and is considered when delineating clinical privileges.”

The Joint Commission’s Hospital Accreditation Standards, updated annually, is available from its website at www.jcaho.org.

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The American Podiatric Medical Association has a publication entitled Podiatric Medicine: A Guide for Hospitals, which contains a great deal of helpful information, including guidelines for the delineation of privileges. This publication may be purchased from the APMA, www.apma.org.

Among other things, this publication states, “Because of limited availability, some podiatric physicians were unable to participate in approved non-surgical or surgical postgraduate training.” It goes on to say that in many cases, these practitioners have years of experience, continuing medical education, preceptorship training and/or other forms of education, which qualify them for privileges.

This guide emphasizes that professional criteria required for the granting of privileges must be uniformly applied to all applicants and that podiatric physicians must not be held to a higher or prejudicial standard.

The APMA’s official position is that Board certification should not be required for hospital privileges or for inclusion in insurance panels, but where it is required for all specialties, then either CPME-accredited Board (American Board of Podiatric Orthopedics and Primary Podiatric Medicine, ABPOPPM, or the American Board of Podiatric Surgery, ABPS) should be acceptable. The APMA, through its Health Systems Committee, will write to hospitals on behalf of members who are denied privileges.

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In the District of Columbia and in at least 28 states – Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming – statutes and/or administrative and judicial actions authorize podiatrists to be members of hospital medical staffs, to hold clinical privileges and to provide patient care. These so-called non-discrimination statutes are powerful weapons for those seeking privileges.

Below is a summary of legal precedents, prepared by ACFAOM’s attorney:
MEMORANDUM

TO: Carol Shaner
FROM: Heidi Abegg
RE: Podiatrist hospital privileges
DATE: July 24, 2001

You asked me to look into *Dooley v. Barberton Citizens Hospital*, as well as any other applicable precedents and summarize their findings.

In *Dooley*, an Ohio Supreme Court case from 1984, Dr. Dooley, a licensed podiatrist, filed a complaint against Barberton Hospital seeking an injunction ordering the hospital to grant him medical staff privileges as a doctor of podiatric medicine, and to allow him to perform those surgical procedures for which he is licensed under Ohio law. The hospital’s rules provided that privileges would be extended to Board Certified or Board Eligible podiatrists who are licensed in the State of Ohio and who have completed at least two years of post-graduate training in an approved residency program. The hospital’s rules also provided that podiatrists granted privileges shall provide conservative care of the foot excluding surgical procedures with anesthesia.

Dr. Dooley was board eligible with the American Board of Podiatric Surgery, and had graduated from the four-year program at the Ohio College of Podiatric Medicine, and had one year of residency training. Also, he had been afforded full surgical privileges at Wayne General Hospital in Orrville, Ohio.

Ohio law provided that the governing body of any hospital, in considering and acting upon applications for staff membership or professional privileges within the scope of the applicants’ respective licensures, shall not discriminate against a qualified person solely on the basis of whether such person is certified to practice medicine or osteopathic medicine, or podiatry, or dentistry.

The court in *Dooley* found that the two-year requirement was in addition to board certification or eligibility. Moreover, no surgical privileges were allowed even if a
podiatrist could be found to meet the criteria. When this two year rule was examined within the context of other hospital specialty classifications, such as dentists or oral surgeons who were allowed minor surgical privileges after only one year of post-graduate training (or two months of internship required for minor privileges in obstetrics), the court found it evident that the two year residency requirement was not reasonable. Since less than 8 to 10% of the national podiatric graduates had participated in a two year residency at the time the hospital rules were promulgated, and in view of the fact that no two year residencies were available in Ohio, the hospital’s rules were discriminatory against podiatrists as a class. Prior to the enactment of Ohio law prohibiting discrimination against podiatrists (mentioned above), such discrimination may have been allowed under hospital discretion.

Thus, the Ohio law, and the absence of any credible justification for the two year residency requirement, led the court to conclude that the two year residency requirement, in conjunction with the requirement of board eligibility or certification, was illegally discriminatory because it was not reasonably related to a determination of whether or not the podiatrist is qualified.

Also, the court found the rule denying all but conservative foot care privileges and excluding surgical procedures with anesthesia was discriminatory. No matter how good the podiatrist might be or how much training he might have, the podiatrist would still be relegated to performing de minimus procedures that could be performed just as well outside the hospital. Thus, the court found it unreasonable to create rules so inflexible as to negate the opportunities of a podiatrist to fully practice his or her profession.

As of 1985, at least 12 other states had adopted antidiscrimination rules or statutes similar to Ohio’s, including Arizona, California, Florida, Louisiana, Maryland, Massachusetts, Nevada, New York, North Carolina, Oregon, South Carolina, and Virginia. However, I cannot say for certain whether a hospital may still refuse privileges to podiatrists without looking at the individual statutes. Furthermore, some states may distinguish between private and public hospitals in their antidiscrimination statute.

In New Hampshire Podiatric Medical Association v. New Hampshire Hospital Association, a case decided by the US District Court for the District of New Hampshire in 1990, the New Hampshire Podiatric Medical Association alleged that licensed podiatrists of New Hampshire were unlawfully denied hospital privileges in violation of the US and New Hampshire Constitutions. Specifically, the NH Podiatric Medical Association claimed that licensed podiatrists had been denied the opportunity to treat patients and perform surgery at hospitals. The NH Podiatric Medical Association had unsuccessfully lobbied for passage of an antidiscrimination statute.

The court found that there was a rational basis for the state’s decision to classify different medically related professionals differently and that courts have consequently rejected these kinds of claims. The court refused to classify podiatrists and licensed physicians as similarly situated, and thus refused to find that podiatrists were entitled to equal staff privileges at hospitals.
A majority of courts continue to refuse to review cases involving exclusions from private nonprofit hospitals’ medical staffs. In these jurisdictions, the private nonprofit hospitals have absolute discretion to exclude whomever they choose. In these jurisdictions, the courts do not consider the reasonableness of the bylaw or the rationale for withholding privileges.

As you are probably aware, many physicians and hospitals are resistant to podiatrists having privileges. An example of this can be found in a case from North Carolina, where the orthopedic surgeons on the hospital’s staff testified that they regarded podiatry as an “infringement” on the practice of orthopedic surgery and that the profession would be downgraded if the hospital allowed podiatrists to perform inpatient foot surgery.

A deferential court would accept a hospital’s reasoning that traditional medical doctors are more competent than nonphysician health care providers. In one case, a hospital bylaw granted staff membership to dentists and persons with unrestricted licenses. Dentists could join the hospital staff because doctors with unrestricted licenses don’t generally engage in dentistry. Podiatrists however, were unable to obtain staff privileges because they had restricted licenses. The staff’s orthopedic surgeons testified that they could better serve the needs of the whole patient because of their ability to diagnose and treat physical and emotional problems manifested through foot and leg disorders. The court concluded that the hospital’s bylaw was reasonable because orthopedic surgeons are competent to treat the entire patient whereas podiatrists can treat only foot and leg disorders.

Another court has stated that physicians do not obtain a constitutional right to staff privileges upon licensure. Hospitals may therefore impose additional standards beyond the state’s minimum criteria if those standards were reasonable and relate to hospital operation. But, another court found that although the hospital could require additional qualifications beyond licensure requirements, it could not reexamine the elements of the state’s threshold requirements and differentiate between osteopaths and allopaths when both types of training and education are acceptable for licensure.

In conclusion, there are precedents that support podiatrist privileges, as well as precedents giving hospitals unbridled discretion. The strongest case for discrimination would exist in a state that statutorily prohibits discrimination against podiatrists -- a podiatrist could simply quote or cite the statute to the hospital. If the state does not have such a statute, then arguments similar to those in the Dooley case could be made.