

## Fair hearings 101

# Prevent fair hearings in five law-abiding steps

Throughout the “Fair hearings 101” series, **CPR-LI** has covered various aspects of the fair hearing process, from what language medical staffs need to include in the bylaws to how to choose the right hearing panel members. Although these topics are important, medical staff leaders need to understand how to avoid costly, time-consuming, and burdensome hearings altogether. By following these tips, you can avoid hearings while upholding your medical staff’s commitment to strong physician performance and appropriate conduct.

### Create crystal clear bylaws

A physician has the right to request a fair hearing if the hospital takes either of the following actions because it is concerned about the physician’s professional conduct or clinical competence:

- The hospital denies the physician’s application or reapplication for medical staff membership and privileges
- The hospital suspends, restricts, or revokes a physician’s privileges

“The easiest thing to do is take remedial measures, such as monitoring or proctoring, that do not usually trigger a fair hearing. That means you have to understand what actions do and do not initiate a hearing under your bylaws,” says **Michael R. Callahan, Esq.**, partner at Katten Muchin Rosenman, LLP, in Chicago.

Callahan suggests that the medical staff bylaws only allow for a fair hearing if the hospital is required to report the physician to the state or the National Practitioner Data Bank (NPDB). Reportable events include:

- Suspending a physician’s privileges for more than 30 days.
- Terminating a physician’s privileges.
- Restricting a physician’s privileges.
- Requiring a physician to consult with a department chair or the chair’s designee and get his or her approval before going ahead with a requested

procedure. “It essentially gives the chair veto authority,” says Callahan.

- Denying a physician’s application for privileges at appointment or reappointment.

For example, if a hospital denies a physician’s application or reapplication for privileges because it is concerned that the physician’s conduct has or could adversely affect patients, the hospital is required to report that physician to the NPDB and the physician would therefore have hearing rights.

However, denials based on administrative transgressions, such as failure to pay medical staff dues or submit a timely application, are not reportable to the NPDB, and the physician would not be granted hearing rights.

“There is no point in allowing a hearing for administrative suspensions because, unless otherwise required under state law, all the physician has to do is pay the dues or finish the medical records,” says Callahan. “Where such hearings are permitted, even if not reportable, we limit the scope of the hearing to whether the basis for the suspension was accurate (i.e., was the record completed or not?)”

One way to avoid denying a physician’s application is to establish eligibility criteria that physicians must meet to apply for medical staff membership and privileges. If a physician does not meet those criteria or submits an incomplete application, the credentialing professional should ask the physician for additional information. If the physician then fails to supply that information, the credentialing professional does not have to process the physician’s application and thus can’t deny it, says **Constance Baker, Esq.**, partner at Venable, LLP, in Baltimore.

Some physicians with questionable backgrounds will often let their applications lapse if the medical staff

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presses them for additional information, suspecting that a denial will result in a fair hearing and a possible report to the NPDB. "There are many times when a doctor has chosen not to complete an application for appointment or reappointment because he or she saw there was trouble brewing," Baker says.

Although some medical staffs include reductions in medical staff category in their list of hearing triggers, The Greeley Company does not include it in its list of fair hearing triggers. "Those aren't reportable, but sometimes medical staffs think that these decisions are significant enough to include on the list," says Callahan.

## Conduct a frighteningly thorough investigation

Conducting a solid investigation and keeping meticulous documentation is often the ticket to avoiding a hearing. "When the physician's lawyer reviews those documents, he or she may feel that there is an overwhelming likelihood that the physician is going to lose either at the hearing level or the board level," says Baker. If the odds are stacked against the physician, he or she may rescind his or her request for a hearing or not request a hearing at all.

To conduct a thorough hearing process, be sure that your bylaws define the following:

### ➤ **What circumstances trigger an investigation?**

According to *The Greeley Guide to Medical Staff Bylaws*, Second Edition, published by HCPro, Inc. (available at [www.hcmarketplace.com](http://www.hcmarketplace.com)) an investigation is triggered when the medical executive committee (MEC) suspects that there is reason to recommend corrective action against a medical staff member.

- **What does the term "investigation" mean?** Because the NPDB requires hospitals to report practitioners who voluntarily surrender membership or clinical privileges while under investigation or in lieu of corrective action, be sure to clearly define the term "investigation" and how it differentiates from standard peer review.

- **Who can initiate an investigation?** The MEC should be the only body authorized to declare that a formal investigation has begun, says Baker. Requesting an investigation is not the same as actually commencing one, so be sure the MEC adequately documents when an investigation has begun. If the physician resigns during the course of the investigation, that is a reportable action, Baker explains.
- **Who carries out the investigation?** Some medical staff bylaws state that the entire MEC can serve as the investigating body, but the MEC often has too many members for that to be effective, says Baker. Instead, she suggests that the MEC appoint an ad hoc subcommittee to conduct the investigation.

To conduct a thorough investigation, committee members should:

- Review medical records connected with the incident under investigation
- Interview nurses, advanced practice professionals, and others who have firsthand knowledge of the issue under investigation
- Share with the physician that an investigation is under way and interview him or her to hear the other side of the story
- Not allow the physician's attorney to attend any of the interviews, as this stage of the investigation is informal

Baker notes that rarely would the investigating committee interview patients for fear of the physician slapping them with a defamation claim. "Hospitals don't want to drag patients into their internal processes, and they don't usually want to advertise that they are doing a peer review as it is confidential information," says Baker.

Once the investigation is complete, the investigating committee should create a report outlining the findings of fact (e.g., "According to two nurses and as evidenced by the medical record, the physician failed to round on

patient X for two days during the hospitalization.”). In addition, the report should include conclusions and recommendations to the MEC. All documentation compiled throughout the investigation, such as minutes from investigating committee meetings, medical records, memos, and interview notes, should be available for review.

### **Offer progressive discipline**

If a physician commits an egregious act, such as rape or assault, the hospital should summarily suspend or revoke his or her privileges. However, the medical staff may choose to handle lesser offenses through a system of progressive discipline and multiple opportunities to improve that don't trigger a fair hearing. These opportunities may include additional education, mentoring, or proctoring in varying degrees and intensity.

“The message from the medical staff is, ‘Everyone makes mistakes, and we need to learn from those mistakes. We want to work with you, and you need to work with us,’ ” says Callahan.

For example, if a physician arrives at work intoxicated, rather than suspending him or her, the medical staff may extend a helping hand by suggesting that the physician take an administrative leave of absence to participate in a rehabilitation program. A voluntary leave of absence is not reportable to the NPDB and is not cause for a fair hearing. If the physician doesn't comply, the medical staff can suspend him or her to prevent harm to patients, which is reportable to the NPDB and therefore hearing-worthy.

Disciplinary steps should be outlined clearly in the medical staff's code of conduct policy and impaired practitioner policy. Be sure that these policies align with your hospital's disruptive behavior policy, which applies to everyone who sets foot in the hospital, says Callahan.

### **Suggest that the physician resign or allow privileges to lapse**

If progressive disciplinary measures fail to correct a physician's problem behavior, a medical staff leader, such as the chief of staff or department chair, may recommend to the physician that he or she resign, says Callahan. On

the one hand, voluntary resignation in the absence of an investigation or recommendation for corrective action is not reportable to the NPDB, but it will raise a red flag for any other hospital to which the physician applies. On the other hand, resignation in lieu of corrective action is reportable to the NPDB, so the physician may choose the path of least resistance and resign.

Alternatively, the chief of staff, department chair, or other medical staff leader may suggest that a physician with questionable behavior and/or competence let his or her privileges lapse, says Callahan.

However, keep in mind that suggesting to a physician that he or she resign or not reapply does not preclude the hospital from sharing information about the physician's performance with hospitals that request references down the road.

“Use of absolute waiver of liability forms before responding to any third-party inquiry under these circumstances is a prerequisite,” says Callahan.

### **Strike a settlement agreement**

If a physician decides that a fair hearing is not in his or her best interest, he or she may rescind the hearing request and offer to settle with the hospital. By settling, a physician can work with the hospital to draft language that will be included in the hospital's report to the NPDB and the state medical board, as well as a letter of reference.

“If [the action] is reportable, the hospital is obligated to report it, but there are some choices in wording that can be negotiated,” says Baker.

The settlement should also include whether the physician is prohibited from applying for privileges at the hospital again.

“It is a binding contractual obligation between the hospital and physician with the full force and effect of the law,” says Baker.

Hearings cost your hospital tens of thousands of dollars, countless hours, and heartache, so it is best to avoid them unless absolutely necessary. With these strategies, your medical staff will be able to do just that while staying within legal bounds. ■