The dos and don'ts of conducting fair hearings

Hospital labs have a sterile environment in which to determine whether a patient has sickle cell anemia, and the outcome is typically straightforward. However, medical staffs do not have such a sterile environment to determine physician competence, and the outcome is often not crystal clear.

Generally, every member of your medical staff has the right to a fair hearing if they are accused of unprofessional behavior or technical incompetence, but ensuring a truly fair process can be difficult. **MSB** has highlighted some key dos and don'ts to help make your fair hearing process just that—fair.

Don'ts

When preparing a hearing panel, avoid the following:

➤ **Don't appoint direct competitors.** "You can't have a physician's arch nemesis sitting on the hearing committee, because he or she stands to gain from the physician's termination or will be less than objective," says **Michael Callahan,** an attorney at Katten Muchin Rosenman in Chicago. However, sometimes the committee responsible for appointing panel members may not know where to draw the line, he adds. For example, he recalls being involved in the summary suspension of an orthopedic surgeon. The hearing panel was not only devoid of other orthopedic surgeons, but also general surgeons, "even though, technically, they don't compete," he says. The physician in question claimed the hearing was not fair, because none of the panel members were surgeons and did not understand his arguments.

When deciding who is a direct competitor, it is important to identify the issue at hand, says Callahan. If Dr. X is undergoing a hearing for disruptive behavior, panel members don't have to be in the same specialty. "Anyone can understand [behavior issues]," he says. However, if Dr. X is undergoing a hearing for clinical or technical problems, the hospital should appoint at least a few panel members who practice in the same or similar specialty but are not direct competitors. If necessary, the hospital may need to bring in noncompeting physicians from other hospitals.

Also, if the patient populations of Dr. X and a panel member do not overlap, they technically are not direct competitors, Callahan says.

➤ **Don't appoint people who had direct involvement in the events leading up to the hearing.** The person who blew the whistle on Dr. X cannot participate on the panel, says Callahan, and you must also exclude any members of a committee who met to discuss Dr. X's poor performance. However, Callahan adds, individuals who have heard at the watercooler that Dr. X might undergo disciplinary action do not need to be excluded. "Knowledge of the situation is not enough to kick someone off of the hearing committee," he says.

Annemarie Martin-Boyan, an attorney at Temple University Health System in Philadelphia, says that bylaws should be clear as to what level of involvement prohibits someone from serving on the hearing panel. "A lot of hospitals take the position that if you voted on the matter before or were directly involved in making a recommendation, that would preclude you from the panel," she says.

➤ **Don't allow physicians access to other physicians' records.** When Dr. X is preparing a defense, the hospital should allow him or her access to all incident reports, meeting minutes, or other records that were used when making the decision to take corrective action against Dr. X, says Callahan. He adds that Dr. X may also want access to other physicians' files to find information regarding disciplinary actions against them; if successful, he or she could make a case that the hospital is singling him or her out. "I can see the argument, but we don't give access to peer review files of other physicians," he says.

Boyan says that in seeking other practitioners' files, Dr. X may be trying to divert attention away from the issue at hand. "As a rule of thumb, you want to limit the scope of the questions that go before the panel. You don't want [the hearing] to become a trial of the institution or of all the medical staff members in a particular department."

➤ **Don't make it impossible for the hearing panel to overturn the medical executive committee's (MEC) decision.** If the MEC recommends discipline for Dr. X, and Dr. X appeals, the hearing panel has the authority to recommend a different course of action to the MEC, Boyan says. For example, if the MEC suggested that the board suspend Dr. X, the hearing panel, on a second analysis, may recommend proctoring, professional devel-

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opment, and/or continuing medical education (CME) for a specific period of time.

The example can also be flipped around: if the MEC recommended proctoring, but the hearing panel determined proctoring was not sufficient discipline, the panel could recommend suspension. "You want the panel members to know that they have a say as to how [cases] ultimately go to the board," Boyan says.

If the hearing committee gives complete deference to the MEC, "it raises the issue as to whether this is really going to be a fair proceeding," Callahan adds.

➤ **Don't assume hearings are the only way to address physician behavior and/or competence problems.** Callahan and Boyan say that hospitals should consider a hearing only as a last resort. "Hearings are expensive, time-consuming, and may lead to litigation," says Callahan. As soon as a hospital begins looking into a physician's performance, it should inform and consult with that physician, adds Boyan.

Callahan says hospitals have several options to help physicians get back on track, including:

- Monitoring
- Proctoring
- Counseling
- CME

Boyan says The Joint Commission's ongoing professional practice evaluation requirements should help hospitals identify negative trends in physicians' performance far before disciplinary action is needed. "It works out better for everyone if the physician gets the help that he or she needs before a hearing is required," she says, adding that taking proactive measures to help physicians may benefit the hospital if circumstances ultimately lead to a hearing. "If you are doing all of these things, and the individual fails to change [his or her] behavior or demonstrate improvement, you have shown as an organization that you have tried, and I think that makes the hearing easier," says Boyan.

Dos

Strive for the following when preparing a panel:

➤ **Do avoid biases on either end of the spectrum.** Hospitals should avoid appointing panel members who have a grudge against or who are good friends with Dr. X, Callahan says. In addition, hospitals should also avoid appointing members that have a referral agreement or contractual relationship with the hospital or the physician. For example, if a hospital appoints a medical director who has an exclusive contract with the hospital, Dr. X can object, claiming that the medical director would vote in the best interest of the hospital. Callahan says that hospitals should avoid creating even the appearance of bias so as to not give Dr. X additional grounds to claim the hearing was unfair.

Boyan adds that hospitals need to remind physicians of their obligation to disclose any conflicts they foresee with panel members.

➤ **Do appoint panel members who have good standing within the hospital.** The hearing panel receives more information than any other committee regarding the claims brought against Dr. X. Fair hearings aggregate all documents and data illustrating Dr. X's performance and involve testimonies from witnesses and experts. For that reason, the hospital takes the hearing panel's recommendations seriously.

"With that in mind, you obviously want people who are highly regarded within the institution, professional, thoughtful, and fair," says Callahan. "If, for example, you appoint courtesy staff members who hardly ever show up at the hospital, you are watering down the potential impact the panel's recommendation is going to have."

Although it may be difficult for hospitals to find medical staff members who are willing and able to serve on a hearing panel, Boyan says that hospitals should avoid overusing those individuals. The hearing process is not only time-consuming, but judging peers can also be emotionally taxing on panel members. "It is a lot of work, and they don't get compensated for it," she says.

➤ **Do allow the opportunity to raise objections.** Even if you have tried to be objective when choosing a hearing panel, you might not know that Dr. X and a panel member were partners 10 years ago and had a bitter falling-out, says Callahan. "That is why you give physicians an opportunity to object."

If Dr. X objects to the appointment of a panel member, he or she needs to provide the committee responsible for appointing panel members with adequate justification. The committee chair will decide whether the objection is valid and determine whether the committee should remove the individual in question from the panel.

"As a general rule, [the committee would] abide by the physician's request, but sometimes you will see physicians objecting for no reason," Callahan says. He explains that Dr. X may object to a panel member he or she knows has no tolerance for deviations in performance, but notes that, "of course, that kind of objection would be denied."

Hospitals that offer physicians an opportunity to object to panel members are protecting themselves in the long run, Callahan says. If Dr. X was given the opportunity to object, he cannot try to overturn the hospital's decision to terminate his or her privileges by claiming the panel was biased.

➤ **Do assure panel members of the protection your hospital will provide them.** Finding individuals who are willing to sit on a hearing panel is difficult, so you want to protect them from the potential threat of litigation, says Callahan. To help panel members feel safe throughout the hearing process, Callahan says the hospital should remind panel members that its insurance policy will cover and defend them from any claims associated with their recommendations. "The hospital needs to be able to say, 'If that physician sues you, we will provide a defense for you,' " he says.

Boyan adds that insurance coverage varies depending on the relationship the physician has with the hospital. If the medical staff members serving on the hearing panel are employees of the hospital, they are likely to be automatically insured by the hospital's policy.

"It gets tricky when you have volunteer medical staff. You would have to provide them some assurance of coverage if they asked for it," she says, adding that hospitals should ask their insurance companies whether coverage for volunteer activities is available in the event Dr. X files suit.

➤ **Do provide physicians with adequate notice.** Surprisingly, some hospitals take corrective action against physicians without providing those physicians with adequate reason, says Callahan. In such a scenario, the case could be thrown out of court because Dr. X did not have an opportunity to adequately defend him- or herself. Hospitals should always notify physicians as to why a corrective action is being taken against them.

"If I am a physician and you are going to take away or reduce my privileges, I want to know exactly what I did wrong and the data used to support that decision," Callahan says.

Providing physicians with adequate notice can also help the hospital avoid a hearing altogether. Callahan says that if Dr. X receives enough evidence illustrating his or her performance problems, he or she may choose to forgo a hearing and instead choose to resign from the medical staff.

"There comes a point where the physician might say, 'What's the point of having a hearing—there is no way I can win,' " he adds.

➤ **Do follow your bylaws and policies to the letter.** If a hospital fails to follow its bylaws, it invites the panel to question the hospital's motives against Dr. X, says Callahan. "The court might say, 'Maybe there is something to this physician's claim that he is being railroaded,' and decide that there is no substantive basis for the charges." He adds that most hospital bylaws are structured to ensure that the process is fair—but by not following their bylaws, hospitals undermine this careful structure.

Boyan adds that following your bylaws is only half the battle. "You have to make sure your bylaws are good, and that you are refining them as you learn." ■

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