

The Medical Staff: How Hospitals Should Adjust Their Practitioner Investigations, Hearings, and Appeals for the New Normal

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Peer Review During the Pandemic

Committee Processes we will Address:

- Routine review conducted by Peer Review Committees
- Formal investigations triggered by the Medical Executive Committee or the governing body
- Hearings to consider adverse recommendation against Practitioner
- Appellate Reviews of the Hearing Decision

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I. Routine Peer Review

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Peer Review

- Routine peer review is typically conducted by the Section or Department of practitioner being reviewed, and/or
- An Interdisciplinary Peer Review Committee/comprised of practitioners from various specialties
- Generally, there is a written policy that governs the peer review process

Hospital Routine Peer Reviews (con't.)

How Does Routine Peer Review Work?

- Cases are sent to Peer Review that do not meet certain criteria
- Reported unprofessional conduct is also evaluated
- Peer Review Committee meets monthly or every 2 months to routinely review cases/conduct
- Normally, the Committee meets in person and has a paper agenda and packet
- Committee determines if care was acceptable after allowing practitioner the opportunity to provide input

Hospital Routine Peer Reviews (con't.)

- Input from practitioner can be
 - In person interview
 - Written response
- Notice is sent to practitioner, requesting input
 - Normally, Notice is by Certified Mail or First Class Mail
- From Committee's perspective its always better to at least obtain written input from the Practitioner
- Practitioner may be allowed to appear before the Peer Review Committee, but at discretion of the Committee
- Committee then makes a decision about whether the care or conduct was acceptable and if additional steps are needed to address
- Practitioner is notified of decision in writing

Peer Reviews (con't.)

How Has the Pandemic Impacted Routine Peer Review?

- Peer Review may have been delayed because of surge, inability to meet in person, and unavailability of practitioners to participate
- May face a back log of peer review
- Delay tactics by some Practitioners
 - Always want to meet in person
 - Never wants to commit position in writing

Key Take Aways:

- Notices to Practitioner may be by certified mail, hand delivery, overnight courier or email.
 - If by email, MSO should request confirmation of receipt or follow-up in email that notification was received for documentation in the record.
- Peer Review Committee meetings may be in person, telephonic, or electronic (virtual), at the discretion of the Committee Chair or Chair's designee
- Practitioner's input may be obtained in writing and/or in person at the discretion of the Committee
- Modify your Peer Review Policy to conform to your current or future practice during the pandemic
- Obtain Business Associate Agreement with electronic provider

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II. Formal Investigation By Medical Executive Committee/Governing Body

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Formal Investigations/Corrective Action

- Formal Investigation is a step up from routine peer review
- A formal investigation typically is addressed in Medical Staff Bylaws or Credentials Policy, Medical Executive Committee is the body that initiates the investigation
- Hospital Governing Body can also initiate, but rarely done
- Investigation initiated based on concerns raised by Medical Leaders or Administration
- Initiated because of serious concerns regarding competence or conduct

Formal Investigations/Corrective Action

- Who investigates?
 - Entire MEC (absent competitors)
 - Ad Hoc Committee appointed by MEC made up of members of the medical staff
- Some Bylaws allow for Ad Hoc Committee Member(s) to be appointed from another hospital
 - Amend your Bylaws to provide for this possibility
 - Allows formal investigation to proceed when a surging hospital cannot identify sufficient members of its Staff to conduct an investigation
 - Investigation can take 30 or more days

Formal Investigations/Corrective Action

- How is the Investigation Conducted?
 - Typically, the MEC or Ad Hoc Committee meets in person
 - Reviews documents
 - Interviews are conducted in person
 - Affected practitioners, Experts, and Staff
 - Summaries of interviews made
 - Ad Hoc Committee makes a report to the MEC with recommendations
 - MEC makes final recommendations concerning affected practitioner's privileges
 - Notice of MEC decision provided to affected practitioner

Formal/Investigations/Corrective Action

How Should Formal Investigations Proceed in a Pandemic?

- Meetings can occur in person
 - Need masks and social distancing (at least 6 feet)
 - Difficult to hear
 - Difficult to share documents
- Meetings can occur partially in person, telephonically, and electronically (virtual)

Formal Investigations/Corrective Action

Meetings of MEC/Ad Hoc Committee

- Protect confidentiality
 - Practitioner needs to attend via video in Hospital Administration/do not email documents
- Organize and paginate MEC Ad Hoc Packet (especially for virtual meetings)
- Paginated packet of documents make remote and in person meetings (with social distancing) more efficient

Key Take Aways:

1. MEC/Ad Hoc Committee meetings and interviews may be in person, telephonic, or electronic (virtual), at the discretion of the Chair or Chair's designee
2. Practitioner may participate via video conference, but protect confidentiality by having Practitioner attend via video in Hospital administration room
3. Organize and paginate MEC packet for more efficient meetings
4. Modify Medical Staff Bylaws to allow for (a) Notice of a Formal Investigation via email, with confirmed receipt, (b) telephonic or electronic (virtual) MEC and Ad Hoc meetings, and (c) allow Ad Hoc Committee Members to be selected from other hospitals

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III. Hearing Procedures

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Hearing Procedures

- Practitioner is entitled to request a hearing if the MEC or Governing Body takes an action or makes a recommendation that would adversely affect privileges/membership
 - Examples Suspension for >30 days, Recommendation to terminate privileges/membership or deny an application based on competence or conduct
- If Practitioner requests a hearing, it will be conducted as an informal trial
- Jurors are other practitioners
 - Judge is a lawyer (Presiding Officer)
 - The MEC prosecutes the case
 - The Practitioner defends the case
 - Parties both have right to counsel participating in hearing
 - The MEC and Practitioner can call and examine witnesses
 - They introduce documents
 - A court reporter is present
 - The Hearing Panel adjourns to deliberate and render a decision at conclusion of evidence

Hearing Procedures

Hearings have always taken place in person

Hearing Procedures

- How has the pandemic impacted Hearing Procedures?
 - In-person Hearings stopped for a while
 - State governments issued Orders limiting gatherings
 - If tried to conduct in person, might not be able to retain court reporter
 - Most laws require court reporter to be in room with witness
 - Court reporters couldn't hear witnesses with masks and with social distancing
 - Documents couldn't easily be shared in person because of social distancing, more copies were required with detailed pagination
 - Participants refused to appear in person for health concerns and inconvenience
 - In person hearings were used to protect PHI and Peer Review Privileged information

Hearing Procedures

- Notices to Practitioner:
 - Practitioner is entitled to request hearing
 - Notice of day, time, and place of hearing (in accordance with Healthcare Quality Improvement Act)
 - Normally sent by Certified Mail
- Pandemic significantly slowed mail and overnight couriers
- Delayed Hearing Procedure Deadlines
- Difficult to obtain 3 to 5 hearing panel members during hospital surge
- Hearings typically last more than one evening
- Hospitals in a surge may not allow non-essential personnel required for hearing in hospital (attorneys, court reporter, etc.)

Hearing Procedures

How have hearings moved forward during the pandemic?

- Virtual Hearings
- Hearings may be held via Webex, Zoom, etc.
 - Note whether state courts issued order allowing electronic hearings
 - These Orders substantiate the reasonableness of a hospital remote hearing
- Hospital or a law firm scheduling a Virtual Hearing, must have appropriate Business Associate Agreement with the electronic platform provider
 - Critical because hearing will likely involve sharing PHI
- Court reporters
 - Need Business Associate Agreement
- Virtual hearings appear to be easier to schedule among participants

Hearing Procedures

Moving forward during a pandemic...

- Notices to be sent by Special Notice as required by Bylaws AND via email, with confirmation of receipt
 - Physicians' offices may be closed and not able to accept hand delivery or Certified Mail
 - Physicians may be operating via telemedicine
 - Physician and MEC may agree that notice may be served via email, with confirmation of receipt
- Pre-Hearing Conference
- Hearing Officer, MEC, and practitioners agree to transfer Confidential Documents/PHI by secure email or secure file transfer

Hearings Procedures

Moving forward during a pandemic ...

- Court reporters
 - Some states issued orders/waivers allowing court reporter to be remote from witness
 - You need to check your jurisdiction for such order/waiver
 - Make sure order/waiver is still in effect
 - Court reporters have become adept at proceeding with virtual depositions and know the technology
- Need Virtual Breakout Rooms for
 - Counsel to confer with Presiding Officer
 - Parties to Confer with our counsel

Virtual Peer Review Hearings

Moving forward during a pandemic ...

- **Effective Examination and Cross Examination with documents**
 - Provide electronic and physical copies ahead of time
 - To Parties, Witnesses, Hearing Panel, Presiding Officer
 - All documents must be carefully and consistently paginated and marked as Exhibits
- **Sending documents with PHI**
 - Have agreement regarding how physical documents must be returned after the hearing
 - Can schedule courier to wait during witness testimony to retrieve documents when testimony is complete
- **Secure Database of Admitted Exhibits for the Hearing Panel**
 - Add any written statements of the MEC and Practitioner
 - Add hearing transcript when completed
 - All may be used during the hearing panel's deliberations

Hearing Procedures

Concerns with Virtual Hearings:

- Internet goes down
- Witness freezes while speaking
- Technical issues with sharing documents
- Concern someone is coaching witness through texts
 - If suspected, request conference with Presiding Officer
- Need paralegal or staff present to assist with these issues
- MEC representative and affected practitioner cannot confer or exchange notes with their counsel during hearing/must go to Virtual breakout rooms
- Have cell numbers and emails of Presiding Officer and all witnesses in the event there are technical issues

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IV. Appellate Reviews of the Hearing Decision

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Appeals

After the Hearing Panel issues decision, the Practitioner and/or MEC have right to appeal decision to Governing Body

- Governing Body may hear appeal or appoint smaller Appellate Review Body
- Oral argument before the Appellate Review Body or Governing Body is likely discretionary
- Logistics of Oral Argument
 - 3 to 5 Appellate Members, Court Reporter, Attorneys, Practitioner, MEC representative, staff members
- Both parties submit written statements citing to evidence

Appeals

How has the pandemic affected appeals?

- Initially delayed oral arguments
- Same issues for appeals as seen with hearing

Key Take Aways

- **Hearing & Appeals**
 - Obtain agreement to send notice via email, with confirmation of receipt
 - Obtain Court Reporter service with experience in virtual depositions/hearings
 - Secure confidential and protected documents
 - Practice and become comfortable with technology
 - Hold practice sessions between Presiding Officer, Attorneys, and Paralegals
 - Have everyone's contact information in case technical difficulties
 - Use stable internet connection (consider individual hot spot)
 - Support Staff is vital
- **Modify Hearing Procedures to conform with current or future practice during the pandemic**

Why Important to Revise Bylaws:

- Some states treat Medical Staff Bylaws as a contract
- Hospitals are often bound by the terms in Medical Staff Bylaws
- Avoids ambiguity for the future
- All health care providers, administrators, and front line workers are stressed
- The peer review process should not add further stress when in a pandemic or mass casualty situation

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