From Paper to Decision: Applying the Fair Hearing Panel to Reality

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Every accredited hospital has a Fair Hearing Plan (FHP) when practitioners on the professional staff challenge certain adverse decisions regarding membership and privileges. The FHP provides a process accommodating two interests: the interest of the hospital and its professional staff in protecting patient safety, and the interest of the practitioner in avoiding harm to their career and ability to practice.

Both Fair Hearings and court-based litigation involve an adversarial process with presentation of evidence to neutral decision makers. However, what takes place in the Fair Hearing process is different from regular litigation involving discovery and a lengthy path to trial. By design, Fair Hearings take place in a compressed time frame, involve a minimal exchange of information, and shift the burden of proof to the practitioner. The Fair Hearing forum is intense for all participants, with much at stake.

This article addresses issues that may arise for health care attorneys when navigating the Fair Hearing process, from applying the FHP on paper to the actual hearing, then through the appellate review process and final decision.[1] Ideally, the goal of everyone involved in the Fair Hearing process should be an efficient presentation of relevant information so that the process is fair to all stakeholders: the affected practitioner, professional staff leadership, hospital administrators and governing board members, and most importantly, patients.

The following discussion assumes that the FHP is followed from beginning to end. In reality, the Fair Hearing process often is stopped by a negotiated resolution or the practitioner's resignation.

Legal Basis for Fair Hearing Plans

The Health Care Quality and Improvement Act (HCQIA) provides immunity for those involved in a professional review action, including leaders, administrators, witnesses, committee members, and other participants in the hearing.[2] To qualify for immunity, the action must be taken:

1. In the reasonable belief that the action was in furtherance of quality health care;
2. After a reasonable effort to obtain the facts of the matter;
3. After adequate notice and hearing procedures afforded to the physician or other such procedures that are fair to the physician; and
4. In the reasonable belief that the action was warranted by the facts known after the reasonable effort to obtain the facts and adequate notice and hearing procedures have been afforded to the physician.[3]

The emphasis on reasonableness is a theme carried throughout the Fair Hearing process. HCQIA contains specific notice and hearing requirements, which are described in this article.

In addition, Joint Commission Standard for Medical Staff Bylaws MS. 01.01.01 requires that the bylaws contain a Fair Hearing and appeal process. At a minimum, the Standard requires that the bylaws include the process for scheduling and conducting hearings and appeals, as well as the composition of the Fair Hearing committee.[4]

Common Elements of FHPs

FHPs appear in different places in hospital professional staff governance documents. They may be in bylaws, policies and procedures, or a standalone document. It is important to keep in mind that, while an FHP is legally required for accreditation (and thus government reimbursement), it also is adopted by the vote of the professional staff membership.

FHPs vary in their details, but generally have common elements, including the following:

- A triggering event, which generally is a decision adversely affecting the practitioner, such as restricting, suspending, revoking, or denying membership or privileges (the trigger may or may not have a time component, as dictated by the FHP);[5]
- Notice of the adverse decision;[6]
- Specified time and manner to request a Fair Hearing;[7]
- Time period within which the Fair Hearing must take place;[8]
- Selection of a hearing committee;[9]
- Procedures for the hearing, which include prehearing matters, standards for presentation of evidence, opportunity to be represented by counsel, right to cross-examine, order of proof at the hearing, and creation of the hearing record;[10]
- Deliberation and decision by the hearing committee;[11]
- Review of the hearing committee's decision by a higher authority, such as a Medical Executive Committee (MEC);[12]
- Opportunity for the practitioner to have appellate review of an adverse hearing committee decision;[13]
- Procedures for appellate review, which includes review of the hearing record by a different committee;[14] and

- Review of the appellate review decision by a higher authority, which ultimately is the governing board when the final decision is adverse to the practitioner.[15]

Fair Hearings are not that common. Many FHPs have been in place for years, or even decades, without being used, or at least without being reviewed. Like any important governance document, an FHP should have regular review and maintenance.

Initiating the Hearing Process

The Fair Hearing process begins when the corrective action process ends. Certain defined decisions trigger Fair Hearing rights. Generally these are adverse actions such as denial of membership or privileges, non-renewal of membership or privileges, suspensions and certain practice restrictions, or revocation of membership. Adverse actions may include a recommendation from a professional staff committee (such as the MEC) for the board to take action, or an action by the board.

At the time of the adverse decision the practitioner receives written notice, sometimes called a "special notice." The notice typically includes detailed information about the proposed adverse action, reasons, and procedural rights, including the right to request a Fair Hearing. The receipt of the notice starts the time running to request a Fair Hearing.

The notice of adverse recommendation or action is a critical document in the Fair Hearing process. For the practitioner, it provides detailed information about the proposed adverse action and the right to a hearing. For the professional staff or board, it fulfills the duty of clear communication to the practitioner about the decision and the reasons behind it, as well as the process.

Most professional staff documents are far behind in terms of modern methods of communicating. An FHP will describe the content of the notice and how it must be delivered. The plan requirements should be closely followed through the process. While communicating by email is easy and part of everyday life, it generally is not a manner of communication allowed by FHPs. Complying with the FHP's specified form of communication is essential to ensure substantial compliance.

After receiving the notice of adverse action, the practitioner has a set time period, prescribed by the FHP, to request a Fair Hearing.

Selecting the Hearing Committee and Hearing Officer Considerations

While HCQIA contemplates a hearing before a mutually acceptable arbiter or one hearing officer appointed by the hospital, most FHPs provide for a panel-style hearing committee selected from the professional staff. Economic competitors of the affected practitioner are disqualified.

Other factors besides economic competition should be screened for in selecting the hearing committee. These include individuals with the following: close knowledge of the events involved in the adverse action;[16] involvement in the peer review and corrective action plan leading up to the adverse action; bias against the practitioner; a family or business relationship; and any other reason the individual might be viewed as less than objective. The fact that a potential committee member is an employee of the health system is another issue to consider, but is not a disqualifying factor by itself. The goal is to have a hearing committee made up of fair and unbiased peers of the practitioner who can be trusted by both sides to look closely and independently at the evidence.

Some FHPs allow for selection of hearing committee members from outside the organization's professional staff, such as through a state medical board or association.

Hearing committee service is a large responsibility and a major time commitment, even in shorter hearings. Whether hearing committee members should be paid for their service is a subject of some discussion. If they are to be paid, thought should be given to allowing the practitioner to pay half of the costs, with the understanding that the hospital or professional staff will pay the entire cost if the practitioner declines. This removes any suggestion of undue influence.

Hearing committee members should be informed about peer review protection, the privileged nature of the proceedings,

and the importance of keeping all documents and communications confidential.

FHPs generally provide for optional use of a hearing officer, whose job is to rule on matters of procedure and evidence and advise the hearing committee, although not participate in decision making. While there is an additional expense, using a hearing officer can be helpful. Retired judges are an excellent source of hearing officers, as are experienced health lawyers with no relationship with the organization.

Involvement of Counsel

FHPs allow the affected practitioner to be represented by counsel, and many choose to be.[17] The most common plan provisions allow the professional staff or board to be represented by counsel only if the practitioner is.

Fair Hearings happen fast, require intense preparation, and can be stressful for everyone involved. A high level of cooperation between counsel, with a good line of communication always open, helps everyone. Once counsel are involved, there should be an immediate discussion of how long the hearing is expected to take. Ideally, the lawyers will cooperate on procedural matters so that everyone involved can focus on the issues in dispute. It does not help Fair Hearing committee members, who are physicians taking time from their practices, to deal with unnecessary lawyering.

Preparing for the Hearing

A well-run and efficient hearing requires a great deal of planning as well as close coordination between counsel (where involved), professional staff leadership, and medical staff specialists. It is nearly impossible to focus too much on the details and logistics of preparation and the hearing itself. There is little to no room for error.

Once the hearing committee has been formed, the hearing should be scheduled immediately. This requires an estimate of how long the hearing will take. Many Fair Hearings can be completed in a day (even though it may be a long day). Others require multiple sessions, sometimes over consecutive days and other times over a period of time.

FHPs have short time frames for hearings to take place, often between 30-45 days after the request for hearing. Coordinating all of the schedules involved is a major task. By agreement, the professional staff and practitioner can extend the timelines, but many people who work in this area believe that variations from the FHP should be kept to a minimum. When the date is set, all participants should be promptly notified.

The affected practitioner receives a notice of hearing (again, often called a special notice) that provides detailed information about the proposed adverse action, acts, and omissions resulting in the proposed action; reasons forming the basis of the proposed action; witnesses expected to testify; and medical record numbers involved. The notice of hearing is another

critical document. It provides detailed information to the practitioner about what to expect at the hearing and the issues to be defended. It also may serve somewhat the same function as a complaint in the litigation setting. A thorough notice of hearing can provide the hearing committee members with a road map to important issues that they are to decide and to key items in what often is a large amount of evidence.

In response to the notice of hearing, the practitioner generally is required to submit a list of witnesses.

Most FHPs allow for witness and exhibit lists to be amended at any time, even during the hearing, so long as the other side has a reasonable opportunity to study and respond to the evidence. The best practice is not to hold evidence back, although it is not unusual for additional evidence to be uncovered in the course of preparing for a Fair Hearing.

FHPs do not provide for the type of discovery that lawyers are accustomed to in litigation. Governance documents generally allow professional staff members to inspect their medical staff files. The notice of hearing and witness lists generally provide information about what will be presented at the hearing. Lawyers coming from the civil trial world and new to the Fair Hearing arena can find the simplified process to be uncomfortable.

Great attention to details of the hearing is essential. This includes:

- Venue;
- Room set up;
- Court reporter or recorder;
- Conference call or video link for witnesses testifying remotely (tested in advance);
- Schedule, including breaks;
- Water and coffee service;
- Meals;
- Building access; and
- Place cards identifying participants.

All participants should be told what to expect in terms of locale, hours, schedule, breaks, and other details. There is an event planning component to a successful Fair Hearing.

Every Fair Hearing will have some exhibits, and some have many. The best practice is to provide exhibits to the Fair Hearing committee members (and the other side) at least a week in advance, to allow time to prepare. The exhibits should be provided in binders and offered in electronic format to members who prefer that. The exhibits and all other communications should be handled in a Health Insurance Portability and Accountability Act-compliant manner.

The Fair Hearing

Fair Hearings tend to look somewhat like trials or arbitration hearings, although with fewer rules. Generally, all participants are introduced, the hearing procedures are reviewed, opening statements are given, witnesses are examined and cross-examined, exhibits are introduced, and closing arguments are made. For efficiency, it helps if agreements can be reached on objections to exhibits before the hearing, or for any objections to be resolved before the first witness testifies. Witnesses testify under oath, and a record is made of testimony by the court reporter or by recording. Having a court reporter present is the best practice. Sometimes legal memoranda, either outlining the issues of the case in general or addressing a specific legal issue, are submitted.

The standard for evidence is the administrative law standard: the hearing committee is entitled to consider any relevant matter that reasonable persons might customarily rely on in conduct of serious affairs.

One major way that Fair Hearings differ from court cases is the burden of proof. Although they may look like trials, Fair Hearings do not involve the issue of which side has the

more persuasive evidence.[18] The purpose of a Fair Hearing is to ensure that the adverse recommendation or decision was supported by substantial evidence and was the result of a fair process. The professional staff committee or board does not have the burden of proof in the traditional sense. Rather, the committee or board has the initial burden of presenting evidence in support of the challenged recommendation or action. The burden then shifts to the practitioner to come forward with evidence in response. FHPs provide that the hearing committee "shall" recommend or find in favor of the committee or board unless the practitioner proves that the action or recommendation was arbitrary, capricious, or not supported by substantial evidence. It is extremely important for the hearing committee members to understand this narrow and specific review function.

After the hearing is over, the hearing committee must deliberate, reach a decision, and submit its written report. The core question is whether the hearing committee supports the adverse action or recommendation, or not. Hearing committee members almost always ask about the length and level of detail expected of their reports. Most often the answer is that it is completely up to the committee. Hearing committee reports simply need to state the committee's recommendation and the basis for the recommendation.[19] The FHP may provide some additional guidance regarding the contents of the report, or there may be specific state statutory requirements.[20]

After the Hearing

The hearing committee report and recommendation is provided to the practitioner and counsel. Typically the hearing committee's decision then goes to the MEC or board for review and reconsideration of the original decision, as set forth in the FHP. At this point the adverse decision may be reversed, revised, or affirmed. If the decision remains adverse to the practitioner, appellate review rights come into play.

The appellate review process involves appointment of another committee, the composition of which varies among FHPs. As with the hearing committee, the goal is neutral decision makers. The appellate review committee's role is to consider the original action or recommendation, the Fair Hearing committee record, and the Fair Hearing committee's recommendation; and present a recommended decision to the board. Most FHPs provide for an in-person hearing with presentation by the practitioner or counsel, but no further evidence. In most FHPs, the scope of the appellate review committee's authority is narrow: is there sufficient evidence to support the adverse action and was the process in fact fair to the practitioner?

The last step in the Fair Hearing process is consideration by the board of the adverse action or recommendation, and a final decision. From a hospital's perspective, it is important to be prepared for the final action. A plan should be in place for any possible outcome, as the board's decision becomes effective immediately.

Conclusion

Fair Hearing Plans have two main objectives: protecting patient safety and a fair process for the practitioner. The stakes could not be higher. The hospital committee or board comes to the process having made a painful decision about a professional staff colleague. The practitioner is defending career and professionalism. Only one party can succeed. However, the process succeeds if it is organized, understandable, and true to the Fair Hearing Plan.

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1 This article addresses the practical points of the Fair Hearing process and federal law. Practitioners should be sure to review any state-specific requirements regarding Fair Hearings.
2 42 U.S.C § 11111(a).
3 42 U.S.C § 11112(a).
4 MS.01.01.01, EP 34-35.
5 42 U.S.C. § 11151(1).
6 42 U.S.C. § 11112(b)(1)(a).
7 42 U.S.C § 11112(b)(1)(b).
8 42 U.S.C. § 11112(b)(2).
9 MS.01.01.01, EP 35; 42 U.S.C. § 11112(b)(3)(a).
10 42 U.S.C. § 11112(b)(3).
11 42 U.S.C. § 11112(b)(3)(D).
12 MS.01.01.01, EP 34.
13 MS.01.01.01, EP 34.
14 MS.01.01.01, EP 34.
15 MS.01.01.01, EP 34.
16 Some knowledge of the background facts is not necessarily a disqualifier, and in certain settings may be unavoidable.
17 Many malpractice insurance policies provide limited coverage for professional review actions such as Fair Hearings.
18 Some states have statutes that provide a burden of proof for the Fair Hearing. For example, in California, the burden of proof is preponderance of the evidence. Cal. Bus. & Prof. Code § 809.3.
19 42 U.S.C. § 11112(b)(3)(D).
20 *See, e.g.*, Cal. Bus. & Prof. Code § 809.4(a)(1).