

## 6 Considerations For Medical Staff's Virtual Peer Reviews

By **Ronald Ravikoff** (May 27, 2020, 4:37 PM EDT)

Today's need for social distancing creates unique challenges for hospitals in ensuring that medical staff peer reviews can proceed properly and fairly using remote hearing procedures. Here are some of the primary issues that must be addressed when deciding how and when to move forward with such hearings.



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### Threshold Concerns: Authority to Proceed

It is the rare medical staff bylaw that addresses the use of a remote hearing procedure. In the absence of such a provision, hospitals need to lay a procedural foundation allowing the hearing to proceed. Possible remedies would be for the medical staff committee to adopt an emergency procedure as a temporary provision for the duration of the pandemic. Alternatively, the parties may voluntarily agree to such a procedure.

Lastly, the medical staff bylaws may give the hearing officer sufficiently broad authority to order a remote hearing. The statement of authority should verify that the remote giving of oaths is provided for and the location of the hearing is established. Whatever the basis for using the remote procedure, it should be clearly articulated in the final report and recommendation.

A stipulation might contain the following language:

The parties agree that videoconferencing is an acceptable means of holding this hearing under the medical staff bylaws. The hearing panel may use videoconferencing to conduct the hearing, and no party shall object to the report and recommendation on the basis that the hearing was conducted by videoconferencing. The parties further agree that oaths may be taken remotely and that the deemed location of this hearing shall be [\_\_\_\_\_].

A final report and recommendation might contain the following language:

The hearing officer and panel have determined that the use of videoconferencing was appropriate in this matter. The interests of the parties were protected in the proceeding, no material prejudice occurred and the parties' interests in the efficiency, promptness and fairness of this matter was necessary and better served by conducting the proceeding by videoconference rather than by deferring the hearing until such time that it was possible to schedule a hearing in a single physical location in which the participants could be present. The hearing officer and panel were

cognizant of the difficulties created by the remote hearing format and took all reasonable steps to ensure that the proceeding was fair to all parties and there was no material negative impact on the ability of any party to fully present its case. In order to ensure fairness, the proceedings were continually monitored and the parties were regularly questioned regarding any problems. The hearing officer and panel conclude that a full and fair hearing was held.

## **Confidentiality**

Uniformly, medical staff bylaws require that the hearing be treated as confidential. If personal health information is to be utilized, the requirements of the Health Insurance Portability and Accountability Act of 1996 must be satisfied.

In addition to the normal confidentiality restrictions, the hospital should ensure that the videoconferencing platform is HIPAA compliant and ascertain whether a business associate agreement is necessary. (However, the "conduit" exception may apply). In order to be HIPAA compliant, the platform should:

- Require that all devices access the platform via encrypted connections.;
- Prevent recordings of sessions from being saved to the cloud;
- Allow session recordings to be saved to a local device only;
- Block PHI or personally identifiable information from being collected or reported (personal identification numbers (e.g., driver's license numbers, Social Security numbers, passport numbers, etc.); medical records; and IP addresses); and
- Use encryption for the chat feature.

## **Equipment**

The hospital should select an appropriate videoconferencing platform. As discussed above, the platform must ensure the confidentiality and data security of the proceeding.

The hearing should have a technically proficient support person present during the entire proceeding in case problems arise. Again, a BAA may be needed.

The hospital should verify that all participants have access to a computer, tablet or smartphone with sufficient processing power and appropriate features for them to meaningfully and comfortably participate.

The hearing officer and attorneys should have devices with webcams and headsets with microphones.

All participants who are going to be viewing documents extensively, including the hearing examiner and the attorneys, should have two screens: one to display the proceedings and the other to display documents and exhibits.

## **Preparation**

Prior to the hearing, the hospital should ascertain where each participant will be physically located.

The hospital should assign a coordinator to work with the attorneys and hearing officer to ensure that nonparty witnesses are scheduled and available when called.

Before the date of the proceeding, all participants (except nonparty witnesses) should conduct a test run to get used to the platform's features and operation and work out any issues.

The coordinator should verify that all participants can connect to the platform.

Any party calling a nonparty witness should be responsible for ensuring that that witness is able to connect to the platform.

All participants must agree on a system for distributing and displaying documents. If a witness will be testifying using documents, keep in mind that the platform may not allow the witness and the document to be viewed at the same time. To remedy this, a separate screen should be used. Because the documents will be displayed offline, they can be distributed in advance of the hearing (via flash drive) and should be Bates stamped for easy identification and retrieval. Alternatively, all participants can receive Bates-stamped copies of the documents in advance of the hearing.

## **Conducting the Hearing**

The hearing officer should act as the host and control of the features of the platform. This requires that the hearing officer understands how to use all the platform's features.

The hearing officer must take responsibility for ensuring the fairness of the process and that all participants have access to adequate equipment and know how to use it properly. The hearing officer should periodically ask all participants to state on the record whether they perceive any problems with the conduct of the hearing. If connectivity problems arise, the hearing officer should decide how to continue, keeping in mind the requirement of procedural fairness.

Prior to each session, the hearing officer must ask everyone in the hearing to:

- Identify themselves;
- Confirm that there is no one else in the room with them;
- Affirm that they will not record or take screenshots of any part of the proceedings; and
- For nonparty witnesses, confirm that all participants are disclosed and no one is present off screen.

All parties must confirm that no party, representative or witness will be in the same room as any member of the tribunal.

During the hearing, all participants should have their cell phones with them and their email accounts ready for either backup or off-screen communications if necessary. If one side wishes to create a

mechanism for communicating privately, both email and text work well. A WhatsApp chat group may also be effective.

The hearing officer should have in place a backup communication plan, thus the need for all participants to have their cell phones nearby.

The hearing officer should request that all nonessential applications on participants' computers be closed during the hearing.

Unlike in-person hearings, remote hearings provide no opportunity for spontaneous breaks. To avoid this limitation, the hearings should be conducted in prescheduled blocks of time (e.g., two hours) with breaks in between. If possible, counsel should announce in advance which documents will be used in the upcoming block.

### **The Committee's Deliberations**

The same rules apply to the committee's deliberations as to the hearing itself.

Unlike a traditional deliberation process, in which the hearing officer may or may not participate,<sup>[1]</sup> in the context of a remote deliberative process, it is necessary for the hearing officer to, at a minimum, act as the host for the conference.

Ultimately, the hallmarks of a successful hearing are preparation, technical support and flexibility.

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[1] See, generally, Code of Ethics for Hearing Officers in Peer Review Hearings, Canon V, AHLA 2013.