Chapter 5: The Board's Role in the Credentialing Process

Professional staff members have a direct impact on the quality of care provided in a hospital. For that reason, there must be an effective method to ensure the hospital recruits and maintains an appropriate complement of skilled professionals. This chapter provides an overview of the credentialing process, the board's role in it, and broader procedural elements for a board's consideration.

In This Chapter:

Understanding Credentialing

Although a variety of health care professionals work in hospitals, credentialing is only required for physicians, dentists, midwives, and extended class nurses with privileges. These professionals are not generally employed by the hospital. They are usually independent contractors who bill the Ontario Health Insurance Plan for their services and are granted privileges to practice in the hospital pursuant to the process set out under the *Public Hospitals Act* and/or the hospital's by-laws. Credentialed professional staff have direct impacts on the quality of care provided in the hospital. Due to this, credentialing professional staff is one of the hospital boards' most important governance roles.

Credentialing includes a range of activities and processes, such as:

- Reviewing applications for initial appointments;
- Verifying qualifications;
- Identifying the scope and nature of privileges;
- Granting privileges;
- Performing periodic reviews; and
- Conducting annual re-appointments.

Each of these activities and processes are aimed at ensuring the hospital recruits and maintains an appropriate complement of skilled professionals. The board is ultimately responsible for ensuring an effective and fair credentialing process.

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More comprehensive information on the board's role in the credentialing process can be found in the OHA's *Professional Staff Credentialing Toolkit* (toolkit). The toolkit provides a detailed overview of the credentialing process as well as the roles and responsibilities of key players. In addition, the toolkit discusses the importance of a culture of patient safety and the role of responsible and respectful professional staff engagement in the context of credentialing.

Overview of the Appointment Process

Under the *Public Hospitals Act* and the hospital by-laws, the board is ultimately responsible for all appointments and re-appointments to the professional staff as well as for all suspensions, revocations and/or other alterations to professional staff privileges. These responsibilities cannot be delegated by a board. The failure to properly evaluate applicants for appointments and re-appointments exposes patients to harm and may result in hospital liability.

Physician Appointments

All privileges decisions involving physicians must be considered in the context of the *Public Hospitals Act*, Regulation 965, hospital by-laws, and case law. The *Public Hospitals Act* procedural rules for privileges apply to physicians only, and not to dentists, midwives or extended class nurses. However, Regulation 965 allows hospital boards to pass by-laws for other professional staff members and, to the extent that hospitals exercise that discretion, the professional staff by-law typically applies the same procedural rights to all groups. For example, the OHA/OMA Prototype By-law extends the procedural rights afforded to physicians under the *Public Hospitals Act* to all categories of the professional staff. All hospitals that engage the services of dentists, midwives and extended class nurses should have clear credentialing rules that apply to those groups.

The *Public Hospitals Act* establishes the following procedural requirements and powers of the board in relation to medical staff (physician) appointments and hospital privileges:

- Every physician is entitled to apply for hospital privileges and to have their application considered by the hospital in accordance with the hospital's by-laws and the *Public Hospitals Act*.
- With every application, the medical advisory committee must meet and make a written recommendation to the board.
- The medical advisory committee must give the applicant written notice of its recommendation that informs the applicant that they are entitled to request written reasons for the recommendation and to request a hearing before the board about the application.
- If a hearing is not requested by the applicant, the board may implement the recommendation. If a hearing is requested, the board will hold a formal hearing during which the medical advisory committee and the applicant will present evidence for and against the recommendation. After hearing the evidence, the board is required to decide whether to appoint the applicant to the medical staff.
- Each appointment to the medical staff is for a maximum of one year. Physicians must re-apply annually, and the re-applications are considered by the medical advisory committee and board following the same application process as new appointments.
- The board may also revoke or suspend a physician's appointment when it considers this necessary. This is referred to as 'mid-term action', and there is usually a process for this outlined in the hospital's by-laws.
- if an applicant or member of the medical staff considers themself aggrieved by a decision of the hospital board to not appoint or re-appoint them, or by a decision that cancels, suspends or substantially alters their hospital privileges, they are entitled to ask for written reasons for the decision, and to request an appeal of the decision to the Health Professions Appeal and Review Board (HPARB). HPARB is a tribunal appointed pursuant to the Ministry of Health Appeal and Review Boards Act. There is also a further right of appeal from HPARB decisions to the Divisional Court.

Other Professional Staff Appointments

As outlined above, hospital by-laws may extend the procedural rights afforded to physicians under the *Public Hospitals Act* to other categories of professional staff (dentists, midwives, and extended class nurses with privileges) including establishing a similar process for requesting written reasons and a hearing before the hospital board; however, only physicians have the right to appeal a decision of a hospital board that affects their privileges to HPARB and then on to the Divisional Court. The *Public Hospitals Act* does not extend this right of appeal to any other members of the professional staff.

The Board's Role in Credentialing

The board has six areas of responsibility respecting the credentialing process, including:

- Setting the context;
- Choosing leadership;
- Making decisions;
- Holding hearings;
- Understanding and applying the principles of natural justice and procedural fairness; and
- Ensuring processes are followed by leaders.

Setting the Context

The board has an overarching responsibility for setting the context within which the credentialing process operates. This context includes the board's approval of:

- The rules and regulations for professional staff;
- Policies and procedures applicable to professional staff;
- By-laws establishing the criteria and processes for appointment, re-appointment, and changes to privileging;
- The form of application or, if not the form, the required content of the application—in effect approving the scope of due diligence required in respect of each applicant for appointment and re-appointment; and
- The strategic directions of the hospital that will inevitably impact professional staff resource planning.

Many of these responsibilities are contained in, outlined, or enabled by a hospital's by-laws.

Hospital By-laws

Regulation 965 under the *Public Hospitals Act* requires the board to pass by-laws that provide for the organization of the medical staff, and where the hospital has dental, midwifery or extended class nursing staff, for the organization and appointment of these professional staff as well. Extended class nurses are registered nurses who are registered with the College of Nurses of Ontario as a registered nurse in the extended class under the *Nursing Act*. Many hospitals now collectively refer to these categories of staff as the professional staff, and the Medical Staff By-Laws are now referred to as the Professional Staff By-Laws.

The by-laws approved by the board and confirmed by the members of each hospital will provide for the organization of the medical staff in the hospital and, as applicable, for the organization of the dental, midwifery, and extended class nursing staff. While each hospital's by-laws will be different, in general terms, the by-laws will cover such things as:

- The qualifications and criteria for appointment to the professional staff (the medical, dental, midwifery and extended class nursing staff) of the hospital. This includes license to practice and appropriate specialist qualifications where applicable; professional liability protection (insurance); skills, training and experience for the privileges requested; ability to work and communicate with other staff in a professional manner; hospital resource plans; and the need for the professional's services.
- The process for the appointment of the dental, midwifery and extended class nursing staff is usually the same or very similar to the process for medical staff.

→ Find Out More

The OHA and the Ontario Medical Association (OMA) developed the *Hospital Prototype Board-Appointed Professional Staff By-Law* resource which may be adopted by hospitals or used as guidance for developing local hospital by-laws. The prototype by-law is available at www.oha.com

- The categories (e.g., active, associate, courtesy staff) and departments (e.g., surgery, emergency, pediatrics) of the hospital staff and the privileges and duties that attach to each category or department. For instance, active staff members typically have the privilege of admitting patients to the hospital, whereas other categories may not have admitting privileges. Also, professional staff in certain categories or departments may have on-call responsibilities, whereas others do not.
- The process to be followed to fulfill each of the requirements set out in the *Public Hospitals Act*. This includes the handling of initial applications; the processes for granting initial appointments, annual re-appointments, and changes in appointments; and the steps to be taken when it is considered necessary to revoke or suspend an appointment (including urgent mid-term action). For each of these, there will be a process set out for how the issue is to be considered by the medical advisory committee and possibly by other committees or officers of the hospital, leading to a recommendation by the medical advisory committee, and then a decision by the board.
- Administrative matters, such as granting leaves of absence, monitoring practice and transferring care from one professional staff member to another.

In addition to the above, the board is responsible for choosing the leadership accountable for implementing and facilitating the mechanisms and requirements contained in the board approved by-laws.

Choosing Leadership

In choosing leadership, the board is responsible for:

- Establishing the medical advisory committee;
- Appointing the senior officers and medical staff leaders responsible for initial appointment and re-appointment processes (e.g., chief of staff/chair of the medical advisory committee, department chiefs); and
- Determining, through the by-laws, whether the medical advisory committee will include non-medical staff members (without a vote), in addition to the voting medical staff members of the medical advisory committee.

Medical Advisory Committee

The medical advisory committee is the primary committee responsible for supervising medical and other professional staff in the hospital. It is responsible under the *Public Hospitals Act* for making recommendations to the board concerning the appointment, re-appointment, requests for changes, revocation, suspension or restriction of the hospital privileges of the medical, dental, midwifery, and extended class nursing staff. The *Public Hospitals Act* sets time limits within which the medical advisory committee must consider and make a written recommendation to the board and the process for exceptions to this limit.

The by-laws of the hospital set out the process by which the medical advisory committee makes its recommendations. For all applications, the medical advisory committee is required to make a written recommendation to the board. The professional staff member is entitled to written notice of the recommendation and can ask for written reasons for the recommendation.

The medical advisory committee assesses credentials, health records, patient care, infection control, the utilization of hospital facilities and all other aspects of health care and treatment at the hospital and may establish a credentials committee to assist with this process. The credentials committee would be responsible for investigating the qualifications and experience of new applicants, and often with assessing applications for re-appointment. In performing its duties, the credentials committee will undertake any specific investigations required by the by-laws (e.g., obtaining proof of license and other qualifications) and other investigations it considers appropriate. The credentials committee then reports to the medical advisory committee.

Where no credentials committee exists, the medical advisory committee is responsible for all aspects of the process.

The medical advisory committee will review the application and the information provided by the credentials committee. It will consider whether the applicant meets the criteria set out in the by-laws for appointment or re-appointment. It will also consider the hospital's resource plans and whether there is a need for additional professional staff members with the applicant's particular expertise.

When it is believed that some form of mid-term action (e.g., action between the annual re-appointments) is necessary relating to a professional staff member's privileges, a hospital's mid-term action process should require certain steps to investigate the issues and report to the medical advisory committee, including provision for immediate action where necessary. This commonly occurs if a professional staff member's actions are potentially putting patients at risk or otherwise adversely affecting the quality of patient care and the operation of the hospital. Once the matter is reported to the medical advisory committee, it will meet and consider whether to make a recommendation to the board for mid-term action. The affected professional staff member is often given the opportunity to attend the medical advisory committee meeting and present their answers to the complaints against them.

In establishing the medical advisory committee, and receiving its recommendations, the board exercises a portion of its oversight and engagement responsibilities respecting the credentialing process. In addition to this establishment and oversight role, boards are responsible for making decisions and holding hearings respecting credentialing.

Making Decisions

The board is responsible for making decisions respecting professional staff, including:

- Appointing and re-appointing the medical staff;
- Revoking or suspending appointments and/or canceling or suspending any member of the medical staff's privileges who no longer meets the hospital's qualifications or who contravenes any applicable by-laws, rules, regulations or statutes;
- Appointing and re-appointing other members of the professional staff (e.g., dentists, midwives and extended class nurses), where the by-laws provide for these types of board-appointed professional staff members;
- Determining the scope of any privileges granted to a member of the professional staff;
- Reviewing temporary appointments made by the CEO and recommended by the medical advisory committee to continue; and
- Making decisions about the granting of a leave of absence for professional staff where there will be a suspension or restriction of privileges (or, alternatively, approving a leave of absence policy to be administered by the chief of staff/chair of the medical advisory committee).

The medical advisory committee's recommendation will commonly be provided to the board by its chair or the chief of staff. It may be a combination of a written and verbal report. It may deal with one or more applicants or with the re-appointments of all professional staff for a particular year. The person making the report will provide some information based on the medical advisory committee's recommendation. Board members may ask questions if they wish (e.g., respecting the process that has been followed). While the board does not need to receive all the details for every candidate, it must be reassured that the processes meet legal requirements. The board is responsible for ensuring an effective and fair credentialing process.

The *Public Hospitals Act* provides that, if a hearing before the board is not requested, the board may implement the recommendation of the medical advisory committee.

The board's decision is made by way of a vote on whether to accept the medical advisory committee's recommendation. While the board is entitled to give 'great weight' to the recommendations of the medical advisory committee because

of its medical expertise[21], the board must make its own independent decision as there are additional issues that the board must consider when making privileging decisions such as: quality of patient care; patient, staff and public safety; the hospital's legal obligations; fairness to the professional staff member; the role of the hospital in the community; and the effective and efficient operation of the hospital.

Holding Hearings

If a privileges applicant requests a hearing before the board following receipt of the medical advisory committee's recommendation to the board, the board is required to appoint a time and hold a hearing to decide whether to appoint/re-appoint or revoke/suspend the privileges of the applicant.

These board hearings are formal legal hearings and, accordingly, the board is responsible for conducting them in compliance with the rules for privileges hearings established under the *Public Hospitals Act*, and in line with the principles of natural justice and procedural fairness (further outlined below). The medical advisory committee will present its case in support of its recommendation. The applicant is given an opportunity to respond. Both sides may call witnesses and present documents. The medical advisory committee and the applicant are typically represented by legal counsel. The board often has its own independent legal counsel.

When the board is required to hold a contested credential hearing, the issues the board is required to consider are highly contextual and situation-specific. The types of issues commonly addressed in these hearings may include: the competence of the professional staff member for the position; collegiality, including the ability to work with others and comply with codes of workplace conduct and other hospital policies; and human resources plans and resource allocation decisions.

Hospital privileging disputes can be extremely expensive and have negative reputational consequences for the hospital—board members must take this role seriously. Privileges hearings are unique to hospitals and board members should understand their role in this quasi-judicial process.

Understanding and Applying the Principles of Natural Justice and Procedural Fairness

Administrative law is the body of law governing agencies that have the legal authority to make decisions affecting others—such as hospital boards. For example, administrative law applies to a broad spectrum of public interfacing decision-makers, ranging from immigration decisions to landlord and tenant board decisions, to potentially broader governmental policy decisions. Directors who sit on hospital boards have been vested with important powers and must use this power responsibly to uphold certain principles, including the interrelated principles of **natural justice** and **procedural fairness**.

Natural Justice

Natural justice is a fundamental administrative legal concept rooted in a moral understanding of 'fairness'. Canadian courts have developed the following two basic principles of natural justice:

1. The decision-maker must be impartial and unbiased; and
2. The individual affected must receive, before the decision is made, sufficient notice of the case against them and the opportunity to respond to it.

Procedural Fairness

In order to ensure professional staff members receive the fair treatment to which they are entitled under natural justice, credentialing hearings must be conducted in accordance with the principle of procedural fairness; also known as due process. According to procedural fairness, the professional staff member has a right to:

- Receive notice of the allegations against them;
- A fair, impartial, open decision-making process; and

- Present their case before the board, to present witnesses, to review documentation in advance, and to cross-examine witnesses.

The requirements of procedural fairness require a board to meaningfully grapple with key issues or central arguments during a credential hearing. A board cannot act as a 'rubber stamp' of the medical advisory committee's recommendation. It must instead 'bring an independent responsible and committed approach to the review process.'[22]

Many cases before the Health Professions Appeal and Review Board (HPARB) and courts have considered how hospitals have handled physician privileging and whether the principles of natural justice and procedural fairness have been properly applied. Hospital board decisions have been overturned when it was determined that the hospital did not provide appropriate procedural protections to a physician.

When considering privilege matters under the *Public Hospitals Act*, hospital boards must abide by the twin principles of natural justice and procedural fairness. What is required often depends on the circumstances of each individual case. The board should have its own independent legal advice in this respect. The two basic principles set out in this section should always be kept in mind and followed appropriately in all appointment and privilege decisions made by the board.

Ensuring Processes are Followed by Leaders

It is the board's responsibility to monitor activities in the hospital and take measures it considers necessary to ensure compliance with the *Public Hospitals Act*, its regulations and the hospital by-laws. The board should ensure reviews are undertaken as part of the re-appointment process and that there are processes for robust, periodic reviews. The board should also receive reports and briefings from the chief of staff/chair of the medical advisory committee on the overall credentialing process to satisfy itself the process is fair and thorough. Finally, the board should review the performance of the senior officers and medical staff leaders.

> **→ Find Out More**
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> Supervision of leadership is more fully discussed in Chapter 3.

Risk of Poor Credentialing

Credentialing mistakes can be costly for hospitals. The Health Insurance Reciprocal of Canada (HIROC) issued a Risk Reference Sheet acknowledging there has been increased litigation resulting from lapses in credentialing processes.[23] In the Risk Reference Sheet, HIROC identifies the following themes in litigation claims by patients against hospitals:

- Perceived/actual 'rubber stamping' of recommendations for appointment/re-appointment by health care organizations;
- Perceived over-reliance on information from provincial/territorial professional regulatory authorities to inform appointment and privileging decisions;
- Alleged multi-patient harm incidents involving the same practitioner resulting in class actions;
- Allegations that re-appointment processes did not include quality and utilization data and performance reviews;
- Lack of performance evaluation processes for professional staff and chiefs/heads;
- Alleged failure to have a robust process that asks for all pertinent malpractice claim settlements (versus those with a legal judgment) and complaints resulting in a regulatory body hearing (versus those with negative finding/undertaking); and
- Perceived lack of independent verification of information provided by applicants.

HIROC also noted the following themes in litigation claims against hospitals by their professional staff members:

- Allegations that appointment, re-appointment, privileging and disciplinary decisions were unreasonable, arbitrary and/or made in bad faith;

- Out-of-date professional staff by-laws;
- Allegations that there was a breakdown in process for revoking privileges:
  - Not previously defined and/ or not related to quality of care issues (e.g. to resolve interdisciplinary/ conflicts among practitioners); and
  - Without following due process (e.g. progressive disciplinary and natural justice);
- Perceived/actual systemic tolerance of unprofessional/ disruptive behaviour, in particular in surgical and obstetrical settings; and
- Lack of documentation of:
  - Discussions with credentialed staff regarding their unprofessional/disruptive behavior resulting in ongoing conflicts and denial of the conversations and the behaviour; and
  - The rationale to support appointment, reappointment, privileging and disciplinary decisions; and
- Perceived lack of independent verification of information provided by applicants.

Credentialing disputes can cost hospitals hundreds of thousands of dollars in legal fees. Damage awards against hospitals in Ontario for serious credentialing mistakes can be upwards of one million dollars.

Frequently Asked Questions

1. How much information does the board usually receive about the physicians that it appoints?

The board will receive a combination of written and/or verbal report from the chair of the medical advisory committee or chief of staff in their capacity as chair of the medical advisory committee on behalf of the medical advisory committee. This typically does not go into a lot of detail about individual physicians. This is detail that the board does not need to implement the medical advisory committee's recommendation, so long as it is satisfied with the process followed by the credentials committee and the medical advisory committee in arriving at the recommendation.

2. Are dentists, midwives and extended class nurses entitled to the same procedural protection as physicians under the *Public Hospitals Act*?

The provisions of the *Public Hospitals Act* apply to physicians and members of the medical staff only. The Act itself does not refer to other professional staff members. However, the regulations under the Act allow hospital boards to pass by-laws for other professional staff groups and, when hospital boards do so, the by-laws typically apply the same processes to all groups. As noted above though, only physicians have the right to appeal a decision of a hospital board that affects their privileges to HPARB and then on to the Divisional Court. Hospital by-laws cannot extend this right of appeal to other members of the professional staff. Where there is a question of what procedural protections should be afforded to an individual applicant or group of applicants, the board should consult its legal counsel.

3. Should the appointment of physicians and other professional staff members be dealt with in an *in camera* session of the board?

As these decisions deal with professional staff personnel matters, it is more appropriate to hold the meeting *in camera*. While some boards may deal with re-appointments in the open portion of a board meeting, if any re-appointment is other than routine, or if questions are asked, the matter should be moved to an *in camera* portion of the meeting. Under the *Freedom of Information and Protection of Privacy Act*, records of meetings regarding hospital appointments and hospital privileges are excluded from the right of access to hospital records.

4. Can the board appoint physicians for more than one year?

No. The *Public Hospitals Act* specifically states that the term of appointments of physicians to the medical staff can be for a 'period of not more than one year'.

5. Do all re-appointments need to come up at the same time?

Not necessarily. In most hospitals, for administrative convenience, all re-appointments are considered together, but they do not have to be. Each hospital can decide on the process that works best. There may be benefits to staggering the timing of re-appointment applications (such as by department so that different departments submit applications at different times throughout the year) to make the workload more evenly distributed throughout the year for administrative staff, the medical advisory committee, and board.

6. Can anyone other than the board appoint a physician? Can the board's role be delegated to a committee?

No. The *Public Hospitals Act* provides that only the board can appoint a physician. However, most hospital by-laws allow an officer of the hospital (e.g., the chief executive officer) to temporarily appoint a physician to fill an immediate need, but this usually requires board confirmation at its next meeting.

7. What if the board is considering not implementing the recommendation of the medical advisory committee?

If the board receives a recommendation from the medical advisory committee that, for some reason, it is considering not implementing, it is recommended that the board receive specific legal advice before making its decision. The issue should be deferred to the next board meeting and legal counsel consulted by the board chair in the interim.

8. Should board members sit on the medical advisory committee?

Section 35 of the *Public Hospitals Act* requires that the 'board shall establish a medical advisory committee composed of such elected and appointed members of the medical staff as are prescribed by the regulations'. The composition of the medical advisory committee is set out in section 7 of Regulation 965 under the *Public Hospitals Act*. It is clear that it is to be comprised of physicians only.

The only non-physician member provided for in the regulation is the chief of dental staff for Group A hospitals. Otherwise, only physicians can be members. Therefore, any other attendees at medical advisory committee meetings should be non-voting.

If board members sit as non-voting members of the medical advisory committee, they may acquire information that may later disqualify them from sitting as a member of the board on a hearing regarding the same matter. Section 39(4) of the *Public Hospitals Act* provides that members of a board holding a hearing shall not have taken part in any investigation or consideration of the subject-matter of the hearing. Accordingly, it is usually recommended that the medical advisory committee not include members of the board, other than as required under Regulation 965.

9. Increasingly, hospitals are moving to a common or 'joint' credentials model. What is it and how does it work?

Different circumstances arise when regional or 'joint' credentialing among hospitals makes sense, including:

- When two or more hospitals share professional staff;
- When hospital A needs professional staff to perform a service and hospital B provides the professional staff to perform that service (e.g., hospital B provides anesthesiologists to hospital A);
- When the hospitals intend to share professional staff in an under-resourced area and want to allow for streamlined credentialing; and
- To reduce the burden on professional staff who work in multiple locations.

A hospital board cannot delegate its responsibility for decisions about appointment or re-appointment. Each hospital board retains ultimate responsibility for the credentialing process and cannot fetter (meaning confine or restrain) its decision-making power by virtue of being part of a joint credentialing initiative. Any joint credentialing initiatives must be satisfactory to each hospital's board.

There may be many ways to conduct joint credentialing. It is important for participating hospitals to seek legal advice early in the process to ensure the proposal for joint credentialing meets legal requirements.

A common form of application (a Joint Credentialing Application Form) may be adopted by the hospitals to explain how the process will work and who is entitled to participate.

Sometimes, a single application form is adopted that lists every hospital in a geographic area. The applicant then indicates to which of those hospitals they are applying, and the application form is provided to those hospitals. In some models, the credentials committee and medical advisory committee at one of the hospitals take a lead role in reviewing the credentials and investigating the background of the applicant. The applicant would consent to that information being shared with the other hospitals. No applicant information should be shared amongst hospitals participating in a joint credentialing scheme without the prior written consent of that applicant.

In other models, two or more hospitals may adopt a common medical advisory committee and appoint the same individual as a chief of staff. In this model, the common medical advisory committee reviews the application and makes a recommendation to each of the boards of the independent hospital corporations participating in the common credentials model.

Regardless of which process is followed, each hospital remains responsible to ensure that it has put in place and followed a process to ensure that physicians are qualified for the privileges that they are granted. Accordingly, each board must ensure that there is a structure in place that enables the proper credentialing and recommendation process for initial appointments and re-appointments.