

# **The Code of Ethics for Hearing Officers in Peer Review Hearings**



*Approved by the American Health Lawyers Association  
on June 29, 2013*





## **The Development and Adoption of The Code of Ethics for Hearing Officers in Peer Review Hearings**

Michael D. Roth, an AHLA Fellow and a former member of the AHLA Board of Directors, formed a committee in early 2012 to draft this code (“Drafting Committee”). The members were S. Allan Adelman (a Past President of AHLA), Michael A. Cassidy, Laurie J. Levin, and Robyn S. Shapiro. Collectively, the Drafting Committee brought to the task a wealth of experience in representing both physicians and medical staff and in serving as Hearing Officers in peer review hearings. Geoff A. Drucker, Manager of the AHLA Dispute Resolution Service, served as the staff liaison.

The drafting committee resolved to use the Code of Ethics for Arbitrators in Commercial Disputes as a model and borrowed substantially from the language of this document. On March 27, 2013, the committee referred a proposed Code of Ethics to the AHLA Dispute Resolution Service Council for review. On May 20, 2013, the Dispute Resolution Service Council approved the proposed Code with a few clarifications.

On May 31, 2013, AHLA President Dinetia M. Newman appointed a committee to examine the draft code and report its recommendations to the Board of Directors (“Review Committee”). The Review Committee members were: Michael R. Callahan, as a representative of the Medical Staff, Credentialing, and Peer Review (MSCPR) Practice Group; Jeanne F. Franklin, as a representative of the Dispute Resolution Service Council; and Michael L. Silhol, as a representative of the Board of Directors.

The Review Committee recommended several amendments. The original drafting committee reviewed these amendments and recommended in favor of adopting the revised document. On June 29, 2013, the AHLA Board of Directors voted unanimously to adopt this new code. The AHLA Executive Committee approved the comment to Cannon V on May 14, 2015.

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## Preamble

Effective peer review is critical to health care providers' efforts to continually improve patient safety and quality of care. Fair peer review hearings for physicians and other licensed health care practitioners are indispensable to effective peer review. Peer review hearings often are presided over by Hearing Officers. These Hearing Officers rule on procedural and evidentiary matters, but do not weigh evidence or make final decisions as do judges in jury trials.

This Code of Ethics for Hearing Officers (Code) contains ethical standards to which lawyers can look for guidance when they serve in the capacity of a Hearing Officer at a peer review fair hearing. By establishing these standards, the Code aims to bring greater clarity, consistency, and accountability to the role of the Hearing Officer and thereby enhance the integrity of the peer review process and the confidence of all participants in this process.

While this Code is directed to lawyers who serve as Hearing Officers, others are welcome to look to this Code for guidance.

Much of the structure and language of this Code is based on The Code of Ethics for Arbitrators in Commercial Disputes. The American Health Lawyers Association gratefully acknowledges the pioneering work of the American Bar Association (ABA) and the American Arbitration Association (AAA) in developing ethics standards for neutrals.

## Definitions

As used in this code:

“*Fair Hearing*” shall mean the hearing to which a *physician* or *licensed health care practitioner* (as those terms are defined respectively in the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11151(6) and (8)) is entitled under applicable Federal and/or State law or is otherwise related to a professional review action (as that term is defined in 42 U.S.C. § 11151(9)) taken against him or her.

“*Fair Hearing Rules*” shall mean the procedural and evidentiary rules which apply to and govern a Fair Hearing. Fair Hearing Rules may, but need not, appear in the medical staff bylaws or in the rules, regulations, or policies of a professional review body.

“*Hearing Panel*” shall mean the panel of impartial persons duly appointed to hear and weigh evidence at a Fair Hearing and, based thereon, to issue a report or decision regarding the adverse action taken or recommended by the Moving Party against the Non-Moving Party.

“*Hearing Officer*” shall mean the person duly appointed to preside at a Fair Hearing and who by virtue of such appointment has the authority and discretion to make all rulings on matters of law, procedure, or the admissibility of evidence.

“*Moving Party*” shall mean the Party which is seeking to uphold its recommended or implemented adverse action against the physician, licensed health care practitioner, or other professional who triggered entitlement to a Fair Hearing under the Fair Hearing Rules or otherwise applicable law.

“*Non-Moving Party*” shall mean the physician, licensed health care practitioner, or other professional who is opposing the recommended or implemented adverse action at the Fair Hearing.

“*Parties*” shall mean the “*Moving Party*” and the “*Non-Moving Party*.” Either of the Parties shall be referred to in this Code as a “Party.”

### Comments on Definitions

1. A Fair Hearing may have more than one Moving Party. For example, a health plan and one of its hospitals could consolidate Fair Hearings related to separate professional review actions taken by them against a physician based upon a common set of underlying facts. In instances where there is more than one Moving Party, as illustrated by this example, the term “both Parties” when used in this Code shall mean all of the Parties, i.e., the Moving Parties and the Non-Moving Party.
2. For drafting convenience only, definitions herein include references to definitions contained in the HCQIA. Nothing in this Code creates any obligation to comply with HCQIA.

# Canon I

## **A Hearing Officer Should Uphold the Integrity and Fairness of the Fair Hearing Process.**

- A. A Hearing Officer has a responsibility to the Parties to observe high standards of conduct so that the integrity and fairness of the process will be preserved.
- B. One should accept appointment as a Hearing Officer only if fully satisfied that one:
  - 1) can serve impartially;
  - 2) can serve independently from the Parties and potential witnesses;
  - 3) is competent to serve; and
  - 4) can be available to commence the Fair Hearing in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the Parties are reasonably entitled to expect.
- C. After accepting appointment and while serving as a Hearing Officer, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, a person who has served as a Hearing Officer should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that he or she has been influenced in the Fair Hearing by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as a Hearing Officer where the Parties have consented to the Hearing Officer's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D. A Hearing Officer should behave in a way that is fair to all Parties and should not be swayed by outside pressure, public clamor, fear of criticism, or self-interest. A Hearing Officer should avoid conduct and statements that give the appearance of partiality toward or against any Party.

- E. When a Hearing Officer's authority is derived from the agreement of the Parties, or Fair Hearing Rules, a Hearing Officer should neither exceed that authority nor do less than is required to exercise that authority completely. If, in a Hearing Officer's judgment, a prescribed Fair Hearing Rule violates applicable law, a Hearing Officer should disregard the Fair Hearing Rule and follow applicable law. If, in a Hearing Officer's judgment, a prescribed Fair Hearing Rule conflicts with this Code, a Hearing Officer should take whatever steps are required to comply with this Code, including, if necessary, withdrawing as the Hearing Officer.
- F. A Hearing Officer should conduct the Fair Hearing so as to advance the fair and efficient resolution of the matters submitted for decision. A Hearing Officer should make all reasonable efforts to prevent delaying tactics, harassment of Parties or other participants, or other abuse or disruption of the hearing process.
- G. The ethical obligations of a Hearing Officer begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as a Hearing Officer and certain ethical obligations continue after the decision in the proceeding has been given to the Parties.
- H. Once a Hearing Officer has accepted an appointment, the Hearing Officer should not withdraw or abandon the appointment unless he or she: (i) is compelled to do so by unanticipated circumstances, including conflicts of interest, that would render it inappropriate or impracticable to continue; or (ii) fails to receive the agreed upon amount of compensation in the agreed upon timeframe.
- I. A Hearing Officer who withdraws prior to the completion of the Fair Hearing should take reasonable steps to protect the interests of the Parties in the Fair Hearing.

Comment on Canon I.E

It is expected that this Code will be consistent with all State laws, but to the extent that this is not the case, the Hearing Officer should follow State law.

# Canon II

## **A Hearing Officer Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality.**

- A. Persons who are requested to serve as Hearing Officers should, as soon as reasonably possible in the Fair Hearing process, disclose:
  - 1) Any known direct or indirect financial or personal interest in the outcome of the Fair Hearing;
  - 2) Any known existing or past financial, business, professional, or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the Parties. For example, prospective Hearing Officers should disclose any such relationships which they personally have with any Party or its lawyer, or with any individual whom they have been told will be a fact or expert witness at the Fair Hearing. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
  - 3) The nature and extent of any prior knowledge they may have of the dispute;
  - 4) Any presentations made to and/or meetings with either Party at which they have promoted or discussed their practice or other business activity; and
  - 5) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the Parties, the Fair Hearing Rules, or other rules or practices of the pertinent professional review body, or applicable law.
- B. Persons requested to serve as Hearing Officers should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A continues until the close of a Fair Hearing and requires a person who accepts appointment as a Hearing Officer to disclose, as soon as practicable, in a timely manner, and in accordance with the Fair Hearing Rules and/or any applicable law, any such interests or relationships which may arise, or which are recalled or discovered.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

- E. Disclosure should be made to all Parties, unless other procedures for disclosure are provided in the Fair Hearing Rules or by applicable law.
- F. When Parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as a Hearing Officer, that person may properly serve, provided that facts relating to the Hearing Officer's interests and relationships and the Parties' agreement to his/her service notwithstanding such interests and relationships are documented in the record of the Fair Hearing.
- G. A Hearing Officer must withdraw as a Hearing Officer at a Fair Hearing if both Parties to the Fair Hearing request that he or she withdraw as the Hearing Officer. If a Party requests a Hearing Officer to withdraw for alleged partiality, or an appearance of partiality, the Hearing Officer should follow the process for addressing this situation in the Fair Hearing Rules or applicable law. If the Fair Hearing Rules and applicable law do not provide to the contrary, the Hearing Officer, after carefully considering the matter, may determine that the reason for the challenge is not substantial, and that he or she can nevertheless act impartially and fairly.
- H. If compliance by a prospective Hearing Officer with any provision of this Code would require disclosure of confidential or privileged information, the prospective Hearing Officer should either:
  - 1) Secure consent to the disclosure from the person who furnished the information or the holder of the privilege; or
  - 2) Withdraw.

## Canon III

### **A Hearing Officer Should Avoid Impropriety or the Appearance of Impropriety in Communicating with Parties.**

- A. If an agreement of the Parties or applicable provisions in Fair Hearing Rules establish the manner or content of communications between the Hearing Officer and the Parties, the Hearing Officer should follow those procedures notwithstanding any contrary provision of paragraphs B and C below.
- B. A Hearing Officer or prospective Hearing Officer should not discuss a proceeding with any Party in the absence of any other Party, except in the following circumstances:
  - 1) When the appointment of a prospective Hearing Officer is being considered, the prospective Hearing Officer:
    - i) May ask about or be advised as to the identities of the Parties, counsel, or witnesses and the general nature of the case; provided, however, in such dialogue the Hearing Officer should not communicate with the Party about the merits of the case or permit the Party to disclose to or discuss with him or her the merits of the case; and
    - ii) May respond to inquiries from a Party or its counsel designed to determine his/her suitability and availability for the appointment.
  - 2) A Hearing Officer may discuss logistical matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings with a Party. However, the Hearing Officer should promptly inform each other Party of the discussion and should not make any final determination concerning the matter discussed before giving each absent Party an opportunity to express its views; or
  - 3) If a Party fails to participate in a Fair Hearing after having been given due notice, a Hearing Officer may discuss administrative matters with the Party who is present, and if all Parties expressly consent or the Fair Hearing Rules allow, the Hearing Officer may discuss the case with any Party who is present.
- C. Unless otherwise provided in this Canon, in applicable Fair Hearing Rules, or in an agreement of the Parties, whenever a Hearing Officer communicates in writing with one Party, the Hearing Officer should at the same time send a copy

of the communication to every other Party, and whenever the Hearing Officer receives any written communication concerning the case from one Party which has not already been sent to every other Party, the Hearing Officer should send or cause it to be sent to the other Parties.

- D. Following the conclusion of the hearing and submission of the final hearing report, the Hearing Officer should not discuss with or otherwise disclose to anyone information relating to the nature or conclusion of the proceedings, statements made during the hearing, or deliberations relating to the case except to the extent required or allowed by the Fair Hearing Rules or applicable law.

## Canon IV

### **A Hearing Officer Should Conduct the Proceedings Fairly and Diligently.**

- A. A Hearing Officer should conduct the proceedings in an even-handed manner. The Hearing Officer should be patient and courteous to the Parties, their representatives, the witnesses, and the Hearing Panel, and should encourage similar conduct by all participants.
- B. The Hearing Officer should clearly identify the procedural rules according to which the Fair Hearing will be conducted, which will typically be the Fair Hearing Rules. The Hearing Officer should afford to all Parties the right to be heard and due notice of the time and place of any pre-Fair Hearing conference calls, status conferences, case management conferences, and the like (collectively, Pre-Hearing Meetings) in accordance with those rules.
- C. The Hearing Officer should allow each Party a fair opportunity to present its evidence and arguments in accordance with the applicable rules.
- D. The Hearing Officer should not deny any Party the opportunity to be represented by counsel or by any other person chosen by the Party except as specified to the contrary by the Fair Hearing Rules or applicable law.
- E. The Hearing Officer should make reasonable efforts to assist in the compilation of an accurate and complete administrative record of the Fair Hearing. Nothing herein is intended to suggest or require that the Hearing Officer has any responsibility for making, or causing to be made, a transcript of the Fair Hearing.
- F. A Hearing Officer may suggest to the Parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes; however, a Hearing Officer should not exert pressure on any Party to settle or to utilize other dispute resolution processes. A Hearing Officer should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all Parties.

# Canon V

## **A Hearing Officer May Serve as Legal Advisor to the Hearing Panel.**

- A. The Hearing Officer may serve as the legal advisor to the Hearing Panel but shall not represent the Hearing Panel or any of its members. In this role of legal advisor, the Hearing Officer may: (i) meet with the Hearing Panel outside the presence of the Parties during the course of the Fair Hearing; (ii) instruct and respond to questions from the Hearing Panel on matters related to procedure, evidence, and applicable law; (iii) confer with the Hearing Panel while it deliberates; (iv) assist the Hearing Panel with the preparation of its report; and (v) assist any Hearing Panel member(s) with the preparation of a minority report.
- 1) If the Hearing Officer assists the Hearing Panel by drafting or editing the Hearing Panel's written report and recommendations, the Hearing Officer should be diligent to accurately reflect the findings, conclusions, and recommendations of the Hearing Panel.
  - 2) The Hearing Officer should encourage the Hearing Panel members to edit freely any report drafted by the Hearing Officer on behalf of the Hearing Panel, so that there is no question that the report is the product of the Hearing Panel members who adopt the report.
- B. The Hearing Officer may give written or verbal instructions to the Hearing Panel after the Parties have completed presenting evidence in order to assist the Hearing Panel in its deliberations. The Hearing Officer should afford the Parties an opportunity to object to such instructions before they are given to the Hearing Panel.
- C. The Hearing Officer should refrain from ruling on procedural and evidentiary issues on his/her own volition unless it is critical to ensuring that the Fair Hearing is fair and/or materially complies with the Fair Hearing Rules.
- D. In no event should the Hearing Officer: (i) consider and/or weigh any evidence, (ii) make any substantive decision on any merits of the matter, or (iii) express his/her opinion(s) or view(s) regarding the matters enumerated in the subparagraphs D(a) and D(b).

### *Comment to Canon V*

Nothing in Canon V creates or is intended to create an attorney-client relationship by and between the Hearing Officer, on the one hand, and the Hearing Panel, either Party, or any other person or entity, on the other hand.

# Canon VI

## **A Hearing Officer Should Be Faithful to the Relationship of Trust and Confidentiality Inherent in That Office.**

- A. A Hearing Officer is in a relationship of trust to the Parties and should not, at any time, use confidential information acquired during the Fair Hearing process to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. A Hearing Officer should keep confidential all matters relating to the Fair Hearing process including the Hearing Panel's decision.
- C. A Hearing Officer should comply with all State and Federal confidentiality laws.
- D. It is not proper at any time for a Hearing Officer to inform anyone of any Hearing Panel decision in advance of the time it is given to all Parties.
- E. A Hearing Officer who will receive or have access to Personal Health Information (PHI) as defined in the Health Insurance Portability and Accountability Act (HIPAA) in the course of his/her duties should enter into a Business Associate Agreement consistent with applicable requirements of Federal and State law.

# Canon VII

## **A Hearing Officer Should Adhere to Standards of Integrity and Fairness Respecting Retention and Compensation Terms.**

- A. Hearing Officers should adhere to standards of integrity and fairness in arranging to be compensated and reimbursed for their expenses related to serving in this capacity.
- B. A Hearing Officer should request a written retainer agreement with whomever is paying him/her to serve as the Hearing Officer, which specifies that: (i) the Parties to the Fair Hearing are not the Hearing Officer's clients and (ii) the Hearing Officer will serve as a neutral to ensure a fair process and facilitate a fair and lawful outcome.
- C. Upon the request of either Party, a Hearing Officer should disclose the payment terms for his/her service as the Hearing Officer.
- D. The Hearing Officer should neither gain direct financial benefit from the outcome of the Fair Hearing, nor agree to any compensation arrangement which would create an incentive to favor one Party over the other.
- E. Certain practices relating to retention and payment should generally be avoided by a Hearing Officer in order to preserve the integrity and fairness of the Fair Hearing process. These practices include:
  - 1) Hearing Officers should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a Fair Hearing.
  - 2) Neither the Hearing Officer nor any individual or organization acting on the Hearing Officer's behalf, shall discuss the Hearing Officer's invoices with: (i) a Party, (ii) a Party's legal counsel or other representative, or (iii) a witness or proposed witness at the Fair Hearing; provided, however, if a Party is responsible for paying the Hearing Officer's invoices, the Hearing Officer may send invoices ex parte to the Party and otherwise communicate ex parte with the Party for the sole purpose of informing the Party that an invoice is past due.

- F. Nothing in this Canon is intended to prohibit a Hearing Officer from being paid by both Parties to serve as the Hearing Officer.

*Comment to Canon VII*

Except as expressly stated above, this Canon is not intended to proscribe the inclusion of any specific term(s) in a Hearing Officer's retention agreement. A retainer letter may provide that a Hearing Officer's time in serving as a Hearing Officer shall include his/her reviewing materials to prepare for the Fair Hearing, analyzing and researching procedural and evidentiary issues, conducting Pre-Hearing Meetings with the Parties or their counsel, attending the hearing, and serving as the legal advisor to the Hearing Panel throughout the Fair Hearing process.

Canon VII.B is consistent with Rule 2.4 of the ABA model rules of professional conduct (seventh edition), which states that: "*A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.*"

## Canon VIII

### **A Hearing Officer May Engage in Advertising or Promotion of His/Her Hearing Officer Practice Which Is Truthful and Accurate.**

- A. A Hearing Officer may promote and advertise his/her Hearing Officer practice and availability to serve provided such promotion/advertising is accurate, not misleading, and complies with applicable law. Any statement by a Hearing Officer about the quality of his/her Hearing Officer work must be truthful.
- B. Any advertising/promotion by a Hearing Officer of his/her Hearing Officer practice shall not imply any willingness to accept an appointment otherwise than in accordance with this Code.
- C. Certain practices are generally recognized to conform to the standards set forth at paragraphs A and B immediately above. These practices include:
  - 1) A Hearing Officer may meet with peer review bodies, physicians, the general health care community, and their counsel in order to promote his/her Hearing Officer practice provided he/she does so in accordance with the Code.
  - 2) A Hearing Officer's advertisements and promotional materials may include a description of facts and/or clinical matters at issue in prior Fair Hearings at which he/she has served as the Hearing Officer provided: (i) the descriptions do not identify any of the involved Parties, and (ii) non-Parties cannot determine the identity of any of the involved Parties by using the descriptions alone or in combination with information reasonably available to members of the public or recipients of the materials.
- D. A Hearing Officer should not include information in his/her advertising or promotions respecting what percentage of the time the Moving or Non-Moving Party has prevailed in Fair Hearings at which the Hearing Officer served in such capacity.

- E. Nothing in Canon VIII precludes a Hearing Officer from: (i) printing, publishing, or disseminating advertisements in any electronic or print medium; (ii) making personal presentations to prospective users of his/her Hearing Officer services; or (iii) responding to inquiries concerning his/her availability, qualifications, experience, or fee arrangements, provided the Hearing Officer does so in compliance with this Code.

Comments to Canon VIII

Subparagraphs C.1 and C.2 are not intended to be an exhaustive list of practices which conform to Canon VIII.

Hearing Officers who are attorneys should consult their State Bar rules regarding advertising.



**AHLA**

Dispute Resolution Service

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1620 Eye Street, NW, 6th Floor • Washington, DC 20006-4010  
(202) 833-1100 • Fax (202) 833-1105 • [www.healthlawyers.org/drs](http://www.healthlawyers.org/drs)