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Disruptive Physicians: Minimizing Liability for Negligent Credentialing, Poor Quality of Care, and Physician Conduct

Practical and Legal Approaches for Hospitals, Integrated Systems, Medical Groups, and Other Providers

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Constructively Addressing Disruptive Behavior to Improve Quality Care

Presented at the Strafford Webinar, July 21, 2020

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HUSCH BLACKWELL

Background-Overview of Regulatory Framework Governing Disruptive Physician Issues

- Regulatory Frameworks to consider
 - The Joint Commission (And other accrediting bodies)
 - Medicare Conditions of Participation
 - Health Care Quality Improvement Act (HCQIA)
 - State law
- What context are you in?
 - Hospital Medical Staff
 - Hospital employed physician
 - Physician practice

Privileging and Credentialing

- Hospital performs its due diligence in ensuring that each physician is qualified and competent to perform required duties
 - Includes background check, NPDB report, state license check, references
 - Requires that the hospital's credentialing committee review and approve
- The process also requires the completion of a privilege delineation form
 - Emphasis on patient care, training, and education

Privileging and Credentialing

- Hospital can later be held responsible for a negligent credentialing claim in the event that a physician is deemed unqualified, incompetent, etc., and the credentialing process is at least in part responsible for what is ultimately a bad outcome
 - Defense to a negligent credentialing claim is heavily dependent on the hospital following its own policies, procedures, and governing documents
- The physician's qualifications and competencies are also outlined in the Code of Conduct, Employment or Independent Contractor Contract

Disruptive Behavior – Definition

What is disruptive behavior? The Joint Commission defines disruptive behavior as any conduct interfering with quality patient care or that which undermines a “culture of safety”. This includes:

- Sexual Harassment
- Physical Assault
- Personal attacks on medical staff
- Language that is profane, vulgar, or abusive
- Imposing onerous requirements on others
- Unnecessarily harsh criticism
- Threats of reprisal for reporting disruptive behavior
- Refusal to accept assignments
- Public criticism of other employees or institution

Disruptive Behavior – Classification

- LEVEL 1 → Physical threats, violence, or abuse. Sexual harassment and inappropriate contact. Weapons on hospital property.
- LEVEL 2 → Verbal and visual abuse directed at an individual. Violence and physical actions toward non-personnel such as inanimate objects.
- LEVEL 3 → Verbal abuse directed to group or institution in general.

USE CAUTION WHEN USING THIS TERM

- Labeling someone as a “disruptive physician” can greatly stigmatize and harm their career. Do not use this term unless factually proven that the physician’s actions have been disruptive under the definitions provided. Use with caution.
- The term “unprofessional behavior” is far less damaging to a physician’s reputation and career. Use this term if the potentially disruptive behavior has not yet been proven.

Disruptive Behavior – First Steps: Identification

- Identify the underlying problem. Ask why the behavior is occurring?
 - Miscommunication or non-communication? (#1 cause of conflict)
 - Lack of Acknowledgement
 - \$\$\$\$
 - Ego
 - Clashing personalities/“forced integration”
 - The fallacy of infallibility
 - Territorial disputes
 - Competing interests or goals

When is a Physician “Disruptive”?: Common Law Standards

- Understand what constitutes “disruptive” behavior and what does not.
- History by Case Law - actionable disruptive behavior is characterized by:
 - Objective clear, and convincing documentation of disruptive conduct; and
 - Evidence demonstrating conduct adversely affected patient care.

The Joint Commission (“TJC”) Standards and Guidance

- In 2008 TJC issued Sentinel Event Alert “Behaviors that Undermine a Culture of Safety”
- Intimidating and disruptive behaviors can foster medical errors, contribute to poor patient satisfaction and preventable adverse outcomes, increase cost of care and cause qualified clinicians and administrator and managers to seek new positions in more professional environments
- Safety and quality of patient care is dependent on teamwork, communication, and collaborative work environment

The Joint Commission Standards and Guidance

- Intimidating and disruptive behavior include overt actions like verbal outbursts and physician threats
- Passive actions include refusing to perform assigned tasks or quietly exhibiting uncooperative attitudes during routine activities
- Intimidating and disruptive behavior in healthcare organizations occurs among physicians and nurses, but also among pharmacists, therapists, support staff, and administrators – across the enterprise

The Joint Commission Standards and Guidance

- TJC believes disruptive behaviors often go unreported and unaddressed.
- TJC cited an American College of Physician Executives survey which found that 38.9% of respondents agreed that “physicians in my organization who generate high amounts of revenue are treated more leniently when it comes to behavior problems than those who bring in less revenue”

The Joint Commission Standards and Guidance

- TJC implemented Leadership standard LD.03.01.01
- EP 4: Leaders develop a code of conduct that defines acceptable behavior and behaviors that undermine a culture of safety
- EP 5: Leaders create and implement a process for managing behaviors that undermine a culture of safety

The Joint Commission Standards and Guidance

- All team members should be educated on appropriate professional behavior defined by organization's code of conduct including training in basic business etiquette and people skills
- Code of conduct should be enforced equitably and consistently, regardless of seniority or clinical discipline - **transparency**
- Implement process for addressing intimidating and disruptive behaviors that solicits and integrates substantial input from all team members
- Implement **training** to foster collaborative practices
- Implement policies and procedures

The Joint Commission Standards and Guidance

- TJC also suggested implementation of reporting/surveillance system for detecting unprofessional behavior
 - Tiered, non-confrontational, starting with informal conversations
 - Move towards detailed action plans and progressive discipline
- Attempts to address unprofessional behaviors should be documented

American Medical Association (“AMA”) Response and Model Code of Conduct

- In response to TJC’s actions, AMA adopted “Behaviors that Undermine Safety” policy
 - Calls for medical staffs to develop and implement their own code of conduct in medical staff bylaws, and hospital code of conduct applicable to members of board, management and all employees
- AMA Model Code of Conduct for insertion in medical staff bylaws
 - Distinguishes between **appropriate**, **inappropriate**, and **disruptive** behaviors.

American Medical Association Response and Model Code of Conduct

- AMA expressed concern about adequately protecting accused physician's right to fair process during hospital's handling of an accusation
- Important to recognize a physician's perceived disruptive behavior could have been caused by hospital's own dysfunctional environment of which accused physician himself is a victim
- Concern physician could be sanctioned under guise of disruptive activity for engaging in good faith criticism of an institution or for economic competition with institution

American Medical Association Model Code of Conduct

- AMA Model Code starts with definition of “**appropriate** behavior” as any reasonable conduct to advocate for patients, to recommend improvements in patient care, to participate in operations, leadership or activities of organized medical staff, or to engage in professional practice including practice that may be in competition with hospital
- **Appropriate** behavior is **not** subject to discipline

American Medical Association Model Code of Conduct

- Model Code defines “**inappropriate** behavior” as conduct that is unwarranted and reasonably interpreted by reasonably prudent person under similar circumstances to be demeaning or offensive
- Persistent, repeated inappropriate behavior will be subject to treatment as “disruptive behavior”

American Medical Association Model Code of Conduct

- Model Code defines “**disruptive** behavior” as any abusive conduct including sexual or other forms of harassment, or other forms of verbal or non-verbal conduct that harms or intimidates others to extent quality of care or patient safety could be compromised
- As with Common Law and TJC standards, AMA Model Code requires a **connection between offending conduct and patient care**

AMA – Suggested Interventions for Disruptive Physician

- Medical staff support tiered, non-confrontational intervention strategies, starting with informal discussion of matter with appropriate section chief or department chairperson
- Further interventions include an apology addressing problem, letter of admonition, final written warning, or corrective action pursuant to medical staff bylaws
- Use of summary suspension only where disruptive behavior presents imminent danger to health of any individual

AMA – Suggested Interventions for Disruptive Physician

- Complaints should be written and have critical information necessary to well-document and assess complaint including:
 - Date, time and location of offense
 - Factual description of inappropriate or disruptive behavior
 - Circumstances which precipitated incident
 - Identification of any patient or patient's family member involved in incident
 - Names of incident witnesses
 - Consequences, if any, of inappropriate or disruptive behavior as it relates to patient care or safety, or hospital personnel or operations
 - Any action taken to intervene in or remedy incident including names of those intervening

Disruptive Behavior – First Steps: Identification

- If none of the previous situations seem to be the issue, think about the disruptor personally. Is the reasons extrinsic to work? Divorce, financial problems, familial issues with children, parents, or siblings, substance abuse, and personality disorders are often causes of workplace conflict. Private or familial issues could be the source of the conflict, especially during the COVID-19 crisis.

Disruptive Behavior – Other Issues

- If there is a danger to patient safety:

Immediately contact person designated for action. This will often be someone like a risk management officer, a department chair, director of medical staff, President/CEO, physician-well being committee members, etc. These persons should be identified in bylaws, handbook, or other company policy source.

Disruptive Behavior – Other Issues

If sexual harassment is identified:

Take the same steps outlined in the previous slide.

Disruptive Behavior – Documenting

- If you witness disruptive behavior, especially sexual or physical harassment, **DOCUMENT THE ENCOUNTER!**
- Most people will not document, be the one who does.
- Even if you only witness a single, isolated encounter still report it.
- You may not know that others have reported the same thing, and all of these individual reports help management determine whether there is a pattern of disruptive behavior that needs to be addressed.

Disruptive Behavior – Fixing the Situation

- FIND THE TRIGGER!
- FIX THE TRIGGER!

Before reporting the issue, if the situation is appropriate, you may be able to address the problem. Try putting yourself in the physician's shoes, attempt to understand the problem, and find a solution.

Disruptive Behavior – Addressing the Issue

You may be able to deal with the issue without much commotion. Try assessing which one of the following tools would be sufficient and appropriate to remedy the disruptive behavior:

1. “Informal” intervention, ex: cup of coffee.
2. “Awareness” intervention, ex: meeting with someone of similar status
3. “Authority” intervention, ex: meeting with direct reporting figure, dept. head
4. “Disciplinary” intervention, ex: punishment by board or department

Disruptive Behavior – Remedy Scheme

1st Incident → give verbal warning. Depending on the infraction, be collegial, educational, and adopt a coaching mentality.

Subsequent occurrences → notification to authorities and document of incident

Persistent problems → Written warning, rehabilitation plan, final warning. Refer to state law or state program if available. Corrective action must be taken.

Disruptive Behavior – Physician Coaching

- What does it mean to be a physician coach? What does a physician coach do?

A coach (1) identifies the strengths and weakness his players; (2) builds on their strengths; and (3) improves on their weaknesses. Identify someone to be a coach.

This is a relationship built on trust. In order to be an effective advocate for a change in someone's behavior, that person must trust the coach.

Disruptive Behavior – Physician Coaching

- The key elements of successful physician coaching:
 1. Initial buy-in from both physician and coach
 2. Confidentiality
 3. One-on-one conversation and dialogue
 4. Regular session (but try to decrease frequency as progress improves to stimulate independence)
 5. 6 – 12 month duration is optimal, with check-ins afterwards
 6. Timely and meaningful feedback – this needs to be productive not routine

Disruptive Behavior – Physician Coaching

- Remember, many physicians are “alpha males/females”
 - Self confident and opinionated
 - Highly intelligent
 - Action oriented
 - High performance expectations of him/herself and others
 - Highly disciplined
 - Unemotional

Disruptive Behavior – Physician Coaching

- Thus, in order to coach the physician “alpha”, we must:
 - Get his or her attention
 - Demand his or her commitment
 - Speak their language
 - Hit hard enough to hurt
 - ✓ NO PAIN NO GAIN
 - Engage his or her curiosity and competitive instincts

Disruptive Behavior – Physician Coaching

SAMPLE PHYSICIAN COACHING MODEL

- 6 – 12 months
- Earn trust, get buy-in to start
- Weekly meetings for first month
- Request change in behavior after month 1
- Bi-weekly meeting in month 2
- Quarterly check-ups at 3, 6, 9, and 12 months, emphasize progress
- Telephone or virtual coaching if necessary (*COVID*)
- If no improvement at quarterly check-ups or regression, refer to authority

Disruptive Behavior – Physician Coaching

- If there is a problem, when should you call an attorney?
 - CALL EARLY.
 - CALL OFTEN.

Disruptive or Impaired?

Distinguishing Disruptive Behavior – Impaired vs Disruptive

Impaired Physicians

- Medical Staff Bylaws has different protocols for responding to “impaired physicians” as opposed to disruptive physicians.
- The ADA and the Joint Commission require a non-disciplinary process with “reasonable accommodations” if substance abuse or other mental health disorders may be the cause of the problem.

Distinguishing Disruptive Behavior – Impaired vs Disruptive

- “Reasonable accommodations” are required by the ADA and the EEOC for “qualified individuals” with “disabilities”, if the impaired physician can still perform all the necessary function of their job.
- This is quite controversial. This stance has resulted in incidents of patient harm.
- However, the “reasonable accommodations” are not given to physicians with sexual disorders, with substance abuse issues with illegal drugs, or who threaten the health and safety of others.

Suffering-Disruptive-Impaired Physician Continuum

- Stress and suffering is now across physician spectrum
- Possibility that inappropriate or disruptive behavior is caused by suffering, illness or mental health issue
- Psychiatric clinical conditions such as bipolar disorder, depressive disorders, substance use disorders, or dementia
- Issues can become issues of impairment requiring evaluation and careful management

Impaired Physician – General Definition

- Impaired physician is someone who is unable to practice medicine with reasonable skill and safety as a result of:
 - mental disorder,
 - physical illness or condition, including, but not limited to, those illnesses or conditions that would adversely affect cognitive, motor, or perceptive skills, or
 - substance-related disorders including abuse and dependency of drugs and alcohol

Client with Diminished Capacity - ABA Model Rule 1.14

- Client with Diminished Capacity
 - Lawyer shall, **as far as reasonably possible**, maintain a normal client-lawyer relationship with client
 - Take protective action if **risk of substantial harm** unless action taken and client cannot adequately act in client's own interests
 - **Reasonably necessary protective action**: consulting with individuals or entities that have ability to take action to protect client (can seek guardian)
 - Lawyer impliedly authorized to reveal information about client, but only to extent reasonably necessary to protect client's interests

ABA Diminished Capacity Guidance

- If risk of substantial harm and normal attorney-client relationship cannot be maintained because of insufficient capacity – protective measures can include consults with family and professional services (“appropriate diagnostician”)

ABA Diminished Capacity Guidance

- Diminished capacity balancing factors:
 - Client's ability to articulate reasoning
 - Variability of state of mind
 - Ability to appreciate consequences of a decision
 - Substantive fairness of a decision
 - Consistency of a decision with client's long-term commitments/values
- Lawyer must advocate for least restrictive action on behalf of client

Practical Continuum of Function

- Function Labels – No Simple Definition
 - Engaged and Aware
 - Functional
 - Difficult
 - Dysfunctional
 - Diminished Capacity
 - Impaired
 - Severely Incapacitated
 - Clinically Incompetent
- When is the provider dangerous to the public?

Consider the Governing Documents

- Agreements/Deals/Relationships that may governs response
 - Provider Agreements
 - Service Line Agreements
 - Joint Ventures
 - Shareholders
 - Bylaws
 - Tertiary Contracts

Practical Communications With Physicians Who Are Suffering

- Proactive and constant vigilance
- Practical functional assessment
- Increase provider's awareness
- Leverage good business practices:
 - Listening, **Transparency**, Respect, Trust
 - Data Collection
 - Facilitation – Effective Meetings
 - Follow-up – Responsibility
- Leverage reality and practical risks.

Available Resources

- Physician Health Programs
- Forensic Psychiatrists
- Clinical Psychiatrists/Psychologists
- Treatment Centers
- Regulators (e.g. licensing)
- Local Physician Health Programs
- Practice Consultants
- Senior Statesmen/women
- Defense Lawyers
- Physician Coaches

Implementing Deterrent Strategies

DO NOT, NOT ACT.

- The potential penalties for inaction on a disruptive physician are high.
- Nieto v. Kapoor, 268 F.3d 1208 (10th Cir. 2001).
 - Dr. Kapoor was the medical director of radiation oncology. He repeatedly sexually and racially harassed both employees and patients. Several hospital employees sought work elsewhere because of his actions.
 - Court awarded almost \$4,000,000.00 in damages, both compensatory and punitive, after siding with the plaintiff's who claimed that Dr. Kapoor was created a hostile work environment.

How to Tell If Behavior Is Disruptive

- Distinguish from the actions of a physician who:
 - i. is merely intense or colorful with language
 - ii. is more arrogant than usual
 - iii. criticizes hospital administration but in a manner that doesn't effect patient care or fellow employees
 - iv. is merely a passionate advocate (perhaps misguided but not irrational) for quality patient care

Check the Law

For example, in California (and several other states) it is illegal to:

“penalize . . . a physician . . . principally for advocating for medically appropriate health care . . . nor shall any person prohibit, restrict, or in any way discourage a physician . . . from communicating to a patient information in furtherance of medically appropriate health care.” California Business & Professions Code §2056(c).

Make sure the action is disruptive behavior not patient care advocacy

Distinguishing Disruptive Behavior - Check the Law

Under the California statute, “to advocate for medically appropriate health care” is defined to mean, inter alia, “to protest a decision, policy or practice that the physician . . . reasonably believes impairs the physician’s ability to provide medically appropriate health care to his or her patients.” California Business & Professions Code §2056(b).

- This is sometimes called “Sham Peer Review”

Distinguishing Disruptive Behavior - Check the Law

So, ask yourself before reporting or beginning a peer review process, does the physician have reasonable belief that what he/she is protesting is actually impairing the physician's ability to provide quality care for his/her patients?

Distinguishing Disruptive Behavior - Check the Law

- Some states like California have laws which make filing complaints or alerts of physician misconduct risky for the reporter.
- Under Sec. 1278.5 of the California Health and Safety Code, peer review actions may be subject to whistleblower retaliation suits. See Romero v. Cnty. Of Santa Clara, 2014 BL 194997 (N.D. Cal.).

Distinguishing Disruptive Behavior - Check the Law

- Violating some of the whistleblower/peer review laws in some states can lead to hefty penalties.
- For example, a willful violation of Sec. 1278.5 of the California Health and Safety Code is a criminal misdemeanor punishable with a fine of up to \$20,000.
- In light of this, again, it is imperative to check the law before bringing proceedings whether formal or informal against a possibly disruptive physician.

Implementing the Review Process

- Sources of Deterrent Measures
 - Joint Committee of Medical Staff
 - Nursing Staff Leadership
 - Code of Conduct
 - Bylaws

Implementing the Review Process

- Effective bylaws should set out the procedures for the following:
 - ✓ Initial Assessment
 - ✓ Investigation
 - ✓ Documentation
 - ✓ Informal Action
 - ✓ Formal Meeting
 - ✓ Formal Corrective Action
 - ✓ Administrative Hearing

Making these procedures clear to all employees will help streamline the reporting process and hold disruptive physicians accountable when there truly is a problem.

Investigation vs Informal Process

- Be aware that an “investigation” may trigger reporting requirements
- NPDB defines investigation broadly
 - The NPDB considers an investigation to run from the start of an inquiry until a final decision on a clinical privileges action is reached.
- Most responses to a complaint of disruptive behavior qualify as an investigation under this definition

Implementing the Review Process

Prior to Action

It may be a good idea – given the situation – to consider informal steps prior to involving a review committee in an official capacity. Informal remedies include

- Identifying the unacceptable conduct
- Discussing privately with the physician
- Disseminating a “no-tolerance” policy for the actions taken by the particular physician, without expressly stating his/her name

Implementing Deterrent Strategies

Preemptive Action:

- The onus here is on the Joint Committee of Medical Staff and the Nursing Staff Leadership.
- These groups need to function together to create dialogue about disruptive physicians and the methods of dealing with this problem BEFORE a problem occurs.
- That way there is an environment related to dealing with the issue that is (i) streamlined; (ii) professional; (iii) free from harassment/discrimination; (iv) compliant with federal and state laws; (v) consistent to a standard throughout the organization; and (vi) supportive of quality improvement.
- DIALOGUE ALONE MAY REDUCE CONFLICT.

Implementing the Review Process

Why Take Informal Steps Before Action?

- Administrative informal discipline does not impose a limitation on a physician's practice and is generally non-reportable to the state medical board/NPDB. Thus, this action does not create the possibility to retaliatory legal action or a right to a hearing for the physician. This limits the liability that the hospital or organization can be exposed to.

Implementing the Review Process

If Informal Steps Are Not Effective

Organize a formal meeting. A formal meeting should include:

1. Documentation of the meeting, the attendants, the physician, and the alleged conduct
2. Clear statements of the violation and the expectations for conduct, including citations to the provisions of the Medical Staff Bylaws which had been violated
3. An opportunity for discussion and comments

Implementing Deterrent Strategies

Recommendation

The Joint Committee of Medical Staff and the Nursing Staff Leadership should combine their efforts to write a Code of Conduct – that must be signed as a condition of staff membership – specifically addressing disruptive physicians.

Require all newly hired medical staff to sign and comply with the Code of Conduct.

Far easier to enforce corrective action if the Code was signed, then violated.

Implementing Deterrent Strategies

- Recommendation

Update the Medical Staff Bylaws. Again, include information on the following procedures:

- ✓ Initial Assessment
- ✓ Investigation
- ✓ Documentation
- ✓ Informal Action
- ✓ Formal Meeting
- ✓ Formal Corrective Action
- ✓ Administrative Hearing

Overall goal should be to develop clarity on actions and process to address disruptive physician behavior and expectations on proper behavior.

Implementing Deterrent Strategies

Recommendation

Have clear examples of disruptive behavior that are subject to disciplinary action and develop tiers of severity to illustrate problematic action in the Code of Conduct or Disruptive Physician Policy that is circulated often among physicians.

Sample Tier 1: Minor, mostly insignificant, inappropriate behavior (e.g., rudeness to patients). Penalty is warning.

Sample Tier 2: A pattern of inappropriate action that has significant impact on patient care or fellow employees. Requires previous warning.

Sample Tier 3: Continuous and serious pattern of disruptive behavior, presenting immediate risk to safety of patients and staff, whether or not previous warning has been given.

Implementing Deterrent Strategies

Recommendation (cont'd)

- Include instructions on how to carry out investigations of potential disruptive physician behavior
- Include timelines for these investigation
- Clear guidance on these instructions and timelines is crucial.

Implementing the Review Process

Recommendation (cont'd)

- Boards and Committees should consider implementing an **Independent Review Committee**.
- This would help streamline the process, minimize the risk of whistleblower liability, and overcome uncooperative Medical Staff leadership.
- Additionally, under Medical Staff Bylaws, hospital boards often have the duty to take corrective action if the staff fails to act.
- This committee can often times help coerce medical staff into being more committed to their role as the initial corrective actors.

Implementing the Review Process

Independent Review Committee

- Completely separate from the medical organization, this IRC entity can be retained by the medical staff office or the board and is often structured to be privileged under state law. See Rechsteiner v. Hazelden, 33 Wic. 2d 542 (2008).
- It is recommended that IRC members be licensed medical professionals or healthcare professionals in some capacity.

Implementing the Review Process

Either Independent Review Committee or Internal Review Committee

- The IRC must have the authority to conduct investigations. This includes the power to access documents, consult with the staff, and discuss matters with counsel.
- The IRC must retain its autonomy. Thus, they should choose their own chair or the appointing body should separately designate the chair.

Implementing the Review Process

- The review committee should report to the board and its chair to keep the entity leadership informed of its work.
- **IMPORTANT!** If an IRC-the compensation should be reflective of the fact that they are not being paid to find conclusions of inappropriate behavior, but rather to maintain proper physician behavior.
- If an IRC, initial term – usually six months – should be allowed to be extended if the work they do is positive and the overall culture of the entity improves.

Implementing the Review Process

- The IRC or internal review committee's purpose is to ensure a thorough and proper investigation. As such, steps need to be taken to:
 - i. Ensure confidentiality
 - ii. Gather information from as many relevant source as possible
 - iii. Complete the investigation efficiently, in days not weeks
 - iv. Collect objective information regarding the staff member's behavior
 - v. Compile a behavior timeline, include physician action prior to reported incident

Keeping Peer Review Privilege

- Another recommendation: Try to limit peer review activities from discovery.
 - Reason: There have been decisions eroding privileges/immunities from discovery for peer review records.
 - In Rodas v. Swedish American Health System Corp. 2007 U.S. Dist. LEXIS 60799 (Ill. N.D., Aug. 20, 2007), reports of physician misconduct were found not protected because no peer review proceeding had commenced when prepared.
 - In Orgavanyi v. Henry County Health Ctr., 2010 Iowa App. LEXIS 1585 (Iowa Ct. App., Dec. 22, 2010), another incident report was not protected because it was not in the hands of a peer review committee.
 - SOLUTION? If disruptive physician reports are made, have the committee immediately review them, so that they are protected and not discoverable.

Implementing the Review Process

Documentation

The documents prepared by the IRC or other investigation committee should include: (i) date, time, and description of the circumstances surrounding the potentially questionable acts; (ii) the names and hospital positions of ALL parties involved in the complaint, not just the accused party; (iii) a description of the actual disruptive behavior; (iv) the consequences and harm caused by the behavior; and (v) any action taken to remedy the situation.

Implementing the Review Process

Documentation

It is important to make sure that the documents prepared by the IRC or investigation committee do not include:

- Judgmental language (remember, be objective)
- Unnecessary reference to the person (simply reference the behavior)
- Attacks on the motives of the physician (assume best intentions)

Implementing the Review Process

Next Steps – Administrative Hearing

If neither a informal nor formal hearing fixes the issue, formal action and an offer of an administrative hearing is appropriate.

Implementing the Review Process

Preparing for an Administrative Hearing

- Make sure to have the disruptive behavior well documented, including immediate incident reports and all documents created by the IRC or investigation committee during the initial investigation
- Clearly establish a link between the disruptive conduct and patient care
- Cite to the breaches of the Bylaws and the behavioral contract signed by the physician
- Focus on the prior counseling efforts and attempts to rectify the situation (one of the reasons why it was important to do this initially)
- Utilize the Medical Staff attorney in preparing for hearing
- Be **TRANSPARENT**

Implementing the Review Process

Preparing for an Administrative Hearing

Ensure all documentation is available to and reviewed by entire peer review panel.

In Smigal v. Yakima Valley Mem'l Hosp. Ass'n., Case No. 29415-3-III (Wa. Ct. App. 2012), a peer review committee did not review all of the reports collected during a disruptive physician investigation. The court ruled that the Hospital did not make “a reasonable effort to obtain the facts.” and held in favor of the physician.

Implementing the Review Process

Preparing for an Administrative Hearing

Build a peer review process and **consistently apply the process.**

In In re Peer Review Action 749 N.W.2d 822 (Minn. Ct. App. 2008), a physician was accused of repetitive behavior but only notified of one incident. Inconsistent with prior investigations, the peer review committee decided to not recommend any intermediate corrective steps, in violation of the hospital's own policy. The court ruled in favor of the physician, and found that the hospital's deviation from their established process was evidence that their actions were motivated by malice.

Other Tools-Summary Suspension

Summary suspension

- Summary suspension prior or in alternative to a hearing may be a good idea if the health and safety of a patient or employee is in danger. Check with Bylaws to see if the threshold for summary suspension is met.
- This is likely an option in circumstances of (i) physical assault or battery; (ii) impaired or unsafe condition of physician, so that it endangers safety of patients or employees; and (iii) conduct that clearly violates state or federal law, or which imposes imminent liability on the hospital.

Reporting Requirements

- Think about reporting requirements from the outset
 - NPDB and State law
 - May have different standards
 - See e.g. California 805 Report
- What does the report look like?
 - Recommendation: Have counsel for Medical Staff and physician coordinate on what the report says to ensure there will be no resulting litigation

Thank You

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Q & A Session

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