Disruptive Physicians:
From Credentialing to Disciplinary Action
Minimizing Liability for Poor Quality of Care, Negligent Credentialing and Physician Lawsuits

THURSDAY, MARCH 28, 2013
1pm Eastern    |    12pm Central    |   11am Mountain    |    10am Pacific

Today’s faculty features:

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Disruptive Behavior: Challenges for Physician Leaders

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Stafford Webinar
March 28, 2013
1. What is Disruptive Behavior?
   a. Definition
   b. TJC Zero Tolerance
   c. Causes
   d. Identifying and Dealing with Impairment
   e. Remedies

2. Physician Coaching
   a. Best Coaching Strategies for Improving Disruptive Behavior
   b. Case Study: The Narcissistic Interventionalists
Disruptive Behavior
Professional Code of Conduct

- Conduct that interferes with quality patient care
- Sexual harassment
- Personal attacks on medical staff members or hospital employees
- Vulgar, profane, abusive language
- Physical Assault
- Harsh criticism that belittles, or implies stupidity or incompetence
- Threats of reprisal for reporting disruptive behavior
- Refusal to accept medical staff assignments
- Inappropriate medical record entries concerning quality of care
- Imposing onerous requirements on the nursing staff
- Public criticism or defamation
Classification of Disruptive Behavior

- **Level 1:** Physician violence or other physical abuse directed at people; sexual harassment; weapons on hospital property.

- **Level 2:** Verbal abuse; visual abuse; violence or abuse toward inanimate object.

- **Level 3:** Verbal abuse directed at-large, but perceived to be disruptive.
The Joint Commission

- **ZERO Tolerance!** – Sentinel Alert July 2008

- LD 03.10.01 EP 4: “Leaders develop a code of conduct that defines acceptable, disruptive, and inappropriate behaviors.”

- LD 03.01.01 EP 5: “Leaders create and implement a process for managing disruptive and inappropriate behaviors.”
Disruptive Behavior

“Seek first to understand, then to be understood.”

Habit #5
“The 7 Habits of Highly Effective People”
Stephen R. Covey
Root Cause of Disruptive Behavior

Identify the problem

Ask why?
Causes of Conflict

- Miscommunication
- Non-communication
- $$$
- Ego/Personalities
- Cultural Differences
- Disease of Self-Righteousness
- Territorial Disputes/Jealousy
- Different or Unclear Interests/Goals
- Fixed Thinking/Behavior
Causes of Conflict

#1 Cause of conflict (anywhere, anytime)

LACK OF ACKNOWLEDGMENT!
Causes of Disruptive Behavior

- Divorce
- Financial strain/Payment Reform
- Problems with children or parents
- Practice problems/”Forced Integration”
- Inadequate time off/Burnout
- Substance abuse/Impairment (ACPE < 10%)
- Personality disorder
Identify Impairment/Burnout

Signs and Symptoms

- Change in behavior or attitude/increased belligerence
- Frequently late to work or sick days
- Poor performance/medical errors
- Increase complaints or lawsuits
- Signs of intoxication on the job
Identify Impairment/Burnout

If impairment suspected or identified

- Refer to Physician Well-Being Committee and follow Physician Well-Being Policy
  - Problem treated medically rather than through disciplinary action
  - Confidentiality
  - Counseling/Rehab/12 Step Program
  - Coordinate with State Program for evaluation and monitoring of practitioner if available and indicated
If danger to patient safety identified

- Refer immediately to person or people designated in Bylaws or Peer Review Policy (Risk Management, Dept. Chair, President of Medical Staff, President/CEO, Physician Well-Being Committee) for immediate action
Other Issues Identified

If possible sexual harassment identified

- Refer to person or people designated in Bylaws, Professional Conduct Policy, or Human Resources Policy (Risk Management, Dept. Chair, President of Medical Staff)
Reporting Disruptive Behavior

Document! Document! Document! (Doctors rarely do)

- Single occurrence
- Pattern of behavior

Report goes to Physician Leaders designated in Medical Staff Bylaws, Code of Conduct Policy

Reporting to State Authorities (get legal counsel)
Reporting Disruptive Behavior

Document! Document! Document!

- Date and Time
- Did behavior affect or involve a patient in any way?; if so, identify the patient
- Circumstance that precipitated the event
- Factual and objective description of questionable behavior
- Any consequences related to patient care
- Action taken to remedy situation
Remedies
Remedies

- “Informal” cup of coffee intervention
- “Awareness” intervention
- “Authority intervention
- “Disciplinary” intervention
Remedies

- 1st Incident: Verbal warning, collegial, educational, coaching.

- Further Isolated Incidents: Notification and documentation.

- Persistent Problems: Written warning, rehabilitation plan, final warning.

- Refer to State program if available and indicated.

- Corrective Action and Fair Hearing Plan
Physician Coaching
The Coach

vs.

The Doctor Police
What is Physician Coaching?

One-on-one confidential relationship based on trust

- Identify strengths and weaknesses
- Build on strengths
- Improve or cover weaknesses
Successful Physician Coaching

Key Elements

- Initial buy-in from physician
  (written contract if possible and appropriate)
- Confidentiality
- One-on-one
- Regular sessions of decreasing frequency
- 6 to 12 month duration – Check-ups to prevent backsliding
- Regular, timely and meaningful feedback
  (at least monthly)
Best Physician Coaching Strategies

- Listen/Build Rapport/Trust – in person meetings
- Identify cause (impairment/burnout, situational, personality disorder)
- Identify resistance issues (e.g. past training, law suits)
- Resolve Conflict
- Define clear coaching goals and timeline
- Give timely feedback
- Avoid email except for scheduling meetings
- Carrots and Sticks
Listen/Build Rapport/Trust

Matching and Mirroring

- Email
  7%

- Voice Mail
  7% + 38% = 45%

- In-Person
  7% + 38% + 55% = 100%
Case Study:
The Narcissistic Interventionalist
Best Physician Coaching Strategies

Understanding the Alpha Male (HBR May 2004)

- Self-confident and opinionated
- Highly intelligent
- Action oriented
- High performance expectations of himself and others
- Highly disciplined
- Unemotional
Best Physician Coaching Strategies

Coaching the Alpha Male  (HBR May 2004)

- Get his attention
- Demand his commitment to the coaching process
- Speak his language
- Hit him hard enough to hurt
  No pain, no gain!
- Engage his curiosity and competitive instincts
Physician Coaching of Disruptive Physicians

Sample Coaching Protocol

- Six to 12 months of coaching
- Get buy-in from disruptive physician
- Weekly meetings for first four weeks (month 1)
- Call a truce for month 1 (ask for no flare ups)
- Biweekly meetings in month 2 if needed
- Quarterly check-ups at 3, 6, 9, and 12 months
- Some telephone coaching possible in between in-person coaching
- If no sustained improvement at 6, 9, or 12 month check-up, refer for formal Peer Review action
Coaching Problems and Pitfalls

1. Poor Rapport/No Rapport
2. Poor Listening
3. Unclear Goals
4. Competing Coaches
When to call your attorney

- Call early
- Call often
Thank you!

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Defining the Disruptive Physician

- What is disruptive behavior?
- AMA Paragraph H-140.918 (“Disruptive Physician Policy”): “A style of interaction with physicians, hospital personnel, patients, family members, or others that interferes with patient care” or appropriate hospital operations
Defining the Disruptive Physician

A 2008 VHA survey of 4,530 clinicians found that 77% of respondents had witnessed disruptive behavior by physicians (“Some nurses are afraid to call some physicians because they are afraid they will get yelled at over the phone, even though they have pertinent data to report”)

71% agreed that disruptive behaviors were linked with medical errors and 67% saw a link between disruptive behaviors and adverse events (“Disruptive behavior results in medication errors, slow response times, and treatment errors.”)

99% felt disruptive behaviors impaired nurse—physician relationships (this could lead nurses to quit and have an adverse impact on nurse recruiting)

Failure to act exposes the hospital to malpractice actions, as well as the risk of “hostile work environment” litigation by nurses and other hospital employees.
Defining the Disruptive Physician

- Examples of Disruptive Behavior:
  Abusively berates colleagues, residents, nurses and hospital administrative and staff (particularly in front of others) for not performing up to his or her standards. Objective, cold, unimpeachable criticism is more effective; e.g., “I used to think this nurse was competent, but then she did this. I’m not so sure now.”

  Engages in other types of repeated obnoxious, harassing, profane, bizarre or otherwise inappropriate behavior that adversely affects patient care

  Repeatedly fails to complete paperwork on a timely basis.
Sources of Stress on Physicians

- Overly regulated and second-guessed
- Constantly threatened with meritless litigation
- Underpaid
- Buried under third-party payor and regulatory “red tape”
- Under-appreciated
- Frustrated by inadequate facilities, insufficient trained staff
- Overly criticized
- Not in control of their work environment
What is Disruptive Behavior?

- Inappropriate anger can lead to:
  - Abusive language (including severe and persistent sarcasm)
  - Harassing or intimidating behavior
  - Publicly blaming others for adverse outcomes
  - Threats of retribution, including ruining professional careers, litigation or even physical violence (In at least one case, a car-bombing threat!)
What is Disruptive Behavior?

- Verbal or physical attacks that go well beyond the bounds of fair professional conduct, which may include:
  - Sexual comments or innuendoes
  - Sexual harassment
  - Seductive, aggressive or assaulting behavior
  - Racial or ethnic slurs
  - Constant foul language or lack of regard for personal comfort and dignity of others

(Only “Gregory House, M.D.” can routinely get away with such behavior...
What is Disruptive Behavior?

- Inappropriate responses to patient or staff needs, including:
  - Late or otherwise unsuitable replies to pages or calls
  - Unprofessional demeanor or conduct
  - Uncooperative, defiant approach to problems
  - Rigid, inflexible or explosive responses to requests for assistance or cooperation
  - Inappropriate or disrespectful comments (or illustrations) made in patient medical records or other documents
What is Disruptive Behavior?

- Must be distinguished from a physician who (i) is merely highly intense or colorful or arrogant by nature, (ii) criticizes hospital administration or operations, but in a manner that does not harm patient care or hospital operations, or (iii) is merely advocating strongly (perhaps wrongly but not irrationally) for quality patient care.
What is Disruptive Behavior?

- For example (like some other states) California law expressly makes it 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]
What is Disruptive Behavior?

- 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]
What is Disruptive Behavior?

- Sometimes called “Sham Peer Review”
- California law prohibits retaliation against medical staff “whistle blower.”

  Provides for unlimited damages

  Controversial because could disrupt active peer review proceedings (apparent exception to “exhaustion of administrative remedies requirement)

  [California Health & Safety Code § 1278.5]
What is Disruptive Behavior?

- Willful violation is also a criminal misdemeanor punishable by fine up to $20,000
  May eliminate HCQIA immunity too, if facts show corrective action was merely a pretext to remove a physician for complaining about hospital or medical staff problems
  M.D. derives a rebuttable presumption if there is evidence of “whistleblowing” by that M.D. within 120 days prior to date corrective action commenced

- Similar laws exist in other states
What is Disruptive Behavior?

- For example, Wilkey v. McCullough-Hyde Mem. Hosp., No. 1:04 cv 768 (S.D. Ohio 10/18/07)
  
  Privileges revoked for “disruptive behavior” after Dr. Wilkey complained about equipment and scheduling problems

  First external reviewer was a competitor; second external reviewer’s report was favorable to Dr. Wilkey but not provided to Dr. Wilkey or some of Credentials Committee and MEC members. MEC then revoked his privileges

  Court ruled in favor of Dr. Wilkey
Bad Facts Make Bad Law

*Clark v. Columbia/HCA Information Serv., Inc.*

25 P.3d 215 (Nev. 2001)

- Dr. Clark was considered “disruptive” because, among other things, he reported concerns about the quality of patient care to outside agencies and made statements critical of the hospital.

- The peer review board concluded that his reports to outside agencies were disruptive and would “eventually have an adverse impact on the quality of health care.” The board terminated his medical staff privileges.
Clark v. Columbia/HCA Information Serv., Inc. (continued)

- The Supreme Court of Nevada held in favor of Dr. Clark that the peer review committee and the hospital were not immune from suit under the federal Health Care Quality Improvement Act, because the revocation of Clark’s staff privileges was not made with the reasonable belief that it was in furtherance of quality health care (Compare California Business & Professions Code §2056, cited above)

- The Court also ruled that, because Dr. Clark had apparently been a “whistle blower,” it was against public policy to enforce any contractual release from liability that he had signed
What is Disruptive Behavior?

- However, a 2007 California court decision that gives comfort to hospitals and medical staffs: In Johnson v. Riverside Healthcare System LP, Cal. Ct. App. No. E 0384/10 (10/18/07), the Judicial Review Committee’s action to deny reappointment of physician who was clinically competent but “complicated scheduling, delayed patient surgeries and . . . Put patient lives at risk” was upheld. (“Physician exhibited abrasive and disrespectful conduct toward nurses” other staff to the extent they were unwilling to work for him.” )
Summary of Medical Staff Strategies for Dealing with Disruptive Behavior

- Joint Committee of Medical Staff and Nursing Staff Leadership (Nurses tend to be unionized, so not really a level playing field)
- Code Of Conduct
- Bylaws
  - Initial Assessment
  - Investigation
  - Documentation
  - Informal Action
  - Formal Meeting
  - Formal Corrective Action
  - Administrative Hearing
Code of Conduct or Cooperative Efforts to Promote Patient Care

- Medical Staff must be committed to supporting a culture that values:
  - Integrity
  - Honesty
  - Professionalism
  - Fair dealing
  - Sensitivity to the feelings of both patients and staff
Physicians and nurses may be reluctant to blow the whistle

July 2010 study in *JAMA* found that of 1,891 physicians surveyed, **33%** had failed to report a physician colleague who was **incompetent to practice medicine**.

Only 64% agreed with the statement “physicians should report all instances of significantly impaired or incompetent colleagues.”
But a study published in January – February 2008 Health Affairs journal found:

80% of 1,082 physicians and surgeons in Washington and Missouri said they did report medical errors through at least one formal mechanism such as risk management or incident report. Still, 70% found hospital reporting system inadequate.

- 45% did not even know if hospital had a reporting system
- Much more likely to report if reporting process took less than two minutes, confidential and nonpunitive
Recommendation: Joint Committee of Medical Staff and Nursing Staff Leadership

- A Joint Committee of Medical Staff and Nursing Leadership should be tasked with creating (with the approval of the Medical Staff and the Hospital Board) an environment that is:
  - Professional
  - Collegial
  - Free from harassment/unlawful discrimination
  - Compliant with federal/state laws
  - Consistent with a high standard of professionalism
  - Supportive of continuous peer review and quality improvement

- Can address disruptive nurses and other hospital personnel too

- Dialogue alone may reduce conflict
Recommendation: Written Code of Conduct Signed By All Medical Staff Members As Condition of Medical Staff Membership

- Purpose:
  
  Establish detailed appropriate behavioral guidelines from the outset.

  Deterrent effect: physicians who conclude they cannot exercise sufficient self-control to abide by the Code of Conduct are deterred from joining the Medical Staff.

  Easier to enforce corrective action against physicians who sign the Code of Conduct and subsequently violate it.
Recommendation: Written Code of Conduct Signed By All Medical Staff Members As Condition of Medical Staff Membership

- **Joint Commission Leadership Standard 03.01.01**

EP 4: “The leaders develop a code of conduct that defines acceptable, disruptive, and inappropriate behaviors.” (Emphasis added.)

EP 5: “Leaders create and implement a process for managing disruptive and inappropriate behaviors.”
Code of Conduct

- Creates Behavioral Expectations
  - Courtesy
  - Respect
  - Dignity
  - Professionalism
  - Refrain from conduct that is offensive or disruptive conduct to the workplace and/or patient care
HR Employment Issues

- Need to compare “disruptive behavior” and “impaired physician” standards as applied to employed physicians and other hospital employees to those applied to independent medical staff members.
- It is fairly common to see employed physicians held to a higher or different standard than independent physicians.
- Process for dealing with disruptive behavior of employed physician also can be different and remedial measures can be imposed with less process and terminations imposed more quickly.
Although these disparate and conflicting standards may be legally enforceable under contract law by can result in claim that two standards of care or conduct are permitted. If lesser standard applied to independents, who otherwise might have been disciplined or terminated if employed, a patient who is impaired by a disruptive/impaired independent physician would have stronger grounds to bring corporate negligence or similar theory against hospital.

Terminated employed physicians seldom get same hearing rights as independents but also are rarely reported even though hospital is required to do so under Data Bank requirements.
Non-disciplinary or remedial measures taken with respect to disruptive/impaired behavior are not reportable to Data Bank and usually not to the state unless:

- Action involves involuntary termination, suspension or reduction of privileges resignation while under investigation or in lieu of reportable corrective action, or a mandatory consultation requiring prior approval and
- Conduct has or may have an adverse impact on patients.
- Leaves of absence, voluntary reduction of temporary privileges, monitoring, proctoring, mandatory consultations not requiring prior approval are not reportable.
- Disciplinary action of any kind could be reportable to state licensing authorities – check state Medical Practice Act and state board rules.
Data Bank and State Reporting Requirements (cont’d)

- A physician under any of these remedial measures who returns with the ability to exercise full privileges is not reportable to the Data Bank even if determined to be impaired.

- If, however, privileges are terminated or reduced or suspended after the leave or because physician refused to cooperate or participate or did not comply with remedial action plan, decisions are reportable to Data Bank.
  
  Must decide if physician does or does not receive a hearing as part of the after care or well-being if terminated plan.
Data Bank and State Reporting Requirements (cont’d)

If no hearing, but is reported, hospital and medical staff cannot access HCQIA immunity protections provisions.

A better alternative would be to provide at least some form of hearing. Scope could be limited. More likely than not physician may simply resign. Important to give physician forum to fully learn of the allegations against him and opportunity to challenge them.
Data Bank and State Reporting Requirements (cont’d)

- Must check state laws on reportability.
  
  In Illinois, any determination that impairment exists must be reported even if physician successfully participates in a plan and privileges are maintained or restored. In Texas, danger to the public is the threshold.

This difference on how a state versus the Data Bank handles reporting can sometimes complicate effort to get the physician to willingly participate in a plan. Consider State Professional Health Program.
Other Strategies for Dealing with Disruptive Behavior

Medical Staff Bylaws

Develop expectations of proper behavior and a written policy for enforcing those expectations

May cite examples of types of behavior that are disruptive and will be subject to disciplinary action

Include provisions for reviewing and addressing a physician’s disruptive behavior by an independent professional retained by the medical staff office or the investigative committee (structured to be privileged under state law). Rechsteiner v. Hazelden, 33 Wis. 2d 542 (2008). [Extended peer review protection to outside addiction treatment of physicians]
Strategies and Remedies for Dealing with Disruptive Behavior

- Medical Staff Bylaws (cont’d)
  Include specific timelines for investigations and the handling of disruptive behavior by medical staff members

Continually educate and update the medical staff on policies regarding disruptive behavior and harassment
Impaired Physicians

- Under the Medical Staff Bylaws, “impaired physicians” are handled separately from other types of disruptive physicians.

The Joint Commission requires an ADA-compliant non-disciplinary process (with “reasonable accommodations”) for substance abuse as well as depression and other mental health disorders (under the American Psychiatric Association’s Diagnostic and Statistical Manual – V).

ADA and the EEOC mandate “reasonable accommodations” for a “qualified individual” with a “disability,” if the physician can perform all of the essential functions of his or her job. Controversial. Recently some resulting incidents of harm to patients reported in the media.

However, the ADA does not apply to physicians (i) with sexual disorders, (ii) with substance abuse disorders due to current illegal drug use, or (iii) who threaten the health and safety of others.
Strategies and Remedies for Dealing with Disruptive Behavior

- Initial Assessment
- Investigate

Points to remember when collecting information:

- Take appropriate steps to ensure everyone’s confidentiality
- Information should be gathered from as many relevant sources as possible
- Investigation should be done quickly, in days not weeks
- Collect objective factual information regarding the staff member’s behavior
Strategies and Remedies for Dealing with Disruptive Behavior

Points to remember when collecting information (continued):

- Avoid subjective opinions regarding the perceived problem

- Avoid making informal medical diagnoses

- Also review any unacceptable prior behavior by the physician

- Review whether there has been any decline in the physician’s clinical performance. (Evidence of a performance problem jeopardizing patient care justifies immediate referral to a medical staff committee to consider appropriate intervention.)
Practical Continuum of Function

- Function Labels – No Simple Definition
  - Engaged and Aware
  - Functional
  - Difficult
  - Dysfunctional
  - Dimished Capacity
  - Impaired
  - Severely Incapacitated
  - Clinically Incompetent

- When is the provider dangerous to the public?
Solutions

- Proactive and constant vigilance
- Practical differential diagnosis
- 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
Resources/Consults

- 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
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