Chief of Staff Boot Camp

Disruptive Practitioners: Practical and Legal Tips for Dealing with The Elephant in The Room

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Overview

• What do we mean by “disruptive behavior” and “disruptive practitioners?”

• What are the legal and regulatory ramifications of such behavior for medical staffs and hospitals?
  - When is corrective action legally viable?
  - What is NOT disruptive behavior?
  - Fair hearings
  - Employment Issues

• What are the proper responses to disruptive behavior and some tools for implementing them?
  - Codes of Conduct
  - Productive Interaction
  - Behavior Agreements
I. What is “disruptive behavior,” and who are “disruptive practitioners?”
Defining Disruptive Behavior

AMA 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].”
II. What are the legal and regulatory ramifications of such behavior for medical staffs and hospitals?
A. When Is Corrective Action Legally Viable?
California Law on Disruptive Practitioners

Miller v. Eisenhower Medical Center (27 Cal.3d 614, 1980)

- Applicant denied based on poor references regarding his “ability to work with others”
- The MEC must establish a nexus between the behavior concerns and patient care in order to take action
- This not mean a bad outcome must be shown, only the potential for one
- Dr. Miller’s ironic later problems
A Common Problem

No one wants to act in such cases

- Understandable discomfort – we are embarrassed for these people
- Reluctance leads to poor response
  - Failure to document
  - Failure to warn fairly
- Thus, when the “last straw” is added, there are not enough to act on!
- Disruptive practitioners tend to fight
What We Struggle With

“I’m right there in the room, and no one even acknowledges me.”
B. Caution: What is NOT Disruptive Behavior?

Physician who is merely:

- Intense
- A “Character”
- Arrogant
- Criticizes the hospital administration
- Advocates vigorously, loudly, or colorfully for improved patient care
A Universal Problem

Ambrose was having a bad day

And he didn't care who knew it.

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1. Patient Care Advocacy: Usually not disruptive

California Business & Professions Code §2056:

“It is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients.”
What does “Advocate for a medically appropriate health care” mean?

- “[T]o protest a decision, policy or practice that the physician . . . reasonable believes impairs the physician’s ability to provide medically appropriate health care to his or her patients.”
- Such advocacy can be mistaken for disruptive behavior
- Caution and careful planning required
Disruptive behavior may be disguised as – or even *coupled with* patient care advocacy

- Approach such situations with care
- Joint Commission repercussions
- Require specific documented support for claims of care advocacy
2. And beware of “Whistleblower” Protections

Federal Health Care Quality Improvement Act (HCQIA)

- Provides for sweeping immunity
- But only when action must be taken in “reasonable belief” that it was in furtherance of quality health care
- Availability of immunity can have profound impact
How HCQIA Helps You: The Poliner Case

• Dr. Lawrence Poliner: cardiologist, alleged improper suspension of his cath lab and echocardiography privileges, injury to his reputation and career.
  • Federal court jury concluded hospital and peer reviewers had not acted in good faith
  • Awarded Dr. Poliner more than $360 million in compensatory and punitive damages for a 29-day suspension.
• The Court reduced the jury's award to $33 million.

• But the number that became legendary was $360 million.

• July 23, 2008: U.S. Court of Appeals for the Fifth Circuit overturned the entire award – based on HCQIA

• Poliner v. Texas Health Systems, 537 F.3d 368 (5th Cir. 2008)
How HCQIA Can Hurt You: *Clark v. Columbia/HCA Information Services, Inc.*

- Dr. Clark considered “disruptive;” reported concerns about the quality of patient care to outside agencies and made statements critical of the hospital.
- Peer review board: Dr. Clark’s reports to outside agencies would “eventually have an adverse impact on the quality of health care.”
- Decision: terminate medical staff privileges.
- Nevada Supreme Court:
  - Peer review committee and hospital *not immune from suit* under HCQIA; revocation of Clark’s staff privileges was *not* made with the reasonable belief that it was in furtherance of quality health care
  - 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.
    
    *(Clark v. Columbia/HCA Information Serv., Inc. 25 P.3d 215 (Nev. 2001))*
2. “Whistleblower” Protections

• California example: Section 1278.5, Health and Safety Code, effective 1/1/08).

• Prior to amendment, the law protected only health care facility patients and employees who are “whistleblowers” from retaliation or discrimination.

• Purpose is to encourage reporting of unsafe patient care conditions.

• The amendment includes medical staff members in that protection.
C. Fair Hearings

- Important in every state because of Health Care Quality Improvement Act
  - Expensive
  - Stressful to organization
- A hearing based on disruptive behavior is very different from one based on purely medical issues
  - Non-physician witnesses and related issues
  - Documentation issues often critical
D. Employment Issues

• Is your disruptive practitioner an employee in addition to being a member of the medical staff?
  ▪ Labor law issues arise
  ▪ HR will need to be involved

• Is there an employment contract?
  ▪ Termination provisions govern
  ▪ Beware misuse of “without cause” termination
III. Proper responses to disruptive behavior and tools for implementing them

- Codes of Conduct
- Early Intervention (productive interaction)
- Behavior Agreements
A. CODES OF CONDUCT
A Code Is A Good Idea; Also A Requirement

Joint Commission Leadership standard issued 2008 (LD.03.01.01.)

• Adds two elements of performance:
  ▪ The hospital has a code of conduct that defines acceptable and disruptive and inappropriate behaviors (EP 4); and
  ▪ Health care facility leaders create and implement process for managing disruptive and inappropriate behaviors. (EP 5)
Objectives of Code of Conduct should be stated:

- Ensure highest-quality patient care
- Prevent behavior disruptive to hospital operations and ability of medical staff and others do perform their jobs
- Avoid “hostile work environment”
Medical Staff Bylaws: the place for a code of conduct?

New standard applies to entire facility – both medical staff and employees

Rules governing Medical Staff behavior belong in Bylaws
The (Elusive) Goal
B. Productive Interaction

Come Let Us Reason Together
A Pre-Disciplinary Approach

• Prior to any MEC action or investigation
• Invitation to a witnessed meeting
  ▪ CMO + Chief of Staff is usual model
  ▪ Or other combination that builds trust
  ▪ Interpersonal skills critical
• Try to form an alliance
• Follow up with written summary
• Follow through, insist on accountability
• Copy of sample PI policy available
C. Behavior Contracts
1. A Case Study on Behavior Contracts


- History of bad behavior
- Reappointed conditionally
- Required to sign *behavior contract*
- Result: Termination, formal hearing, unsuccessful court appeal by Dr. Ghanem
The Agreement states:

- Dr. Ghanem has been “counseled regarding compliance with required standards of behavior for a Medical Staff member”
- Cannot be reappointed unless agrees to comply with Medical Staff’s standards
- Failure to comply with standards results in termination from the Medical Staff
- Lists 15 specific conditions for reappointment, based on prior misconduct
Examples:

“f. Dr. Ghanem will not mention or indirectly make reference to any sexual matter, either seriously or jokingly, when conversing with any individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.

“g. Other than as required in the practice of medicine, Dr. Ghanem will not make reference to the physical appearance of any individual to any person in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.”
A Common Element in These Matters
2. Using Behavior Contracts

Advantages:

• Creates a record; avoids “institutional memory” issues
• Establishes your seriousness
• Lays groundwork for legally defensible corrective action (as in Ghanem case)
Behavior Contracts

Sample structure for a behavior agreement:

- Compliance with the Medical Staff Bylaws, Rules and Regulations and Policies and Procedures
- Behavioral Requirements
  - General Compliance with Medical Staff Standards
  - Specific Behavioral Requirements
Specific Behavioral Requirements might include:

- As used in this Agreement, terms intended to guide Dr. Welby’s behavior, including but not limited to “demeaning,” “discourteous,” “name calling,” “demands,” “criticize,” “non-constructive,” “intimidate,” “grievance or concern,” or “undermine confidence” shall have the meanings a reasonable person would give them in the same or similar circumstances.
Another possible Specific Behavioral Requirement:

• Dr. Welby will not, under any circumstances, make demeaning or discourteous comments, including but not limited to name calling, or give demeaning or discourteous orders or demands to any individual in St. Solvency Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. These prohibitions include responding to any individual who contacts Dr. Welby or any St. Solvency representative to discuss concerns or issues regarding Dr. Welby or his patients.
Yet another possible requirement:

- Anger Management Program, Psychiatric Evaluation, and Crew Training
  - Enrollment in program
  - Role of Committee on Physician Health
  - Behavior Management Coach Support
  - Psychiatric Evaluation
And another:

- **Violation of the agreement** (“default” or “breach”):
  - May result in corrective action as authorized by the Medical Staff Bylaws
  - Hearing rights will be those provided in the Medical Staff Bylaws
  - *The sole issue for consideration in any such hearing shall be whether Dr. Welby failed to comply with the terms of the Agreement*
A possible concluding requirement:

- **Term and Termination**
  - Agreement remains in effect for so long as Dr. Welby retains Medical Staff membership or privileges at the Hospital
  - Termination of Agreement by Dr. Welby deemed his immediate voluntary resignation from the Medical Staff of the Hospital, and he may not reapply for ___ years.
Review

• Use care in deciding how and when to act on disruptive behavior
  ▪ There must be a connection to patient care
  ▪ Patient care advocacy is not disruptive behavior, nor is whistle-blowing
  ▪ Patient care advocacy may be used as a “cloak” for disruptive behavior

• There are legal and regulatory ramifications to bad behavior

• Remember tools for implementing sound responses to bad behavior
  ▪ Codes of Conduct
  ▪ Productive Interaction
  ▪ Behavior Agreements
What We Want to Avoid

“OK, OK, OK. ... Everyone just calm down and we’ll try this thing one more time.”
Questions And Discussion