MEDICAL STAFF LEADERSHIP
ORIENTATION
Community Memorial Health System
Ventura County Medical Center
January 26, 2019

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Walking the Leadership Tightrope: Understanding and Meeting the Challenges

Overview:

• Board Authority and Medical Staff Self-governance
• Legal Update
• Credentialing and Peer Review
• Disruptive/Impaired & Late Career Practitioners
• Immunities and Protections
• Case Studies
Understanding Roles and Responsibilities

ACTUALLY, I'M NOT A DOCTOR... I'M THE HEALTH CARE ADMINISTRATOR.

THAT'S OKAY. I'M NOT THE PATIENT... I'M HIS ATTORNEY.

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Board and Medical Staff Legal Roles
Corporations and other artificial legal entities shall have no professional rights, privileges, or powers under the Medical Practice Act.

- Bus. & Prof. Code 2400
Corporate Practice of Medicine

- Corporations are **prohibited** from practicing medicine

- **Required:** Separation between medical/clinical decisions made by physicians and business decisions by corporations

- Unlicensed practice of Medicine
  - Bus. & Prof. Code 2052
Clinical decisions that constitute the unlicensed practice of medicine if performed by a Corporation

- What diagnostic tests are appropriate for a particular condition
- The need for referrals to, or consultation with, another physician/specialist
- How many patients a physician must see per day and how many hours a physician must work
- Responsibility for the overall care of the patient
Prohibition on CPM

- Protects patients from unqualified persons or entities making or influencing medical decisions
- Reduces chances of divided loyalties between physician and employer and physician and patient
- Minimizes undue influence or interference with physician’s judgment and physician-patient relationship
Prohibition on CPM

- Protects patients so that those who make decisions affecting the provision of medical services;
  - Understand the medical implications of those decisions;
  - Have an ethical obligation to place the patient’s interests ahead of their own; and
  - Are subject to the enforcement powers of the Medical Board
Hospitals & the Organized Medical Staff
Title 22, Sec. 70701

The Governing Body shall adopt Bylaws providing for:

- Appointment and Reappointment of Medical Staff
- Formal organization of Medical Staff, “competent” and “worthy in character and professional ethics”
- **Self-government of the Medical Staff**
- All reasonable steps to conform to federal, state and local laws and regulations
Title 22, Sec. 70701 (a)(1)(F):

- “The governing body shall. . . adopt written bylaws . . . which shall include provision for . . . Self-government of the medical staff with respect to the professional work performed in the hospital . . .”
The hospital must have an organized medical staff that operates under bylaws approved by the governing body and is responsible for the quality of medical care provided to patients by the hospital.

42 CFR §482.22
Conditions of Participation

- Composition of the Medical Staff
- Medical Staff conducts appraisals of its members
- Examine the credentials for applicants and make recommendations to the governing body
- Telemedicine
- Medical Staff organization and accountability
Conditions of Participation

- Medical Staff must adopt and enforce bylaws
  - Be approved by the governing body
  - Duties and privileges of each category
  - Describe medical staff organization
  - Describe qualifications
  - Include H&P requirement
  - Privileges criteria
  - Autopsies
How well leaders work together is key to effective hospital performance, and the standards emphasize this. Leaders from different groups—governance, senior management, and the organized medical staff—bring different skills, experiences, and perspectives to the hospital. Working together means that leaders from all groups have the opportunity to participate in discussions and have their opinions heard. Depending on the topic and the hospital, individuals from different leadership groups may participate in decision making, and the governing body may delegate decision making to certain leadership groups. Final decisions, however, are always the ultimate responsibility of the governing body; this key principle is assumed in any standard that describes how leaders work together. TJC LD.01.03.01
Caring for patients is the nucleus of activity around which all health care organization functions revolve. The organized medical staff is intricately involved in carrying out, and in providing leadership in, all patient care functions conducted by practitioners privileged through the medical staff process. MS.03.01.01 (Introduction)
The organized medical staff is responsible for establishing and maintaining patient care standards and oversight of the quality of care, treatment, and services rendered by practitioners privileged through the medical staff process. The organized medical staff designates member licensed independent practitioners to provide oversight of care, treatment, and services rendered by practitioners privileged through the medical staff process.  *MS.03.01.01* (Rationale)
The hospital must have an organized medical staff that operates under bylaws approved by the governing body and is responsible for the quality of medical care provided to patients by the hospital.

– MS.1 Organized Medical Staff
MEDICAL STAFF OF COMMUNITY MEMORIAL HOSPITAL OF SAN BUENA VENTURA, An Unincorporated Association Suing On Its Own Behalf, And In Its Representative Capacity For Its Members And Their Patients

V.

Community Memorial Hospital of San Buena Ventura

July 30, 2003
Independent Self-Governing Medical Staff

- SB 1325 – Business and Professions Code 2282.5 – added 2008

“Ultimately, a successful relationship between a hospital’s medical staff and governing board depends on the mutual respect of each for the rights and responsibilities of the other.”
CA Bus & Prof Code § 2282.5 (2017) (a) The medical staff’s right of self-governance shall include, but not be limited to, all of the following:

1. Establishing, in medical staff bylaws, rules, or regulations, criteria and standards, consistent with Article 11 (commencing with Section 800) of Chapter 1 of Division 2, for medical staff membership and privileges, and enforcing those criteria and standards.
2. Establishing, in medical staff bylaws, rules, or regulations, clinical criteria and standards to oversee and manage quality assurance, utilization review, and other medical staff activities including, but not limited to, periodic meetings of the medical staff and its committees and departments and review and analysis of patient medical records.
3. Selecting and removing medical staff officers.
4. Assessing medical staff dues and utilizing the medical staff dues as appropriate for the purposes of the medical staff.
5. The ability to retain and be represented by independent legal counsel at the expense of the medical staff.
6. Initiating, developing, and adopting medical staff bylaws, rules, and regulations, and amendments thereto, subject to the approval of the hospital governing board, which approval shall not be unreasonably withheld.
(b) The **medical staff bylaws** shall not interfere with the independent rights of the medical staff to do any of the following, but shall set forth the procedures for:

1. Selecting and removing medical staff officers.
2. Assessing medical staff dues and utilizing the medical staff dues as appropriate for the purposes of the medical staff.
3. The ability to retain and be represented by independent legal counsel at the expense of the medical staff.

(c) With respect to any dispute arising under this section, the medical staff and the hospital governing board shall meet and confer in good faith to resolve the dispute. Whenever any person or entity has engaged in or is about to engage in any acts or practices that hinder, restrict, or otherwise obstruct the ability of the medical staff to exercise its rights, obligations, or responsibilities under this section, the superior court of any county, on application of the medical staff, and after determining that reasonable efforts, including **reasonable administrative remedies provided in the medical staff bylaws, rules, or regulations**, have failed to resolve the dispute, may issue an injunction, writ of mandate, or other appropriate order. Proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure.
Rights and Responsibilities of Self-Governance

- Establish Bylaws, rules and regulations, criteria and standards for membership and privileges
- Clinical criteria and standards to manage QA, UR and other medical staff activities
- Review and analysis of patient records
- Select and remove officers
- Assess dues
- Retain counsel
## UNDERSTANDING ROLES

<table>
<thead>
<tr>
<th>Board of Trustees</th>
<th>Medical Staff</th>
<th>Administration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ultimate responsibility for Hospital; Operations and Quality of Care/Patient Safety</td>
<td>Responsible for Quality of Care</td>
<td>Responsible for Operations</td>
</tr>
<tr>
<td>Medicare Program - CMS TJC/DNV - Accreditation CDPH - licensing</td>
<td>Board cannot practice medicine and must rely on Medical Staff which is delegated the responsibility to conduct continuous monitoring, peer review and rigorous credentialing</td>
<td>Daily management and fiscal responsibility; regulatory compliance</td>
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<tr>
<td>Governs through Board as a whole and use of committees and sub-committees</td>
<td>Governs through committee structure; MEC, Departments and Committees. Medical Staff Office provides administrative support</td>
<td>Manages operations and departments that support medical staff functions</td>
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Medical Staff Independence Reaffirmed

- Tulare Medical Center Medical Staff vs. Tulare Medical Center
  - Settled July 2018
Medical Staff was 170 physicians as of January 26, 2016
Board voted to dissolve medical staff and replace January 26, 2016
Replacement Staff was 7 physicians
January 27, 2016 Board chair sends letter to Medical Staff announcing Board had “voted to terminate its relationship” with the Medical Staff and enter into a new arrangement with the Replacement Staff
The letter also announced that the Replacement Staff had “adopted new bylaws and rules, which have been approved by the Board, and had elected new officers and department heads.”

The Medical Staff and leaders had no prior notice of, input into, or consented, the replacement of the Medical Staff, its leadership, or its bylaws.
In replacing the Medical Staff the Hospital’s then-existing Board violated the Medical Staff’s right to medical self governance
Settlement

- **Replacement Staff Dissolved**
  - “The Hospital shall not recognize or give any effect to the Replacement Staff, its leaders, or its bylaws.”
Medical Staff Reinstated

“The Hospital shall immediately reinstate and recognize Plaintiff Medical Staff, including its duly-elected officers, as the organized medical staff of the Hospital, will all privileges, rights, and status (including the remaining length of officers’ and members’ terms) that pre-existed the January 26, 2016 actions of the Hospital’s then-existing Board.”
“The Hospital shall immediately reinstate Plaintiff Medical Staff’s bylaws, rules, and policies that pre-existed the January 26, 2016, actions of the Hospital’s then-existing Board.”
Settlement

- The Hospital paid the Medical Staff $300,000 for attorney fees
Avoiding Conflict

- Trust –

*Trust is the result of consistency*
Avoiding Conflict

- Mutual Respect –

*Mutual respect is based on process*
NEW LAWS
Hospital Patient Discharge Process, Homeless Patients – Jan. 1, 2019

- Hospitals required to modify discharge policy
- Inquiry into patient’s housing status
- Individual discharge plan for homeless patient
- Identify a post discharge destination
  - Shelter with supportive services that has agreed to accept the patient
  - Document name of person or agency who agreed to accept, or
  - Residence, or
  - Place of patient’s choice
Prior to discharge document

- Treating physician determined stable for discharge
- Offered a meal
- Given weather appropriate clothing
- Referred to source for followup care
- Prescriptions, offered infectious disease screening, vaccinations, medical screening, info on affordable health service
- Transportation within 30 miles
- Written plan for coordinating services and referrals with County Behavioral Health must include and be updated annually
- List of homeless shelters
- Discharge procedures
- Contact info for homeless shelters
- Training protocols for discharge planning staff
- Maintain a log of homeless discharges
Authorizes a minor who is 12 or older and who states he/she is injured as a result of intimate partner violence, to consent to medical care and treatment and the collection of evidence.
AB 2088 Medical Records

- Requires a health care provider to allow a patient, regardless of their age, who inspects their patient records to provide to the health care provider a written addendum with respect to any item or statement in their records that the patient believes to be incomplete or incorrect. (Amends Health and Safety Code §123111)
AB 282 – End of Life Option Act

- Prohibits a person whose actions are compliant with the End of Life Option Act from being prosecuted for deliberately aiding, advising, or encouraging suicide. (Amends Penal Code §401)
SB 1109 - Opioids

- Requires training and continuing education under the Medical Practice Act, Nursing Practice Act, Physician Assistant Practice Act, Dental Practice Act, Osteopathic Act, and the Optometry Practice Act to include risks of addiction associated with the use of Schedule II drugs.
Authorizes a physician and surgeon to complete a one-time continuing education course of 12 credit hours on opiate-dependent patient treatment and management, including eight hours of training in buprenorphine treatment as an alternative to the mandatory continuing education course on pain management and the treatment of terminally ill and dying patients. (Adds Business and Professions Code §2190.6)
AB 2423 – Physical Therapists

Provides physical therapists with an exemption from the provision in the Physical Therapy Practice Act that prohibits the physical therapist from continuing treatment beyond 45 calendar days or 12 visits, whichever occurs first, without receiving specified doctor approval of the physical therapist’s plan of care to enable them to provide services within their scope of practice under the federal Individuals with Disabilities Act (IDEA) under a school-developed Individualized Education Program (IEP) or an Individualized Family Service Plan (IFSP). (Amends Business and Professions Code §2620.1)
NEW CASES

WE HAD THE JUDGE IN OUR CORNER UNTIL HE STEPPED IN A LITTLE SOMETHING.
Elder abuse action alleging failure to follow patient’s advance health care directive resulted in her death

“This case raises issues concerning the legal obligations imposed on health care providers when a patient’s health care directives conflict with the providers’ opinions that the requested care would be medically ineffective and may cause harm.”
70 year old patient transferred from SNF to hospital with end-stage pancreatic cancer. Advanced Health Care Directive stated she wanted all measures taken to prolong life. Certain measures were not provided on the basis they would be ineffective or cause harm.

Members of the Appropriate Care Committee were named defendants.
- Treating physicians had called for Appropriate Care Committee consult
- ACC reviewed records and case and agreed with treating doctors that palliative measures were appropriate and no advanced life support measures should be used
Case dismissed against ACC members

- “A physician’s duty of care to a patient does not arise until a physician-patient relationship is established.”

- No physician-patient relationship
  - Grand rounds recommendation
  - Proctor
  - Legal exam
  - Pre-employment exam
Dr. Powell applied for and was granted medical staff privileges

He disclosed he had been terminated from Texas hospital and included the Texas Medical Board had dismissed the case

Dr. Powell came up for advancement from Provisional status but had 12 cases under review.
- The MEC recommended advancement
- The Board learned of review and asked MEC to reconsider
- MEC reviewed and recommended advancement
- Board sought dispute resolution and sent a list of questions to MEC
The MEC met with Dr. Powell who indicated his termination from the Texas hospital was for political reasons and he claimed to have an exoneration letter from the TMB.

BVCH General Counsel obtained a copy of the action from the Texas court and it contradicted Dr. Powell’s explanations.

The MEC withdrew its recommendation and deemed Dr. Powell’s application incomplete.
- Dr. Powell’s provisional privileges lapsed
- Dr. Powell produced a letter from a staff attorney with the TMB indicating the investigation was closed
- The original letter was obtained and said “Closed with no action recommended because the evidence does not indicate a violation of the Texas Medical Practice Act.”
With the application then complete the MEC again recommended Active privileges

Board issued tentative denial and right to a hearing

- Patient care issues identified during external peer review
- Incomplete application for failure to provide the letter from the TMB
- Misrepresentation regarding termination from Texas hospital
JRC found in favor of the Board

Dr. Powell attempted to deceive the Board by not producing the letter from the TMB investigator

Dr. Powell misrepresented the reasons why he was terminated at the Texas hospital.
Dr. Powell appealed

“The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism those healing arts practitioners who provide substandard care of who engage in professional misconduct
805 report and hearing was not required when provisional privileges expired

Hospital was not required to extend provisional privileges while application was incomplete
“Dr. Powell lied to Brownwood’s medical staff and lied to Bear Valley’s medical staff about the circumstances, *showing a propensity for dishonest and unethical conduct that could negatively impact his and other physicians’ provision of medical care.* Under the circumstances the Board acted within its authority to protection patient.”
I'm always disappointed when a liar's pants don't actually catch on fire.
Termination for Breach of Confidentiality Upheld

- Two neonatologists were terminated after it was learned they had copied portions of 22 medical records for use in an arbitration with another member of their group.
- JRC and Court upheld the termination Cong Vo v. Pomona Valley Hospital Medical Center, 2018 WL 4501548 (Sept. 20, 2018) not published
TATTLETALE!

I PREFER "WHISTLEBLOWER."
Removal from Call Panel could be Retaliatory

- Psychiatrist was removed from psychiatric ED panel and panel was closed. Because she was the only psychiatrist excluded she alleged retaliation for making complaints about patient dumping.
- Writ of mandate filed to be placed back on panel – trial court denied – Appeal court reversed

Vukov v. Glendale Adventist Medical Center, 2018 WL 161330, April 4, 2018 – not published
Who granted him privileges?

"Nurse, get on the internet, go to SURGERY.COM, scroll down and click on the "Are you totally lost?" icon."
Credentialing defined:

- The process of obtaining, verifying, and assessing the qualifications of a health care practitioner to provide patient care services in or for a health care organization.
Privileging defined:

- The companion piece to credentialing is “privileging,” which is the process of authorizing a licensed or certified healthcare practitioner’s specific scope of patient care services. Privileging is performed in conjunction with an evaluation of an individual’s clinical qualifications and/or performance.

  • MedPro Clinical Risk Dept. 2014
Title 22, Sec. 70701 (a)

Medical staff members are required to:
  – Demonstrate current competence, to a medical staff committee, on initial appointment, and every two year thereafter.
Conditions of Participation

- The governing body must “ensure the criteria for selection [of the medical staff] are individual character, competence, training, experience, and judgment.” 42 CFR 482.12
- The medical staff must examine credentials of candidates for medical staff membership and make recommendations to the governing body on the appointment of the candidates.
MS. 06.01.03

The hospital collects information regarding:

- Current license
- Training
- Experience
- Competence, and
- Ability to perform the requested privileges
Bylaws must include criteria for determining privileges

- All individuals providing care must have privileges
- Individuals with privileges only practice within the scope of their privileges
  - MS.12
Privileges must be

- **Individualized**
  - Practitioner
  - Facility/Service
- **Relevant**
  - Current
  - Realistic
- **Supported by Objective Evidence**
  - Training
  - Experience
- **Continuously Monitored**
  - OPPE
Credential and Privilege to include the Six Core Competencies

- Patient care
- Medical/clinical knowledge
- Practice-based learning and improvement
- Interpersonal and communication skills
- Professionalism
- System based practice
Case Study

WHAT YOU DON'T KNOW ABOUT ME COULD HURT YOU
Ex-Neurosurgeon Christopher Duntsch Sentenced to Life  Feb. 17, 2017
Christopher Duntsch

- MD & PhD – Univ. of Tenn. Health Science Center
- Neurosurgery residency – 2004-2010
  - Program Director
  - Sent to impaired MD program
  - Not allowed to operate independently
- Post residency stayed in research and ran Discgenics
- July 1, 2011 recruited to Baylor Plano
Christopher Duntsch

- **Residency letter**
  - “His work ethic, character, and ability to get along with others were beyond reproach.”

- **Fired from group after first surgery**

- **November 2011 Kenneth Fennel – wrong site surgery**

- **December 30, 2011 – Robert Passmore - Asst. surgeon grabs Duntsch and begs him to stop. Nurses fail to report incident**
January 11, 2012 - Barry Morguloff – Dr. Randall Kirby was the assistant surgeon – Surgery was a “horror”

February 12, 2012 – Jerry Summers – Woke up a paraplegic

Summary suspension – not reported – Privileges reinstated

March 12, 2012 – Kelly Martin – Dead – Post operative hemorrhage following laminectomy

April 2012 – Suspended & Resigned
April 20, 2012 resignation letter states relocating practice
April 20, 2012 reference letter provided to Duntsch from Baylor
April 20, 2012

Christopher Duntsch, MD
4708 Alliance Blvd.
Pavillon I — Suite 630
Plano, Texas 75093

Dear Dr. Duntsch:

On behalf of the Medical Executive Committee of the Medical Staff of Baylor Regional Medical Center at Plano, I am authorized to notify you of the following:

All investigations with respect to any areas of concern regarding Christopher D. Duntsch, M.D. have been closed.

As of this date, there have been no summary or administrative restrictions or suspensions of Dr. Duntsch’s Medical Staff membership or clinical privileges during the time he has practiced at Baylor Reg. Medical Center at Plano.

Yours Very Truly

Patricia Sproles, CPCS
Director, Medical Staff Services
Christopher Duntsch

- July 2012 – Dallas Medical Center grants temporary privileges
- July 2012 – Feolla Brown does from post operative hemorrhage
- July 2013 – Texas Medical Board suspends license
- March 2014 – lawsuit filed against Baylor
- July 2015 - Indicted
Lessons Learned (Again)

- Credentialing –
  - Watch for red flags & follow up
- Impairment –
  - Identify and manage
- Action –
  - Take when necessary
- Reporting –
  - Follow the law
- Reference letters
  - Factual – notice to others
- Information Sharing
  - Proactive
Risks of Failing to Credential and Privilege

- Patient Harm
- Regulatory violations
- Licensure sanctions
- Loss of accreditation
- Negligent credentialing claims
- Civil fines and penalties
- Criminal fines and penalties
- Patient Harm
Negligent Credentialing

Darling v. Charleston Community Memorial Hospital (1965)
- Hospitals have an independent duty to patients
- Reasonable care in selection of physician and granting of privileges

Elam v. College Park Hospital (1992)
- Hospitals owe a duty to insure the competency of its medical staff
“Still, let’s do an x-ray just to be sure.”
False Claims Act

- Enacted 1863
- Civil War supplies
  Thoroughbreds were ordered
False Claims Act
False Claims Act

- *Knowingly* submitting False Claims for payment
  - “Claim” – any demand for payment
False Claims Act

- **Knowledge of Falsity**
  - Actual knowledge
  - Deliberate ignorance of the truth or falsity of the information
  - Reckless disregard of the truth or falsity of the information
Penalties – Aug. 1, 2016 Interim Rule increase

- $11,000 - $21,563 for each claim
- Treble damages
- Double damages in some circumstances for self-reporting
Conditions of Payment vs.

- **Payment** – Conditions which must be met to be paid
- **Participation** – Conditions which must be met to participate in a federal health care program
Medicare Attestation

- Notice to Physicians: Medicare payment to hospitals is based in part on each patient's principal and secondary diagnoses and the major procedures performed on the patient, as attested to by the patient's attending physician by virtue of his or her signature in the medical record. **Anyone who misrepresents, falsifies, or conceals essential information required for payment of Federal funds, may be subject to fine, imprisonment, or civil penalty under applicable Federal laws.**
  - 42 CFR 412.46(b)
COP’s and the False Claims Act

- **Express Certification**
  - Complied with all Conditions of Payment

- **Implied Certification**
  - Complied with all Conditions of Payment and Participation
Expansion of False Claims Act Liability

One year later –

*Universal Health Services v.*

*United States ex. rel. Escobar*
Escobar Underlying Facts

- Patient died from seizure after receiving mental health treatment
- UHS employed unlicensed and unsupervised personnel
- UHS billed for treatment
- Only one of five individuals treating decedent were properly licensed or supervised
Escobar Underlying Facts

- Counselors supervising decedent did not have license and not supervised

- Psychologist had application for licensure rejected
  - On-line unaccredited psychology course
  - Held herself out to be an experienced “doctor”
  - Prescribed medications without required supervision
Escobar Underlying Facts

- Decedent was allergic to the prescribed medication
- Counselor had fraudulently obtained NPI
- 22 additional employees had false NPIs as licensed mental health professionals
- No supervision
Submitting the Claims
Worthless Services

– USA v. Azmat

- “From the very first endovascular procedures he performed in Satilla’s cath lab, it was obvious to the cath lab nursing staff that Azmat was not qualified or competent to perform endovascular procedures.”
- Satilla finally took action but agreed with Azmat not to report if he agreed not to perform the procedures until competent.
- Satilla settled for $840,000.
Whistleblowers

- Health and Safety Code 1278.5
- **Encourages** patients, nurses, **members of the medical staff,** and other health care workers to notify government entities of suspected unsafe patient care and conditions
- **No retaliation** allowed if complaint, grievance or report presented to facility
- **Presumption of retaliation** if action taken within 120 days of complaint
Responding to Practitioner Complaints

- Acknowledge
- Investigate
- Substantiate
- Communicate
- Document
“Whoa! That was a good one! Try it, Hobbs — just poke his brain right where my finger is.”
Peer Review

- Business and Professions Code Sec. 805
- Peer review is a process for review of qualifications, privileges, employment, professional conduct to:
  - Make recommendations for quality improvement and education
  - Assess and improve the quality of care
Peer Review Goals

- Patient Safety
- Remediation and Education
- Objective Evaluation
- Distinguishes System Errors from Individual Performance
Peer Review Hot Topics

- Unexpected poor outcomes
- Never-events
- Weak/borderline performance
- Judgment issues
- Assessing low volume practitioners
- Impairment
- Aging
- Disruptive behavior
Medical Staff Bylaws

- Acts, demeanor or conduct, either inside or outside the hospital, that is reasonably likely to be
  - Detrimental to patient safety or quality of care
  - Unethical
  - Contrary to the Bylaws, R&R
  - Below applicable standards
  - Disruptive
  - Improper use of hospital resources
Corrective Action Tenets

- Corrective action **must be taken when necessary** to protect current and future patients
- Corrective action should be **based on credible facts** capable of independent verification (e.g., documents, witness statements)
- Corrective action imposed should be the **least restrictive to the practitioner but sufficient to protect patients**
Don’t Let the Tail Wag the Dog!
Medical Board of California 805 & 805.01
Reports

- Medical disciplinary cause or reason
  - Restriction
  - Suspension
  - Termination
  - Denial of membership or privileges
  - Summary suspension over 14 days
  - Resigns or leave of absence while under investigation
National Practitioner Data Bank

- Professional review action based on competence or conduct that affects or could affect patient care and adversely affects privileges or membership for more than 30 days
  - Reduction
  - Restriction
  - Denial
  - Revocation
  - Surrender or failure to renew
  - Resignation while under investigation
  - Summary suspension of more than 30 days
Encouraging Effective Peer Review
Peer Review Protections

- Evidence Code Section 1157
- “Neither the proceedings nor the records of organized committees of medical...staffs in hospitals, or of a peer review body, have the responsibility of evaluation and improvement of the quality of care rendered in the hospital or for that peer review body...shall be subject to discovery.”
Health Care Quality Improvement Act

- Encourages peer review
- Provides immunity from damages for those who engage in peer review
- Applies to peer review actions in any state
A professional review action must be taken

(1) in the **reasonable belief** that the action was in the furtherance of quality health care

(2) after a **reasonable effort** to obtain the facts in the matter
(3) after adequate **notice and hearing procedures** are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the **action was warranted by the facts known after such reasonable effort to obtain facts** and after meeting the requirement of paragraph (3)
Civil Code Section 43.8

“...there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person on account of the communication of information in the possession of that person to any hospital, hospital medical staff...when the communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing arts.”
- State - Protected from damages in a civil action
- Health Care Quality Improvement Act

Patient Safety
Practitioner Rights
What is protected?

- Peer Review Body Activities related to
  - Medical research
  - Quality assurance
  - Utilization review
  - Credentialing
  - Education
  - Training and supervision of physicians
  - IRB

- Any connection to grant, denial, restriction or termination of clinical privileges.
What is protected?

- All oral communications or written reports to a peer review body, and
- All notes or records created by or at the direction of a peer review body,
- Including the communications, reports, notes or records created in the course of an investigation undertaken at the direction of a peer review body.
What is not protected?

- Information used in a disciplinary proceeding if the physician brings an action
- Information that is otherwise discoverable, e.g., medical records
- Administrative or automatic actions
Confidentiality & Information Sharing

- Medical Staff Bylaws Requirement
- Waiver of protections if fail to maintain confidentiality
- Harm to reputation of others
- Share information through
  - Process
  - Factually
Nothing shared relieves entity of independent duty to evaluate practitioner

– Smith v. Selma
What is NOT Disruptive Behavior

- Physician who is
  - Intense
  - A “Character”
  - Arrogant
  - Criticizes the Hospital Administration
  - Advocates vigorously, loudly, or colorfully for improved patient care
Patient Care Advocacy is Not Disruptive

- Business and Professions Code Sec. 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.
Characterizing Disruptive Behavior

- Inability to play well with others – not a team player
- Poor communication skills
- Unprofessional behavior
  - Irresponsible
  - Non-responsive
  - Demeaning or intimidating
  - Outbursts of rage
  - Passive-Aggressive
  - Inappropriate sexual remarks or innuendos
  - Shunning, Avoiding
Causes of Disruptive Behavior

- Personality or affective disorder
- Stress, burnout
- Poor social skills
- Lack of insight
- Aging, Medical Problems
- Impairment (drugs, alcohol, addiction, etc.)
- The behavior “works” – *Practitioner gets her way*
California Law on Disruptive Practitioners

- **Miller v. Eisenhower Medical Center** (27 Cal. 3d 614 (1980))
  - Applicant denied based on poor references regarding “ability to work with others”
  - The MEC must establish a connection between the behavior concerns and patient care in order to take action
  - This does not mean a bad outcome must be shown, only the potential for one
Why is Disruptive Behavior Tolerated?

- Colleagues and staff do not know how to deal with it
- Lack of leadership
- Lack of support from hospital administration
- Fear of retaliation
- Absence of a confidential system to identify disruptive behavior
- Practitioner brings in lots of $$$
- Fear of lawsuits
Consequences of Disruptive Behavior

- Poor morale
- Increased staff turnover
- Risk of complications or poor clinical outcomes
- Lawsuits
- Perpetuation of a culture of tolerance
Responses to Disruptive Behavior

- Codes of Conduct
- Collegial Intervention
- Behavior Agreements
- Coach/Mentor
- Well-Being Committee
- Psychiatric Evaluation – Therapy Requirement
- Corrective Action
"He seems cranky, but his heart is in the right place – we gave him an MRI to be sure."
Late Career Practitioners

Dr. Charles Godfrey | 100-Year-Old Doctor Still Practicing
Late-Career Practitioners

- **AMA 2012 Physician Age**
  - 42% older than 55
  - 21% older than 65

- “The rising number of physicians practicing later in life raise concerns about the potential impact aging physicians have on patient safety.”
  - CPPPH 2014
Managing the Late Career Practitioner

- Policy and Guidelines
- Collegial Intervention
- Well-Being Committee
- Formal Action
"...and this is Ralph, your anesthesiologist."
Burnout

- A state of physical, emotional or mental exhaustion combined with doubts about personal competence and value of work
Risk Factors

- Perfectionism
- Need for Control
- Increased sense of responsibility
- Need to please
- Difficulty asking for help
- Difficulty taking time for oneself
Red Flags for Burnout

- Emotional deadness
- Cynicism, disillusionment
- Loss of mental energy
- Anger
- Isolation
- Physical ailments
- Negative attitudes
- Deteriorating quality of patient care
- Self-medication
Suicide is usually the result of untreated or inadequately treated depression, coupled with knowledge of and access to lethal means. Medscape, July 17, 2014

- Physicians have the highest rate of suicide for any profession
- 400+ physician suicides are reported annually
- This statistic does not include suspicious circumstances
Avoiding Burnout

- Recognition
- Exercise, sleep, nutrition
- Supportive professional relationships
- Clinical variety
- Hobbies outside of medicine
- Humor
  - Swetz, J. Palliative Med. 2009
Impairment Definition

Inability to practice medicine with reasonable skill and safety due to:

– Mental illness
– Physical illness, including but not limited to, the aging process or loss of motor skill
– Addiction
12-17% of physicians suffer from a substance abuse disorder in their lifetime.

The rate of depression for male physicians = 12%.

The rate of depression for female physicians = 18%.
Physician Well-Being Committee

- Not an “investigation”
- Not a disciplinary action
- Not reportable
Why we do what we do…

- **Blind Eye: The Terrifying Story Of A Doctor Who Got Away With Murder**, James B. Stewart, June 15, 2000
- **How Peer Review Failed at Redding Medical Center and Why it is Failing Across the Country; A Congressional Report**  June 1, 2008
- **Kadlec v. Lakeview Anesthesia Associates**, 527 F.3d 412 (5th Cir, 2008)
Case Study
Dr. Grumpypants has been a member of your medical staff for 35 years and has always been a bit of a curmudgeon. Over the last 8 months he has become increasingly difficult and has had many run ins with the staff. However, they have been understanding because he recently lost his wife of 45 years to cancer. Today he was doing a routine laminectomy and did the procedure at the wrong level. When the mistake was pointed out he immediately blamed the OR staff.
After being notified of the wrong level surgery you:

a. Notify the Chief of Staff who decides to do nothing because it is a known and accepted complication

b. Review Dr. G’s complications and prepare a graph that shows that an increase of 15% over the last 5 years.

c. Call the Well-Being chair to intervene

d. All of the above

e. None of the above

f. Something else
Key Points

- Late-Career Practitioners
- Policy
- Burn-out
- Suicide
- Interventions
- Fitness for Duty Evaluations
- Roles for Senior Practitioners
- Information Sharing
“You can’t list your iPhone as your primary-care physician.”
Dr. Carefree is a recent recruit who was hired to cover many of the patients without insurance or who only have public funded coverage. He is a specialist in pain management and the patients love him. After he has been on the job about five months the CNO comes to you and states there have been problems with drug disposal. Dr. Carefree will tell patients to bring in their prescriptions and then will confiscate those and write the patients other prescriptions. The patients and staff are complaining and Dr. Carefree is not properly disposing of the drugs with a witness. Also, he has recently been observed slurring his speech, falling asleep and stumbling.
After speaking with the CNO you:

a. Do nothing because there is no written complaint.
b. Call security and have him escorted to the lab for a urine test.
c. Advise your MEC to send him to a drug diversion program.
d. Suggest that your officers call him in and have the chair of the Well-Being Committee present.
e. Check his prescribing patterns and call the Opioid Task Force
f. None of the above
g. Something else
Key Points

- Potential Impairment – Don’t Ignore
- Role of WBC
- Over prescribing
- Investigation and monitoring
- Information sharing
  - Fact of referral
  - No substance
Leadership Challenges
Dr. Vert

Dr. Vert is a pediatrician who is very active in the community. He volunteers his time and often serves as the team doctor for the high school and community sports teams. On Tuesday morning your phone rings at 6:00 a.m. and it is the CMO asking if you have seen the headlines that Dr. Vert has been arrested for possession of child pornography and for molesting child athletes. Over the next few days more details emerge and you learn that he
Dr. Vert

Is being federally indicted on criminal charges. He gets out of jail on a bond and continues to see patients in your hospital. During the next two weeks you learn that the federal prosecutors have confiscated his iphone and all of his computers. You also learn that several boys and girls are coming forward and alleging that he conducted inappropriate examinations of them. You talk to your
Dr. Vert

Medical Staff officers and they are reluctant to take any action because Dr. Vert has not been convicted of any criminal act and his license remains clear. However, the newspapers are conducting independent investigations and there are daily reports of new findings against him. Your Medical Staff officers continue to insist they cannot take an action based on accusations alone.
After spending several sleepless nights you:

a. Tell the CMO and CEO that they must direct the Board to summarily suspend Dr. Vert

b. Advise the MS Officers to immediately require Dr. Vert to have a chaperone whenever he enters the hospital

c. Draft a letter to Dr. Vert requiring him to appear before the MEC

d. B and C

e. All of the above

f. Something else
Key Point

- Bylaws language: conviction, accusation, plea bargain
- Medical Board role
- “Indictment”
- Burdens of Proof
- Patient Safety
- Hospital Reputation
Six months later the publicity has continued and Dr. Vert has permitted his appointment and privileges to expire. The Medical Board has still not acted. You continue to monitor his criminal case and periodically receive updates. It is now two years later and you learn through the news that the indictment for possession of child pornography against Dr. Vert has been dismissed because the information was obtained by the federal prosecutors improperly.
You also learn that the allegations of improper examinations of the child athletes have been dismissed because the examinations were determined to be appropriate through multiple experts. Dr. Vert has now reapplied for membership and privileges on your medical staff. His license is clear and there are no negative actions at any external organization.
You work for a faith based hospital in the Bible Belt. There is already grumbling that he only got off on a technicality. He has never explained the presence of the pornography on his phone and computers because he says the case was dismissed so it is not relevant to his privileges. Certain members of the medical staff think he is a great surgeon and others are offended by the indictment. He insists on going forward with his application and submits CME.
You advise the MEC to:

a. Deny his application because he got off the pornography possession charge on a technicality
b. Deny his application on the basis he does not meet the ethical standards
c. Approve his application but require he has a chaperone at all time
d. Approve his application without restriction
e. None of the above
f. Something else
Key Points

- Ethical Standards
- Athlete Examinations
Dr. Gin is a well-known wine connoisseur who has selected and provided the wines for all the medical staff events for the last ten years. One morning you arrive at work to learn that he has been involved in a terrible accident in which two people were killed. Dr. Gin remains in the hospital for one week and when discharged takes a 60 day leave of absence. During that time you learn the accident was his fault and he was legally intoxicated when the accident occurred. At the end of his leave he submits a letter that he is ready to return to practice with his full privileges. However, you hear that he may be left with a tremor.
You should counsel your Chief of Staff to:

a. See if Dr. Gin will continue to provide the wine for the MEC meetings
b. Immediately summarily suspend his privileges
c. Open a formal investigation
d. Require a fitness for duty evaluation
e. Turn the problem over to the WBC
f. Do nothing until the criminal action has been completed
g. Impose proctoring/monitoring
h. Pour a glass of wine.
i. Something else
Key Points

- Criminal Charges
- Fitness for Duty Exams
- Investigation of external occurrences
- Re-entry programs
- HIPAA
- Information Sharing
Amazing people willing to devote time and sacrifice their personal life to improve the quality and safety of care.

Often a thankless task but,

**WE THANK YOU!**
"...My little black book of lawyer's numbers."
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