Sanford Health

Medical Staff Leadership Training

November 10, 2022

Dan Mulholland and Mary Paterni
Horty, Springer & Mattern

Jointly Sponsored by the University of Pittsburgh School of Medicine
Center for Continuing Education in the Health Sciences and HortySpringer Seminars

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SANFORD HEALTH
November 10, 2022
Medical Staff Leadership Program

November 10, 2022	
Time	**Topic**
8:00 – 8:45 a.m.	**Giving Confidence – Legal Protections for Medical Staff Leaders** • Medical Staff Law 101 • How the Law Protects You!
8:45 – 9:30 a.m.	**Hot Topics in Privileging** • What Could Go Wrong? • "Turf Battles" and New Privileges • Advanced Practice Providers
9:30 – 10:15 a.m.	**Effective Peer Review of Clinical Concerns** • Obstacles to effective reviews • Best practices to create an educational, non-punitive peer review process • Addressing employed practitioners • Obtaining meaningful input from those under review
10:15 – 10:30 a.m.	**Break**
10:30 – 10:45 a.m.	**Practitioner Health** How common are health concerns?
10:45 – 11:15 am	**Keys to confidentiality, Documentation and Access to Files**
11:15 – 11:50 am	**EMTALA and On-Call Issues** • On-call schedule • Selective privileging • Transfers • Paying for call • Penalties
11:50 am – 12:05 p.m.	**Dealing with Behavior that Undermines a Culture of Safety** • Connection between behavior and patient safety • Best practices for addressing behavioral concerns
12:05 – 12:15 p.m.	**Attracting, Preparing, and Maintaining Medical Staff Leaders**

Accreditation Statement

In support of improving patient care, this activity has been planned and implemented by the University of Pittsburgh and HortySpringer Seminars. The University of Pittsburgh is jointly accredited by the Accreditation Council for Continuing Medical Education (ACCME), the Accreditation Council for Pharmacy Education (ACPE), and the American Nurses Credentialing Center (ANCC), to provide continuing education for the healthcare team.

This activity is approved for the following credit: *AMA PRA Category 1 Credit*™. Other health care professionals will receive a certificate of attendance confirming the number of contact hours commensurate with the extent of participation in this activity.

The University of Pittsburgh designates this live activity for a maximum of 4.0 *AMA PRA Category 1 Credits*™. Physicians should claim only the credit commensurate with the extent of their participation in the activity.

Educational Intent

This program is designed for physicians who serve in Medical Staff leadership positions in hospitals. Upon completion of this program, participants should be able to identify common credentialing issues and develop best practices relating to initial appointment, reappointment, and clinical privileges. They should also be able to identify and manage the variety of peer review issues that confront them in their roles as physician leaders. Finally, participants should be able to define the legal responsibilities of Medical Staff leaders and the legal protections available to them.

Target Audience

- Medical Staff Officers
- Department Chiefs
- Credentials Committee Members
- MEC Members
- Bylaws Committee Members
- VPMAs, CMOs, and Medical Directors
- Medical Staff Services Professionals
- Quality/Performance Improvement Directors
- Hospital Management
- Hospital Counsel
- Peer Review Committee Members
- Leadership Council

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Mr. Mulholland was named by *National Law Journal* as one of 40 health care attorneys who have made their mark and he is listed in *The Best Lawyers in America*. Mr. Mulholland has spoken and written extensively concerning a wide variety of health law topics. He regularly advises clients on hospital medical staff, corporate, tax, fraud and abuse, and compliance matters, prepares and negotiates all manner of contracts between hospitals, physicians and managed care organizations. He also serves as trial and appellate counsel in False Claims Act, antitrust, tax exemption, contract and peer review litigation.

Mr. Mulholland is the former Chair of the Credentialing and Peer Review Practice Group of the American Health Lawyers Association. He frequently provides strategic counseling to hospital and health system boards, as well as transactional services regarding mergers, acquisitions, joint ventures and affiliations.

Prior to joining Horty, Springer & Mattern, Mr. Mulholland obtained his undergraduate degree from Duquesne University. He then obtained his *Juris Doctor* degree from the University of Pittsburgh School of Law.

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Mary earned her J.D. from the University of Pittsburgh School of Law and obtained the school's Certificate in Health Law, with a focus in Health Care Compliance and Fraud and Abuse. While there, Mary received the William H. Eckert Prize for superior student seminar paper and the CALI Award in Professional Responsibility, which is given each semester to the student with the highest grade in Professional Responsibility. She also served as a Legal Writing Teaching Assistant for first year law students and the research assistant for the school's Health Care Compliance Online Graduate Certificate Program.

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Conflict of Interest Disclosure

No planners, members of the planning committee, speakers, presenters, authors, content reviewers and/or anyone else in a position to control the content of this education activity have relevant financial relationships to disclose.

No relevant financial relationships with commercial entities were disclosed by:

Daniel M. Mulholland III, Senior Partner
Horty, Springer & Mattern, PC

Mary Paterni, Associate
Horty, Springer & Mattern

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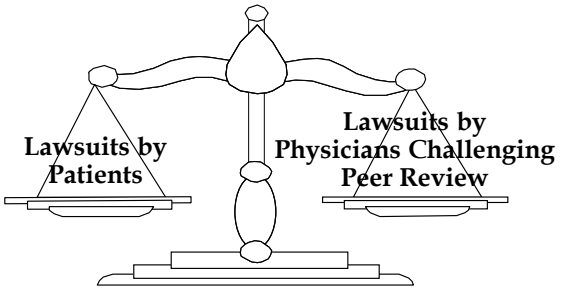
Legal Principles and Protection



2

Lawsuits by Patients

"Corporate Negligence"

- **Appointment and Privileges**
- **Peer Review Issues – Retention**

3

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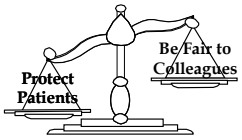
Lawsuits by Physicians

- Fairness – Due Process
- Antitrust
- Defamation
- Discrimination

4



When Balancing…

- Always Put the Patient First!
- Don't Worry About Personal Legal Risk!

5

Legal Protections for Medical Staff Leaders

- Health Care Quality Improvement Act
- Peer Review Statutes
- Release Provisions in Medical Staff Bylaws and Application Forms
- Director's and Officer's Insurance
- Indemnification

6

Clinical Privileging Challenges

7

Basic Principles

Medical staff appointment and clinical privileges are distinct concepts.

8

Medical staff appointment comes with rights and responsibilities.

9

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Clinical privileges define the patient care, treatment and services that can be provided.

10

Basic Principles

No one can do anything to a patient in a hospital without clinical privileges.

11

Tip

Develop a process for tough privileging issues.

12

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Privileging Challenges

- Temporary privileges
- New procedures
- Privileges that cross specialty lines
- Selective resignation

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Foundations of Successful Peer Review System

- Good process
- Good people

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Medical Staff Services

- Maintain central repository
- Prepare *"Informational Letters"*
- Prepare cases for physician review
- Consult with physician leader or CMO for assistance if any questions

15

PEC

- **Acts on any *immediate/urgent* issue**
- **Only occasionally involved in routine *clinical* issues**
- **Primarily responsible for *conduct* and *health* issues**
- **Acts on any other issue referred to it**

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Clinical Specialty Reviewers ("CSRs")

- **Many options for performing this function!**
- **Provide *specialty expertise***
- **Complete objective *Case Review Form***
- ***Option:* Simply forward findings to CPE *OR* can also utilize lower-level performance improvement tools**

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Role of Highly-Functioning Peer Review Committees

- **"Policy" Decisions**
- **Practitioner-Specific Reviews**
- **Lessons Learned & Shared**
- **Monitoring "System" Fixes**
- **Public Relations!**

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PEC

PEC's Role

- Approves PPE Policies
- Broad oversight of process — review of aggregate data
- *No involvement in day-to-day PPE activities, and no review of detailed committee minutes!*
- Policy committee — support for:
  - Protocols
  - Performance improvement initiatives
- Disciplinary action, when necessary

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Educational Lessons Learned & Shared

Education for All Should be an *Integral Part and Specified Outcome* of the PPE Process!

20

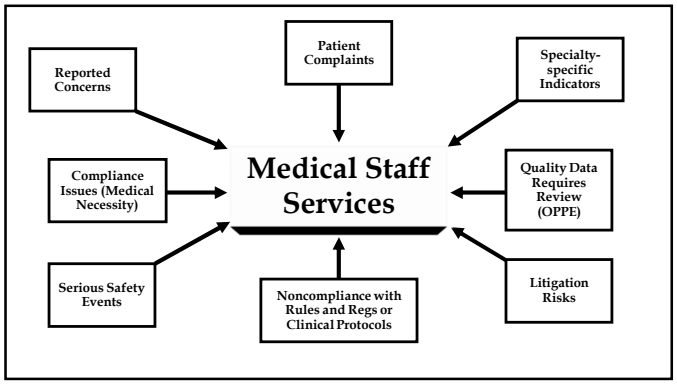
System Issues Identified & Fixed

- System issues are encouraged to be identified *at every point* in the PPE process!
- Reported to Medical Staff Leadership *(we recommend the PPIC!)*, which monitors until resolved.

21

How to Identify Cases for Review

22



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How are clinical concerns identified?

- **Reported concerns/referrals**
- **Patient complaints**
- **Protocol/guideline or rules/regulations/policies not followed**
- **Litigation risks**
- **Medical necessity/utilization issues**
- **Serious safety events**
- **FPPE specialty-specific indicators**
- **OPPE data requires review**

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Reported Concerns

Joint Commission Standard MS.09.01.01, EOP 2

Reported concerns regarding a privileged practitioner's professional practice are uniformly investigated and addressed, as defined by the hospital and applicable law.

25

Reported Concerns

Practical Tips

- **Don't call them "incident reports" — keep them separate**
  - **Incident reports go to Risk Management**
  - **"Reported concerns" go to Medical Staff Services**
- **If using a single electronic reporting system, ask reporter if issue pertains to practitioner's competence or conduct, and route accordingly**
- **Educate Risk Management staff**

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Medical Staff Services

Functions

- **Log case in**
- **Initial review**
  - **Is physician review required?**

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Medical Staff Services

No Physician Review Required

(Medical Staff Services with MS Leader)

- **The case is unfounded or unrelated to a physician**
  - **Close case or forward appropriately**
  - **Include in periodic reports to PPIC**

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Medical Staff Services

No Physician Review Required – Prepare "Informational Letter"

- **Objective circumstances chosen by PPIC**
  - **Medical record deficiencies**
  - **Failure to follow Rules & Regulations**
  - **Failure to follow adopted protocols**
- **Pre-drafted and tactfully worded; generated by Medical Staff Services, signed by Medical Staff leader**
- **Establish limits (e.g., third letter triggers further review)**
- **Include in periodic reports to PPIC**
- **Part of OPPE data**

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Medical Staff Services

Physician Review Is Required

- **Prepare Case for Review**
  - **Obtain medical record**
  - **Summarize case**
  - **Interview witnesses and others**
  - **Pull applicable Rules and Regs, protocols and guidelines, etc.**
  - **Research medical literature**

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Medical Staff Services

- **Documentation Created by Medical Staff Services**
  - **Even if matter involves employed Practitioner, maintain documentation in PPE/peer review file, not personnel/HR file**
  - **HR file includes cross reference**
  - **HR may access as needed**

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What are "Administratively Complex" issues?

- **Clinical cases requiring expedited review**
- **Issues processed under a different policy:**
  - **professional conduct**
  - **health issue**
  - **refusal to cooperate with utilization oversight activities**

32

What about cases involving:

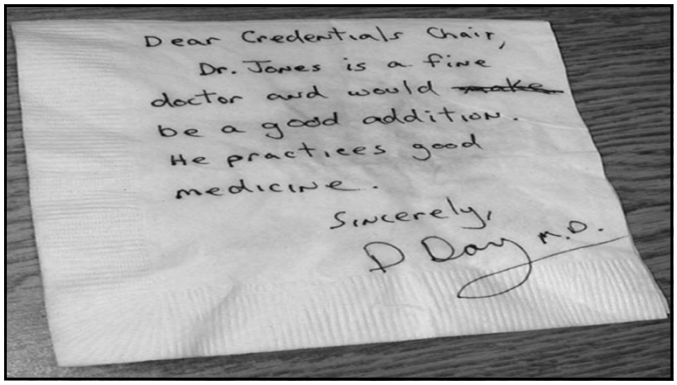
- **Practitioners from two or more specialties?**
- **Clinical Specialty Reviewers?**
- **Specialties not otherwise available on the Medical Staff?**

Medical Staff Services consult with a Medical Staff Leader to route case.

33

Empower Reviewers with *Effective Review Forms!*

34



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Clinical Specialty Reviewers ("CSRs")

Review Form Best Practices

FOUNDATION:

- **Utilize a standardized, carefully-drafted *CASE REVIEW FORM* for *ALL* case reviews and fact-finding!**
- **Must be tailored to *YOUR* PPE process! (i.e., the specific CSR option you choose)**

36

Case Review Form

- *Instructions*
- *Part 1:* **Patient Demographics and Details**
- *Part 2:* **Obtaining Input from Practitioner**
- *Part 3:* **Assessment of Care and Determination**
- *Part 4:* **"Lessons Learned" and "System Issues"**

37

Progressive Steps Continuum Will Successfully Resolve Almost All Issues!

38

Should Be a *Centerpiece* of Process

- **Publicized to the Medical Staff**
- **Known and used by the MS Leaders**
- **Passed generation to generation!**

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The *"Progressive Steps Continuum"* includes:

- *Initial Mentoring Efforts:*
  - **Informal discussions and coaching**
  - **Sharing comparative data/variations from clinical practice (OPPE)**
- *Informational Letters* **to address minor, but still important, issues**
- *Educational Letters* **to provide more specific guidance/suggestions**
- *Collegial Counseling,* **planned and face-to-face meeting to more directly provide assistance**
- *Performance Improvement Plans* **for more significant issues/pattern**
- *"Disciplinary" Action*

40

Basic Principle:

Use the
Least Restrictive Approach
That is Consistent With
Safe Care/Good Quality!

41

The Basics

All Options Except "Disciplinary" Actions:

- ***NO* Hearing**
- ***NO* Data Bank Report**

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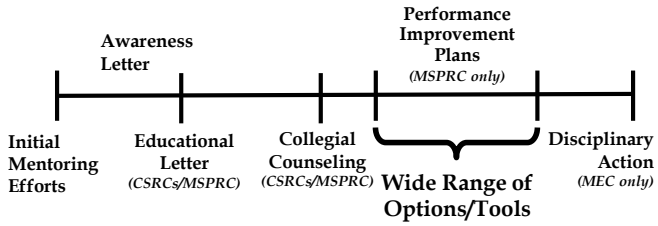
Progressive Steps Continuum



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Describe PIP Options in PPE/Peer Review Policy – and Use Them!

44

Multi-Specialty Peer Review Committee

Improvement Tools

- Educational letter
- Collegial Intervention
- Performance Improvement Plan
- Refer to Employer
- Refer to MEC

45

Performance Improvement Plans

(options used individually or in combination)

- **Additional education/CME**
- **Monitoring/retrospective chart review of next X cases**
- **Procedure indications checklist**
- **Second opinions/consultations**
- **Concurrent proctoring**

46

Performance Improvement Plans

(options used individually or in combination)

- **Participation in formal evaluation and assessment program**
- **Additional training/simulation**
- ***"Other"***

47

General Rules

- **Input can be sought at any time**
- **Multiple requests may be made**
- **Request can include office records**

48

How does the practitioner provide input?

- **Written explanation of care, responding to specific questions**

49

Managing Health Issues During Appointment

50

The Joint Commission MS.11.01.11

Medical staff must have a process for addressing health that is separate from disciplinary process.

51

Definition of a "Health Issue"

- **Substance or alcohol abuse**
- **Use of medication that affects alertness, judgment, or cognitive function**
- **Mental health conditions**
- **Infectious/contagious disease that could compromise patient safety**

52

Reporting

- **Practitioner Health Committee**
- **Duty to self-report**
- **Reports on suspected issues**
- **Confidentiality**

53

Assessment & Reinstatement

54

What are your options?

55

LOA, which requires reinstatement process, is a good option.

56

Fitness for practice evaluation should focus on whether physician is safe and competent to practice.

57

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Fitness for Practice Evaluation

- Entity selected by or acceptable to Leadership
- Authorization to permit communication
- Form of report

58

Reinstatement

- Conditions described in detail
- For substance abuse:
  - Coverage
  - Changes in practice
  - Ongoing monitoring
  - Periodic reports of health status
  - Random screens

59

Documentation

- "Confidential Health File" (separate from Credentials File)
- At reappointment:
  - Medical Staff Office contacts Leadership
  - Leadership prepares confidential summary health report
  - Leadership report includes recommendation regarding ability to safely exercise clinical privileges

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Age-Related Concerns

61

Take Age Out of the Equation

- **Enhance peer review process**
- **Comprehensive examinations for all at initial appointment and reappointment?**
- **360 evaluations for all?**
- **No risk of ADEA violation**

62

Practitioner Health Policy

Key Elements

- **Identify reporting channels**
- **Provide for a fact-finding process**
- **Identify options for reinstatement**
- **Stress confidentiality including separate health file**

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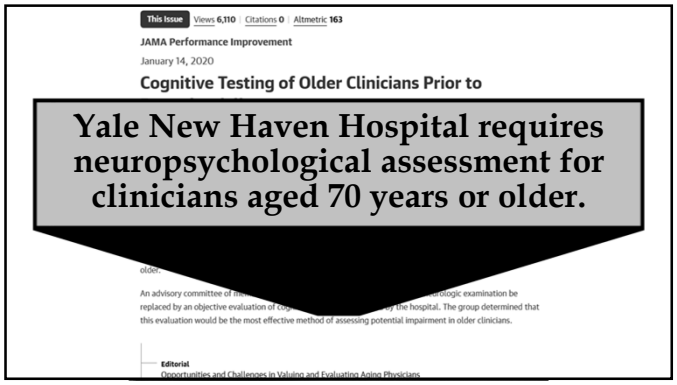
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JAMA Performance Improvement
January 14, 2020
Cognitive Testing of Older Clinicians Prior to
Yale New Haven Hospital requires neuropsychological assessment for clinicians aged 70 years or older.
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An advisory committee of
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Editorial
Opportunities and Challenges in Valuing and Evaluating Aging Physicians

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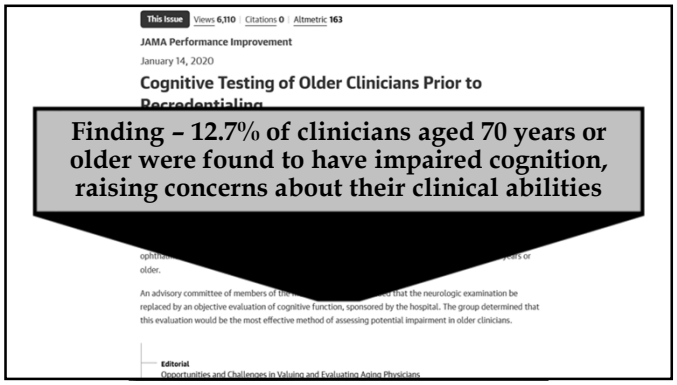
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Finding – 12.7% of clinicians aged 70 years or older were found to have impaired cognition, raising concerns about their clinical abilities
ophthal
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this evaluation would be the most effective method of assessing potential impairment in older clinicians.
Editorial
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But…

66

EEOC v. Yale New Haven Hospital

Filed February 11, 2020

***Allegation* – Yale New Haven violated the ADEA by adopting the Policy and applying it to physicians over the age of 70.**

67

Age Discrimination in Employment Act of 1967 (ADEA)

- **Applies to "employees" (though some courts are interpreting broadly) over age of 40**
- **Prohibits employment action based on age**
- **Applies to mandatory retirement, mandatory testing, etc.**

68

Bona Fide Occupational Qualification ("BFOQ") Exception

Employer can take otherwise prohibited actions where age is a BFOQ.

"Extremely narrow exception to the ADEA's general prohibition of age discrimination in employment."

69

BFOQ
(e.g., airline pilots, bus drivers)

70

Courts have not yet addressed if age can be a BFOQ for physicians.

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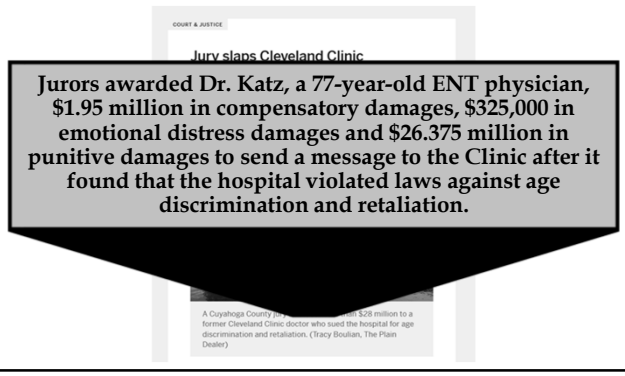

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Confidentiality/Documentation/ Access to Files

73

Risk #1 — Malpractice

"You have *waived* the privilege by your own actions."

74

Risk #2 — Peer Review

"Your breaches evidence *bad faith* peer review."

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Keys

- **Develop a Confidentiality Policy**

OR

- **Revise Existing Policy to Reflect Best Practices**
- **Teach It!**
- **Reinforce at Every Opportunity!**

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Contents of Minutes

General Rule –
The Less Detail, the Better

77

Think a Lot, Speak Little, and Write Less!

78

- **Who was in attendance?**
- **Quorum present**
- ***"After Full Discussion,* [Action Taken]"**

79

- **Details of discussion**
- **Who said what to whom**
- **Record of how each member voted**

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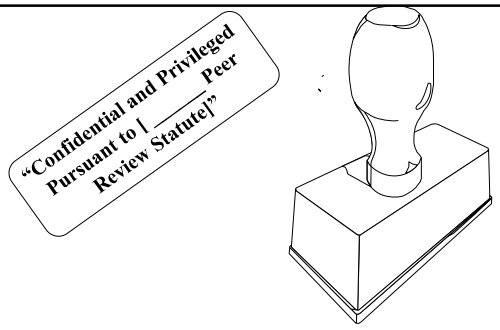

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Distribution of Documents

Consider...

83

- **Not Providing Copies of Confidential Documents in Advance of Meetings**
- **Numbering Copies of Confidential Documents that May Be Distributed before or at Meeting**
- **Collecting and Destroying Copies After Meetings**
- **Secure E-mail/Secure Intranet**
- **Laptop Projections during Meetings**

84

No Discussions Outside Committee Meetings EXCEPT…

- **To another authorized individual with a need to know, and *in private*! OR**
- **Authorized by CEO/legal counsel**

85

Maintaining the Peer Review Privilege

vs.

Protecting Patients

86

Document All Formal Interventions

- **Fosters consistency and fairness**
- **Aids education of new leaders**
- **Facilitates communication through a central repository (be careful of separate files)**
- **Improves effectiveness of interventions**

87

Topics to Address in Follow-Up Letters

- Summarize background
  - describe incident
  - identify relevant Bylaws or policy provision
  - discuss history
- Describe expectations going forward
- Describe consequences of failing to meet expectations (as needed)
- Monitoring, non-retaliation (as needed)

88

Five Audiences

- Physician under review
- Physician's attorney
- Future physician leaders
- Defense counsel
- Judge

Also, ask yourself: How would this look on the front page of the local paper?

89

Whenever You Document…

- Individual given opportunity to respond in writing
- Response kept in file

90

EMTALA
Requirements

91

Under EMTALA, hospitals must:

- **Screen patients**
- **Provide stabilizing treatment**
- **Have an on-call schedule**
- **Accept requests for transfer**

92

But physicians must provide the required care.

93

Top On-Call Issues

- **On-call schedule**
- **Selective privileging**
- **Transfers**
- **Paying for call**

94

ISSUE

On-Call Schedule

95

The Law

A hospital must have an on-call schedule that meets the needs of its patients.

96

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The Law

CMS will apply "all relevant factors" test in deciding compliance.

97

Relevant factors include:

- **Number of physicians**
- **Other demands on physicians**
- **Need for service**

98

Define number of days physicians required to take call.

99

Remember hospital obligation and mission to community.

100

Bylaws and policy should reflect that on-call is an obligation, not a right.

101

<u>ISSUE</u>

Selective Privileging

102

The Law

A hospital should ensure that on-call physicians are granted the privileges the physicians need.

103

One of our orthopedic surgeons wants to resign all privileges except joint replacement privileges.

104

What do we do?

A. **Just say "NO"**
B. **Have the Medical Staff vote on the request**
C. **Grant the request**
D. **Grant the request, it includes "heads, shoulders, knees and toes, knees and toes"**
E. **Develop a policy**

105

Decision to allow resignation of core privileges should consider overall effect on department.

106

Develop policy for resignation of limited privileges.

107

Options

- **Maintain competence in core**
  - **Assess patient and arrange for other care (including transfer)**
- **Allow creation of subspecialty call**
- **Employ specialists and/or contract for coverage**

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ISSUE

Transfers

109

The Law

A hospital that has specialized capabilities or facilities may not refuse to accept an appropriate transfer.

110

The Law

Specialized capabilities or facilities:

- **Burn units**
- **Shock-trauma units**
- **Neonatal intensive**
- **Regional referral centers**

111

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The Law

Any time the hospital provides a service that the transferring hospital does not provide.

112

The Law

Refusing to accept an appropriate request for a transfer can lead to sanctions.

113

Dealing with Behavior That Can Undermine a Culture of Safety

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Joint Commission 2009
L.D. 03.01.01

"The hospital has a code of conduct that defines acceptable and disruptive behavior."

116

Joint Commission 2012
L.D. 03.01.01

"The hospital has a code of conduct that defines acceptable behavior *and behaviors that undermine a culture of safety*."

117

Classic Characteristics of the Disruptive Practitioner

- **Smart**
- **Clever**
- **Charismatic**

118

Classic Characteristics of the Disruptive Practitioner

- **Controlling**
- **Intimidating**
- **Explosive**
- **Litigious**

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Dealing with Disruptive Behavior

120

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Adopt a Professionalism Policy (aka Code of Conduct Policy).

121

Professionalism Policy:

- **Identifies acceptable and unacceptable behavior**
- **Defines review process**
- **Empowers MS leaders to act!**

122

Use Progressive Steps to address concerns early.

123

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Any collegial approach that works — or could work — can be considered.

124

The Meet & Greet

125

- **Develop a game plan <u>BEFORE</u> you meet with the physician**
- **Gather information**
  - **Understand current complaint**
  - **Review chronology of past events**
- **Address confidentiality and retaliation**

126

Don't ignore quality concerns.

127

Most disruptive practitioners view themselves as quality "champions."

128

Stay focused on the inappropriate behavior, not its cause.

129

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Don’t diagnose.

130

**Document,
document, document!!!**

131

Don’t send mixed messages.

132

"You're an excellent surgeon and we want your contribution."

"That's why it's important for…
…your conduct to be appropriate."

133

Define expectations.

134

This letter is to inform you that the Board accepted the recommendation of the Medical Executive Committee that your continued appointment to the Medical Staff be subject to your agreement to strictly adhere to the Personal Code of Conduct set forth below:

1. **You must treat Hospital personnel and physicians practicing at the Hospital in a courteous and professional manner.**

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2. **You must use appropriate administrative channels to register any complaint or concern that you might have about others practicing at the Hospital.**

Specifically, any complaint or concern about any other member of the Medical Staff must be in writing addressed to either the Chief of Staff or the Chair of the Credentials Committee, with a copy to the CEO.

136

Consider outside resources.

137

Don't delay in addressing disruptive conduct that might constitute identity-based harassment.

138

Attracting and Preparing Medical Staff Leaders

139

Preparing Medical Staff Leaders

140

Start with the right people.

141

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Qualifications
Medical Staff Leader

- **Outstanding Clinician**
- **Effective Communicator**
- **Trustworthy -- Respect Confidentiality**
- **Knowledge and Experience**

142

Evaluate your nomination process.

143

Provide meaningful education and training.

144

Keep your leaders longer.

145

Attracting
Medical Staff Leaders

146

Identify and Nurture
Leadership Pool

Physicians who possess qualifications.

147

Develop and Educate

- Appoint to key committees
- Invite to meetings and seminars

148

Equip for Success

- Orientation
- Staff Support
- Leadership Handbook

149

Leadership Handbook

- Survival Tips for Leaders
- Bylaws, Policies, Rules and Regulations
- Tips for Effective Meetings
- Confidentiality Policy

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Leadership Handbook

- **Leadership Responsibilities**
- **Orientation & Evaluation**
- **Benefits and Prerogatives**
- **Legal Protections**

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Other Ideas

- **Quarterly "council" dinners**
- **Medical staff college**

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Thank you.

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