How To Approach Aberrant Physician Behavior

Law360, New York (September 25, 2012, 2:22 PM ET) -- This article addresses aberrant physician behavior and the remedies that a hospital may employ to address that behavior. Specifically, this article addresses the types of aberrant behavior that a hospital most often encounters and focuses on those remedial actions that do not trigger a right to due process under relevant state and federal statutes and that do not trigger the requirement to report the action to the National Practitioners Data Bank (NPDB).

It is generally understood that the goal of physician peer review is to be remedial and not punitive. Traditional corrective action, while useful and necessary when applied in appropriate circumstances, can nonetheless be morale depleting, lead to protracted litigation and shatter professional relationships.

Early recognition of aberrant physician behavior, however, often permits hospital and medical staff leadership to rectify an issue with nonreportable remedial efforts before it becomes a crisis affecting patient care. It is, therefore, in the best interests of all related parties to explore early remedial actions that, when appropriately employed, obviate the need for subsequent privilege-restricting corrective action.

The ultimate goal of this article is to identify the proper range of remedial actions for addressing aberrant physician behavior in an early and proactive manner that will assist the hospital leadership to maintain and further the highest quality of patient care.

Aberrant Physician Behavior

Hospitals are often confronted with three types of aberrant physician behavior: disruptive physicians, impaired physicians and poor quality of care. Both Texas law and the Joint Commission have set forth standards on how a hospital and its medical staff must address aberrant physician behavior. When deciding whether to take remedial action against a physician who has exhibited any of these types of behavior, hospital leadership should consider these standards in determining a proper course of action.
**Disruptive Physicians**

The Joint Commission has addressed physicians’ intimidating and disruptive behaviors as part of its Sentinel Event Alert series.[1] Specifically, the Joint Commission has noted that intimidating and disruptive behaviors “can foster medical errors, contribute to poor patient satisfaction and preventable adverse outcomes, increase the cost of care and cause qualified clinicians, administrators and managers to seek new positions in more professional environments.”[2]

Moreover, the Joint Commission has noted that such aberrant physician behavior “is not rare” and that “most care providers have experienced or witnessed intimidating or disruptive behaviors.[3]

Consequently, the Joint Commission has promulgated a leadership standard in its Comprehensive Accreditation Manual for Hospitals (CAMH) that addresses disruptive behaviors in two of its elements of performance.[4] Specifically, these elements are:

- Leaders develop a code of conduct that defines acceptable, disruptive and inappropriate behaviors.
- Leaders create and implement a process for managing disruptive and inappropriate behaviors[5]

The Joint Commission has also suggested that hospitals maintain a “zero tolerance” policy for intimidating and/or disruptive behaviors, train and educate their staff on appropriate professional behavior, develop systems for addressing, surveilling and correcting intimidating and disruptive behaviors and support these efforts with nonconfrontational intervention strategies to deal with disruptive behavior, starting with informal “cup-of-coffee” conversations, directly addressing the problem and moving toward detailed action plans and progressive discipline, if patterns persist.[6]

**Impaired Physicians**

The American Medical Association defines an impaired physician as one who is “unable to practice medicine with reasonable skill and safety to patients because of physical or mental illness, including deterioration through the aging process or loss of motor skill, or excessive use or abuse of drugs including alcohol.”[7] Current estimates are that approximately 15 percent of physicians will be impaired at some point in their careers.[8]

The Texas Occupations Code requires that a medical peer review committee, a physician, a medical student and a physician assistant shall “report relevant information to the board relating to the acts of a physician in this state if, in the opinion of the person or committee, that physician poses a continuing threat to the public welfare through the practice of medicine.”[9]

The code further requires that a person or committee associated with a professional medical society report to the Texas Medical Board and to the health care entity where the physician has clinical privileges “if the person or committee determines that, through the practice of medicine, the physician poses a continuing threat to the public welfare.”[10]
The Joint Commission has further promulgated a standard whereby a hospital’s medical staff is required to implement a process to identify and manage matters of individual health for licensed independent practitioners, which is separate from actions taken for disciplinary purposes.[11]

The process must include a program for educating practitioners about illness and impairment recognition issues, procedures for referring impaired physicians, procedures for maintaining confidentiality, procedures for evaluating a complaint’s credibility, monitoring procedures during the rehabilitation process, reporting procedures to the medical staff leadership and procedures for initiating appropriate actions if a practitioner fails to complete the rehabilitation program.[12]

**Quality of Care Issues**

Quality of patient care remains at the forefront of priorities for a health entity, according to both federal law and Joint Commission Guidelines.[13] In order to address quality of care issues amongst practitioners and maintain a practitioner’s professional performance, the Joint Commission has promulgated standards in the CAMH that dictate a hospital’s medical staff undertake Focused Professional Practice Evaluations (FPPE) and Ongoing Professional Practice Evaluations (OPPE) of its physicians.[14]

FPPEs involve a time-limited period, during which an organization evaluates and determines a practitioner’s professional performance in situations in which there is no documented evidence of the practitioner’s professional competence or a question has arisen regarding a privileged practitioner’s ability to provide safe, high-quality patient care.[15] The organized medical staff of the hospital must define the circumstances requiring monitoring and evaluation of a practitioner’s professional performance.[16]

OPPEs allow a hospital medical staff to identify professional practice trends early on that impact quality of care and patient safety.[17] Information resulting from the OPPE is used to determine whether to continue, limit or revoke any existing privileges or to undertake other remedial action.[18]

**Professional Review Actions, Due Process and NPDB Reporting**

When addressing aberrant physician behavior and adhering to the above-cited guidelines, a hospital may choose to restrict, suspend or terminate the clinical privileges of a physician on its medical staff. Less costly remedies are often appropriate, however, and may, in fact, be more efficacious if hospital and medical staff leadership employ these remedies early and proactively.

**The Costs of Due Process and Reportable Events**

Certain situations involving aberrant physician behavior require the restriction, limitation or termination of a physician’s clinical privileges. The Health Care Quality Improvement Act (HCQIA), therefore, affords a hospital and its peer review committees presumptive immunity when taking actions and engaging in activities that may result in a restriction, limitation or termination of privileges.[19]
Nevertheless, that presumption may be rebutted if the hospital fails to provide the physician extensive due process protections.[20] These include notice of the adverse action and a trial-like hearing at which a physician may be represented by an attorney, present evidence and cross-examine witnesses.[21] Such due process protections may take many months and cost the hospital a considerable amount in time and attorneys’ fees.

In addition, a corrective action restricting, limiting or terminating clinical privileges has an immediate and long-term adverse impact on the professional relationship between the physician and hospital.

Also, certain corrective and professional review actions require the hospital to report those actions to the NPDB. The HCQIA requires that a hospital report to the NPDB and Texas Medical Board any time a health care entity:

- Takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days
- Accepts the surrender of clinical privileges of a physician while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct or in return for not conducting such an investigation or proceeding[22]

Failure to make such a report can result in loss of federal immunity for physician claims against the hospital in a subsequent lawsuit.[23] On the other hand, because an NPDB report directly impacts a physician’s reputation, such may serve as the basis for a claim of defamation by a physician who has become the subject of a reportable professional action. While the HCQIA provides immunity for any report not made with knowing falsity, this immunity does not prevent a physician from bringing such a claim.[24]

Finally, Texas law requires that a physician be afforded “procedural due process” any time the hospital and/or medical staff engages in “[t]he process for considering applications for medical staff membership and privileges or the renewal, modification, or revocation of medical staff membership and privileges[.]”[25] Texas law further defines “procedural due process” as an action “that meets the requirements of [the HCQIA].”[26]

**Alternative Remedial Measures**

When determining what type of remedial measure to take in response to aberrant physician behavior, the hospital and medical staff leadership may choose to initially consider remedial actions, which would not trigger a due process hearing or the obligation to report the action to the NPDB. These types of action may be advantageous to both the health care and the practitioner if applied early and proactively.

For example, the physician would prefer a nonreportable remedial measure which does not trigger due process because such actions do not directly impact clinical privileges and are not likely to adversely affect the reputation of the physician in the way a reportable event would.

Meanwhile, a hospital and its medical staff may opt for a remedial measure that achieves the desired result but does not require due process or an NPDB report because such a measure conserves resources and avoids a protracted battle with the physician that often results in legal action.
The HCQIA identifies two circumstances under which due process is not required when taking a professional review action:

- Where there is no adverse professional review action taken
- In the case of a suspension or restriction of clinical privileges, for a period of no longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action[27]

The HCQIA further defines the term “adversely affecting” as those actions which “includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.”[28] Accordingly, any remedial measures that do not “adversely affect” a physician do not require the hospital to afford the physician procedural due process in order to maintain HCQIA immunity and/or adhere to Texas law.[29]

In addition, the following actions do not trigger an NPDB report:

- Actions that do not involve possible incompetence or improper professional conduct
- Actions that do not involve possible incompetence or improper professional conduct but do not involve a restriction of clinical privileges lasting more than 30 days
- Actions that do not involve the voluntary surrender of privileges while under or to avoid an investigation

These parameters leave a host of nonreportable remedial measures available to the hospital administration and medical staff leadership.

Thus, for all remedial actions that the hospital and medical staff leadership choose to take, the following questions should be asked before the action is taken:

- Will this action likely remedy or assist in providing a remedy to the aberrant physician behavior?
- Will this action further the goals and guidelines set forth by the Texas legislature, the Joint Commission, the medical staff’s established FPPE, OPPE and the hospital’s internal codes of conduct?
- Will this action be considered outside the definition of a “professional review action” that “adversely affects” the practitioner as defined by HCQIA?
- Will this action remain outside of those professional review actions that a hospital must report to the NPDB?
If the answer is “yes” to all of these questions, the hospital and medical staff leadership may likely proceed with the remedial measure without concern that it will trigger due process requirements of the HCQIA or Texas law or that it will be a reportable event. Such actions may include:

- Informal collegial intervention, including informal cup-of-coffee conversations with the physician, suggestions for further training and education and employment of mediators and conflict coaches[30]
- Requiring a physical or mental health evaluation
- Issuing a verbal warning or formal letter of reprimand
- Requiring monitoring or consultation as a condition attached to the exercise of clinical privileges during a provisional period
- Requiring retrospective chart reviews
- Imposing a probationary period involving a review of cases but with no requirement either for direct, concurrent supervision or for mandatory consultation
- Removing a practitioner from a medico-administrative office within the hospital unless a contract or employment arrangement provides otherwise
- Any professional review action that does not “adversely affect” the physician (e.g., reducing, restricting, suspending, revoking, denying or failing to renew clinical privileges)
- Imposing additional training requirements (anger management, diversity awareness or basic business etiquette)
- Imposing a performance improvement agreement that does not adversely affect the physician’s clinical privileges
- A temporary suspension of clinical privileges lasting no longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action[31]

Proper use of these actions may enable hospital and medical staff leadership to address aberrant physician behavior before it becomes a significant problem and avoid the time-draining and costly process of further peer review.

--By Robert Swift and Jesse Coleman, Fulbright & Jaworski LLP

Robert Swift is a partner, and Jesse Coleman is a senior associate at Fulbright & Jaworski’s Houston office.

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[4] CAMH (2011 ed.) Standard LD.03.01.01 (“Leaders create and maintain a culture of safety and quality throughout the hospital.”).

[5] CAMH Elements of Performance for LD.03.01.01.


[12] See CAMH Elements of Performance for MS.11.01.01.


[14] See CAMH MS.08.01.01 (FPPE), MS.08.01.03 (OPPE).

[15] CAMH Introduction to Standard MS.08.01.01.

[16] CAMH Standard MS.08.01.01.

[17] CAMH Introduction to Standard MS.08.01.03

[18] CAMH Elements of Performance for MS.08.01.03.


[21] Id.


[26] Id.


[29] The HCQIA further requires only “subsequent notice and hearing or other adequate procedures” in situations “where the failure to take such an action may result in an imminent danger to the health of any individual.” 42 U.S.C. § 1112(c)(2).


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