Disruptive Hospital Conduct: How to Effectively Represent Yourself as a Physician or Your Client as a Lawyer

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Disclosure

• I have no relevant financial information to disclose.
Disclosure

- Margo Struthers has disclosed that she served as legal counsel representing clients which include hospitals, physicians, clinics, insurers and medical manufacturers.
• What does “disruptive” mean?
• When and how does it come up?
• How do changes in today’s healthcare make it more complicated?
• What are the tools/resources to help shape possible solutions?
• What processes and approaches can help?
• How to navigate the system and various land mines?
“Disruptive”

[dis-ruhp-tiv] adjective

1. causing, tending to cause, or caused by disruption, which is the act of breaking apart or throwing into disorder.
Today’s Healthcare & Disruptive Innovation

Wikipedia:
A **disruptive innovation** is an **innovation** that creates a new **market** and **value network** and eventually disrupts an existing market and value network, displacing established market leaders and alliances. The term was defined and phenomenon analyzed by **Clayton M. Christensen** beginning in 1995.[2]

Applied to healthcare by Christensen, Hwang, and the late Dr. Jerome H. Grossman of Harvard’s Kennedy School of Government in their book, “**The Innovator’s Prescription: A Disruptive Solution for Health Care**
What is “Disruptive Behavior”?

Personal conduct, whether verbal or physical, that negatively affects or that potentially may negatively affect patient care constitutes disruptive behavior. (This includes but is not limited to conduct that interferes with one’s ability to work with other members of the health care team.) …

AMA, Medical Code of Ethics Opinion 9.045, Physicians with Disruptive Behavior
What is “Disruptive Behavior”?

Any conduct or behavior by an individual in the organization that demeans, intimidates, frightens, or threatens a targeted individual or group and that would be perceived as such by a reasonable person.

(Stony Brook Disruptive Provider Policy)
“While disruptive and intimidating behavior can be displayed by nurses, pharmacists and managers, it is the behavior of doctors which most often causes problems, perhaps because medical culture has had a history of tolerance or indifference to this, or because organizations have tended to treat doctors differently from other staff.”

Ronald M. Wyatt, M.D., M.H.A.
Medical Director
The Joint Commission
October 2, 2013
# Examples of Disruptive Behavior

<table>
<thead>
<tr>
<th>Passive</th>
<th>Passive-aggressive</th>
<th>Aggressive</th>
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<tbody>
<tr>
<td>Incomplete charting&lt;sup&gt;a&lt;/sup&gt;</td>
<td>Excessive sarcasm</td>
<td>Physical aggression</td>
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<tr>
<td>Failure to answer calls/pages</td>
<td>Veiled/implied threats</td>
<td>Yelling/screaming</td>
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<td>Frequent absences</td>
<td>Backhanded compliments</td>
<td>Sexual harassment</td>
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<tr>
<td>Chronic tardiness</td>
<td>Inappropriate charting</td>
<td>Bullying</td>
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<tr>
<td>Getting behind on work</td>
<td>Refusal to complete tasks</td>
<td>Throwing objects</td>
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<tr>
<td>Delayed responding</td>
<td>Making derogatory comments</td>
<td>Physically intimidating others</td>
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<tr>
<td>Silent treatment/avoidant behavior</td>
<td>Undermining/excessively questioning other providers</td>
<td>Demeaning others</td>
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<tr>
<td>Ignoring e-mails</td>
<td>Telling inappropriate jokes</td>
<td>Use of profanity</td>
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<sup>a</sup> Includes failure, per compliance standards, to provide adequate documentation and/or complete necessary paperwork in a patient’s medical record.
“Criticism that is offered in good faith with the aim of improving patient care should not be construed as disruptive behavior.”

AMA, Medical Code of Ethics Opinion 9.045, Physicians with Disruptive Behavior:
Disruptive Behavior is NOT

• Absence of complete harmony
• An isolated incident of behavior that is not reflective of a pattern of seriously inappropriate, deep-seated, and habitual behavior
• Respectful disagreement with the Hospital’s decisions
• Presentation of controversial ideas
• Respectfully complaining about processes or incidents that endanger patient care
Causes: Individual Factors

- Psychiatric disorders (depression, bipolar)
- Personality disorders (narcissistic, borderline)
- Inherent stresses of high stakes, highly stressful situation
- Fatigue and external stressors
Causes: Individual Factors

- **Personal characteristics**
  - Self-centeredness
  - Immaturity
  - Need for power and control in relationships
  - Uses intimidation to control others
  - Resent and resist demands of others, resulting in discipline, even harsher demands
  - View remediation as punishment
  - Feel victimized when cannot victimize others
Causes: Systemic Factors

- Increased productivity demands
- Cost containment requirements
- Embedded hierarchies
- Fear of or stress from litigation
- Ineffective or absent conflict resolution processes
- More employment of physicians by hospitals
- Competition between hospitals and medical staff members
- New care settings, marketplace demands and tensions among health care providers
Consequences of Disruptive Behavior

- Erosion of professional behavior
- Creates unhealthy or hostile work environment
- Lawsuits brought by employees and medical staff
- Turnover of quality caregivers, employees
- Lawsuits brought by patients
  - Malpractice risk and patient complaints about disruptive behaviors are correlated
Impact on Patient Care: TJC

• 2008 Sentinel Event Alert
  “Intimidating and disruptive behaviors can foster medical errors, contribute to poor patient satisfaction and to preventable adverse outcomes, increase cost of care, and cause qualified clinicians, administrators, and managers to seek new positions in more professional environments. To assure quality and to promote a culture of safety, health care organizations must address the problem of behaviors that threaten the performance of the health care team.”

• Stated that it was not limited to physicians and that these behaviors are also seen among other professional and support staff, as well as among administrators
• In 2009, the Joint Commission added a new standard on leadership (LD 03.01.01)

• “Leaders create and maintain a culture of safety and quality throughout the hospital”

• Elements of Performance include:
  
  • The hospital/organization has a code of conduct that defines acceptable and disruptive and inappropriate behaviors;

  • Leaders create and implement a process for managing disruptive and inappropriate behaviors
In 2012, Joint Commission changed “disruptive behavior” term to “behaviors that undermine a culture of safety”

Joint Commission suggests:
- Educating team members about inappropriate behavior
- Holding everyone accountable
- Implement policies and procedures with:
  - zero tolerance
  - whistleblower protections
  - progressive discipline
Strategies to Address Issues

AMA Medical Code of Ethics Opinion 9.045, Physicians with Disruptive Behavior

Each medical staff should develop and adopt bylaw provisions or policies for intervening in situations where a physician’s behavior is identified as disruptive. The medical staff bylaw provisions or policies should contain procedural safeguards that protect due process. Physicians exhibiting disruptive behavior should be referred to a medical staff wellness-or equivalent-committee.
AMA Opinion: Elements for Policies

(a) Clearly stating principal objectives in terms that ensure high standards of patient care and promote a professional practice and work environment.

(b) Describing the behavior or types of behavior that will prompt intervention.

(c) Providing a channel through which disruptive behavior can be reported and appropriately recorded. A single incident may not be sufficient for action, but each individual report may help identify a pattern that requires intervention.

(d) Establishing a process to review or verify reports of disruptive behavior.
(e) Establishing a process to notify a physician whose behavior is disruptive that a report has been made, and providing the physician with an opportunity to respond to the report.

(f) Including means of monitoring whether a physician’s disruptive conduct improves after intervention.

(g) Providing for evaluative and corrective actions that are commensurate with the behavior, such as self-correction and structured rehabilitation. Suspension of responsibilities or privileges should be a mechanism of final resort. Additionally, institutions should consider whether the reporting requirements of Opinion 9.031, "Reporting Impaired, Incompetent, or Unethical Colleagues," apply in particular cases.
(h) Identifying which individuals will be involved in the various stages of the process, from reviewing reports to notifying physicians and monitoring conduct after intervention.

(i) Providing clear guidelines for the protection of confidentiality. (j) Ensuring that individuals who report physicians with disruptive behavior are duly protected. (I, II, VIII)
Misuse of “Disruptive Behavior”

- Referral to peer review process due to reports of disruptive behavior
- Increasing claims of hospitals and medical staffs using the peer review process to label a physician “disruptive” when that physician merely expresses concerns about patient care or otherwise annoys the health system’s administration
Immunity for Peer Review Activities

- Health Care Quality Improvement Act grants hospitals immunity from suit for damages if peer-review actions meet certain standards.
- Some state laws also protect against injunctions.
- Under some state laws, immunity is lost when peer-review process motivated by malice:
  - In some jurisdictions, “malice” is nothing more than the willful violation of a known right or intentional doing of a wrongful act without legal justification.
  - This standard is objective standard and does not depend on the actor’s state of mind.
Example of Loss of Immunity

*In re Peer Review, 749 N.W.2d 822 (Minn. Ct. App. 2008)*

- Hospital suspended physician’s privileges for 120 days following reports that the physician was “disruptive”.
- Physician then sued to enjoin the action.
- District Court granted a temporary injunction.
- Court of Appeals held that the hospital acted with malice because it repeatedly and willfully violated its policies and procedures and therefore was not entitled to immunity under the state’s peer review statute.
• Hospital’s Disruptive/Abusive Behavior Policy required notice to Physician of allegedly disruptive behavior and an opportunity to modify conduct before discipline was imposed, which was not given.

• Hospital policy called for early and gradually increasing intervention, which was not followed.
• Notice of Credentials Committee investigation said Physician was “uncompromising” with an anesthesiologist, losing his temper, using profane language, and “acting disruptively”, but so lacked details Physician could not respond to it.

• Hospital refused to provide findings of fact underlying hearing panel’s decision to allow Physician to submit adequate required written statement of disagreement on appeal.
• Peer review process began outside hospital’s normal channels;
• Hospital cited “unfairly old” incidents;
• Hospital treated Physician differently than those similarly situated;
• Hospital improperly applied its power to “make a public statement”—i.e., National Practitioner Databank report.
San Buenaventura

- Financial pressures at the California hospital
- CEO was not well liked
- The Board unilaterally adopted policies recommended by the administration that took away the medical staff’s right of self-governance
  - E.g. adopted 20 page Medical Staff Code of Conduct
  - Gave the hospital the authority to investigate and discipline physicians not meeting conduct standard
  - Hospital decided that physicians holding a financial stake in an entity competing with the hospital couldn’t hold a medical staff leadership position or vote as a staff member
- Hospital absconded with $250,000 medical staff dues
- Suit was filed
- Settlement was reached
- Out with the old CEO, in with the new
Possible Solutions

• Making expectations explicit by having a code of conduct supported by appropriate policies
• Ensuring robust Board support for clinical leaders in implementation
• Support and training for those dealing with disruptive and intimidating behavior
• Screening for health and personal issues
• Proactive surveillance systems
• Dealing consistently and transparently with infringements
• Dealing with lower level aberrant behavior early
• Having a graduated set of responses (informal, formal, disciplinary, regulatory) depending on the severity of the incident
• Making resources available to help those displaying and those affected by disruptive and intimidating behavior
Common Components to Policies

- Expected behaviors are clearly defined.
- Consequences for divergence from behaviors delineated
- Repercussions should be in accord with severity of incident
- Consequences for repeat behaviors should increase in a step-wise fashion
- Clear communication, documentation
- Consider physician signature/acknowledgement of Code of Conduct upon credentialing
• Initial evaluation important: baseline of medical, social, psychological functioning
• Substance abuse: can complicated behaviors, include drug screenings
• Include monitoring program, consider outside professional monitors
• Threat of external consequences incentivizes compliance with behavioral expectations: threat of sanctions, follow due process rights
• Policies should provide for verification of complaints and adequate investigation, fair hearing process, appeals option
• Joint Commission suggests that interventions be conducted “with adequate resources to support individuals whose behavior is caused or influenced by physical or mental health pathologies.”
• Referral to psychiatric evaluation and treatment may be appropriate to determine causes of problem and assistance plan
• Identification of disruptive behavior must be done in accordance with defined criteria, not arbitrary
• Referral to state medical board may be appropriate when physician declines assistance and danger poses danger to patient care
Progressive Discipline

- Disruptive behavior policies provide for investigation of a report of such behavior. If substantiated:
  - The Medical Executive Committee may engage in informal, collegial intervention to address the unwanted conduct
- Additional (or more severe) disruptive conduct leads to progressively more strict consequences:
  - Required counseling
  - Letter of warning or reprimand
  - Development and implementation of corrective action plan
  - Suspension of privileges (1 to 14 days)
  - Referral to formal disciplinary action pursuant to Corrective Action/Fair Hearing Plan
Disruptive Behavior Pyramid

- Professional Conduct
  - Isolated Incidents
  - Pattern
  - Persists
  - Norm

Interventions:
- Informal Intervention
- Awareness Intervention
- Authoritative Intervention
- Disciplinary Intervention

Majority of People, no issues.

Hickson, G.B., Pichert, J.W., Webb, L.E., Gabbe, S.G.
Effective Navigation for Physicians

- Candid evaluation through counsel under privilege
  - With or without a report
  - With a respected individual
  - What are the implications for the lawyer/client relationship if impairment is identified
- Be cautious of evaluations offered by facility
- Proactively attend CME program on disruptive behavior
- Be cautious of Human Resources alternatives to medical staff processes
- Be cautious of the “Behavioral Contract”
• Be knowledgeable about and engage with appropriate channels
  ➢ Medical Staff Bylaws
    ▪ How helpful are they and what do they say
    ▪ Where are relevant provisions
      ▪ Disciplinary procedures
      ▪ Joint Conference Committee
      ▪ Dispute resolution
  ➢ Policies and Procedures
  ➢ Hospital/Medical Staff Committees
  ➢ Board of Trustees
• Remember: All You Really Needed to Know You Learned in Kindergarten
Conflict Management Strategies

- **Step 1: Identify the source of the conflict**
  - Start by gathering information
  - Give the parties the chance to share their side of the story
  - Acknowledge the information

- **Step 2: Look beyond the incident**
  - Get the parties to look beyond the triggering incident to see the real cause

- **Step 3: Request solutions.**
  - Get the parties to identify how the situation could be changed
  - Question the parties to solicit their ideas
  - Move past finger pointing

- **Step 4: Identify solutions the parties can support**
  - Identify the most acceptable course of action
  - Point out the merits of various ideas, not only from each other’s perspective, but in terms of the benefits to the organization.

- **Step 5: Agreement**
  - Reach agreement to one of the solutions
  - Consider documenting the solution.
  - Identify follow-up, action plan, and plan for resolving future dispute
Conclusion

- Disruptive behavior can impact patient care, from all directions
- Employers, including hospitals, need comprehensive policies and procedures to address disruptive behavior
- Such policies must have multiple entry points and be implemented fairly and uniformly
- Misuse of the “disruptive physician” label can expose the health system to liability and expose physicians to devastating consequences of loss of reputation, inability to participate in physician networks, and even inability to practice medicine
Questions?

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