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University HealthSystem Consortium Joint Council Meeting

Retaliation Against Whistle Blowers: A Chronic Problem or Isolated Occurrence?

Thursday, April 14, 2011

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Environmental Scan (External)

- Transparency and accountability
- Mandatory reporting of sentinel/serious adverse events
- Pay for performance, value-based purchasing
- Hospital-acquired conditions
- Medical necessity enforcement

Environmental Scan (Internal)

- Reduced budgets (staffing, resources) and operating margins
- Greater production pressure
- Greater complexity, clinical and operational
- Quickly changing rules
- Erosion of trust

Professional Dilemmas

- "Up-coding" quality performance
- Clinical/documentation workarounds
- Suppressed internal investigations into adverse events
- Public accountability (reportable events)
- Medical necessity concerns unrecognized
- Peer review functionality
- Steep gradient of authority
- Harassment or insidious intimidation

Desired Healthcare Culture/Environment

For patients/communities

- Patient-centered care aimed at leading practices
- No compromises to data integrity
- Honesty and transparency in quality of care and patient safety

For healthcare professionals

- Respect and trust, common goals for quality and patient safety
- Safe work environment
- Internal and external chain of command
- Effective mechanisms and resources for improvement
- Protection from intimidation, retribution, or harassment

The Texas Nurses' Case

- (April 2008) County hospital employs Dr. A; known history of licensure restrictions for patient care problems; quality managers (RNs) report practice issues to hospital leadership
- (April 2009) Quality staff reports to state medical board after lack of response by hospital
- (June) Both staff are fired by hospital and later indicted
- (September 2009) DOH fines hospital for firing staff and for failure to properly supervise Dr. A

The Texas Nurses' Case

- (Jan 2010) Charges against one nurse dropped
- (Feb) Second nurse acquitted
- (Aug) Nurses settle suit against hospital and county
- (Dec) Dr. A indicted for misuse of information
- (Jan 2011) Hospital administrator, county prosecutor and sheriff indicted

Other Cases

- Hospital (Redding, CA, 2003)
  - Unnecessary cardiac procedures performed, patient records falsified
  - Physicians and administrators repeatedly raise concerns, ignored by parent company (Tenet) and state regulators
  - Complaining physicians intimidated, threatened
  - Patient complaint triggers federal investigation
  - Tenet settles with OIG for $54 million

Other Cases

- Neurosurgeon (Oakland, CA, 2006)
  - Repeated physical threats to nurse, history of prior unaddressed behavioral issues
  - Concerned staff call 911
  - Physician arrested, reported to medical board, receives temporary suspension
  - Hearing deems physician “competent,” license restored

Other Cases

- Cardiologist (San Diego, 2007)
  - Strikes agitated patient repeatedly during cardiac catheterization
  - Immediately resigns, employed by neighboring hospital
  - Staff report directly to DOH, because prior reports on cardiologist's behavior unheeded
  - CMS issues immediate jeopardy letter, hospital fined
  - Medical board issued public discipline in 2010

Other Cases

- Pediatrician (Delaware, 2010)
  - History of sexual abuse complaints since 1994
  - Licensed in DE despite complaints
  - Nurse reports inappropriate touching of patients, hospital investigation determines complaints unfounded
  - Sister of a patient reports erratic behavior to state medical society, deems a “family matter”
  - Physician colleague routinely refers to physician as “pedophile”
  - State takes action only after newspaper publishes stories
  - Total of 115 children abused

Recurrent Themes

- Hospitals fail to take action until forced
- Insufficient/delayed response from regulatory bodies
- Intimidation, fear/reluctance
- Staff report to regulators when hospitals fail to act
- Financial motives often but not always present
- ***Inaction leads to patient harm***

Legal Perspectives

- External pressures to monitor/maintain quality
  - Joint Commission /CMS/accreditation standards
  - Doctrine of Corporate Negligence/Respondent Superior

Legal Perspectives

- Potential for
  - denial of reimbursement, violation of False Claims Act
  - affecting qualifications as a certified Accountable Care Organization
  - denial of NCQA certification
  - private whistle blower actions

Legal Perspectives

- Existing Legal Tools
  - Code of Conduct Policy, Disruptive Behavior Policy, Conflict of Interest, Medical staff bylaws
  - State peer review confidentiality and immunity protections
  - Patient Safety Organization, Concept of "Just Culture"

Legal Perspectives

The goal is to encourage full disclosure and acknowledgment in a protected environment without fear of reprisal or ability to use disclosure for disciplinary purposes

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Legal Perspectives

- Health Care Quality Improvement Act
  - Immunity protections for professional review action
  - Data bank reporting
- State common law protections for “good faith” reporting, voluntary or mandatory
- State and federal whistleblower protections

Legal Perspectives

- Do we have appropriate and comprehensive legal structures and processes in place, internally and externally, to adequately improve quality and protect against retaliatory actions?
- If so, then why do problems or fears of reprisal persist?

Legal Perspectives

- Do we have the necessary legal tools but not the necessary "culture" or leadership to enforce these processes and protections?

or…

Legal Perspectives

- Do we need new structures and processes to protect patients and healthcare professionals?

and

- How do we build and foster the will and commitment to act vigorously to protect patients and healthcare professionals?