Managing Disruptive Physicians

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How do you deal with this?
Like this?
Or like this?
## Four Behavior Patterns

<table>
<thead>
<tr>
<th>Type</th>
<th>Activity</th>
<th>Response</th>
<th>What’s inside</th>
<th>Illness</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Angry</strong></td>
<td>Yelling</td>
<td>“I care about patients!”</td>
<td>Insecure</td>
<td>Mood disorder, subst. abuse</td>
</tr>
<tr>
<td><strong>Out of compliance</strong></td>
<td>Flakey</td>
<td>“That’s not important”</td>
<td>Over-extended</td>
<td>Mania, subst abuse, ADHD</td>
</tr>
<tr>
<td><strong>Inappropriate</strong></td>
<td>Tasteless jokes</td>
<td>“It was just a joke”</td>
<td>Clueless</td>
<td>Narcissism mania</td>
</tr>
<tr>
<td><strong>Creepy</strong></td>
<td>Sexual</td>
<td>“I was just being friendly”</td>
<td>Lonely</td>
<td>Depressed, or sociopath</td>
</tr>
</tbody>
</table>
Action Plan

• Understand that not all disruptive behavior = illness
• Get the doctor’s attention
• Be specific about the changes that must occur
• Counseling / coaching can work
• Take disciplinary action in a timely manner
Tools Needed to Address Behavior Issues:

Adequate Policies and Procedures

- Creates the foundation for enforcing behavior expectations
- Provides framework for managing the problem
- Provides hearing rights when required by law
Tools (cont’d)

Code/Standards of Conduct

- Puts all members of the medical group on notice regarding expectations
- Provides basis for challenging inappropriate behavior
Performance Management Must Be Prompt, Fair and Consistent

- Was the rule or standard reasonable and clear?
- Is there sufficient evidence that the rule was violated or the standard not met?
- Did the employee have sufficient training – notice?
- Are there extenuating circumstances?
- Is the penalty reasonable and appropriate?
- Is the same penalty given to other employees under similar circumstances?
Performance Improvement Process

- Step 1 – Identify clear expectations
- Step 2 – Communicate expectations effectively
- Step 3 – Measure behavior to drive improvement
- Step 4 – Manage the poor performance
- Step 5 – Take corrective action in a timely manner
Step 1 - Identify Clear Expectations

- Drafting a policy or Standards of Conduct.
- Begin with a dialogue among the physicians regarding acceptable and unacceptable behaviors.
- Involve physicians at all levels of the organization.
- If you aren’t achieving consistent compliance with a current policy, do you need to revisit the way you set expectations and communicated them?
Step 2 - Communicate Expectations Effectively

- Policies and procedures should support behavior expectations and require compliance with Standards of Conduct
- Standards of Conduct should be distributed upon hiring
Step 3 - Measure Behavior to Drive Improvement

- Document concerns brought by staff and fellow physicians; preserve in order to trend
- Investigate to establish the merits of the concern
- Communicate the findings to the physician
- Adopt a clear nonretaliation policy and enforce it firmly
Step 4 - Manage the Poor Performance

- Provide feedback – both positive and negative
- Even imperfect data can include valid information that can be used to improve and self-correct
- Praise in public; criticize in private
- When setting new behavior expectations, provide initial feedback in a private, face-to-face meeting
Intervene When:

- A physician demonstrates repeated disruptive behavior despite receiving clear expectations of behavior and multiple instances of feedback that the behavior has not been consistent with these expectations.
- A physician demonstrates a single episode of grossly disruptive behavior that warrants immediate intervention.
Plan Each Intervention Carefully

- Who?
- Where?
- When?
- Goal? (Commitment to comply with the policy?)
- How will the physician react?
Plan Each Intervention Carefully (cont’d)

• What will you do when this reaction occurs?
• What is your back-up plan if the physician refuses to change?
• How will you measure significant change in behavior?
• How will you document the intervention?
Essential Elements of the Intervention

• Identify the problematic behavior or incident
• Refer to previously agreed upon expectations or the approved policy
• Invite the physician to provide another side of the story (not appropriate for third and fourth interventions)
• Deflect excuses and justifications
Essential Elements of the Intervention (cont’d)

• Constantly refer to data
• Focus on the behavior, not the person
• Clarify the nonretaliation policy
• Be persistent
• Keep the intervention time limited
• Close with the physician’s commitment and next steps
• Inform the physician how the meeting will be documented
When to Include a Witness

- Significant disciplinary actions
- Where credibility will be an issue
- If physician has threatened a claim
- Who should the witness be?
Initial Intervention:

Performed the first time a decision has been made to move beyond simply providing feedback into a focused intervention with the physician. It is usually collegial and focused on answering the question, “Why is your performance different?” not “Why are you bad?”
Second Intervention:

Performed if the initial intervention is ineffective in achieving the desired behavior change. This is less collegial and more focused on the physician being responsible for creating a plan to change his or her behavior, and then achieving that plan.
Third Intervention:

Performed if the second intervention has not achieved the desired behavior change. This intervention is still less collegial and is focused on the physician making a clear commitment to the necessary change.
Fourth Intervention:

This is the final warning. It is delivered as a monologue, not a dialogue. It is the last step before corrective action is taken.
Step 5 - Take Corrective Action in a Timely Manner

- May require an 805 report to the Medical Board of California
- If so, then fair hearing must be afforded as well
- Business & Professions Code § 821.5 may also be implicated if peer review body compels a physical or mental examination
Business and Professions Code
Section 805

Requires CEO/Administrator and Medical Director to report to MBOC when a provider’s employment/contract is:
  - Terminated
  - Restricted (either voluntarily or involuntarily)

for a “medical disciplinary cause or reason” meaning that aspect of a licentiate’s competence or professional conduct that is reasonably likely to be detrimental to patient safety or the delivery of patient care.
If a report is filed under section 805, the physician must be afforded specific hearing rights described in Business and Professions Code section 809.
Business and Professions Code Section 821.5

- Business and Professions Code § 821.5 requires Peer Review Bodies to report to the MBOC Diversion Program within 15 days of initiating a formal investigation of a physician’s ability to practice medicine safely based upon information that the physician may be suffering from a disabling mental or physician condition that poses a threat to patient care.
Limitations on Termination “At-Will”

- Statutory Limitations
  - Anti-discrimination laws
  - Retaliation and whistleblower protection
  - Leave laws
  - Various Labor Code provisions
Limitations on Termination “At-Will” (cont’d)

- Public Policy Limitation – Engaging in Protected Conduct
  - Opposing an unlawful practice
  - Filing a claim or report with a government agency
  - Presenting an internal complaint regarding a significant matter
  - Exercising a legal right
  - Performing a legal duty
Limitations on Termination “At-Will” (cont’d)

- Express Contractual Limitation
  - Written agreement that employment is for a specific period, and can be terminated only for “cause.”
  - This can also be provided by oral agreement.
Preserving At-Will Status

- Include at-will language in your employment application.
- Include at-will language in your handbook and employee acknowledgment.
- Watch for handbook and policy language that may limit your right to terminate at will.
- Be careful about statements that may imply a promise of continued employment.
At-Will: The Bottom Line

- Preserve it, but don’t rely on it.

- Always have a good reason for any termination decision.
Proceeding with Termination - Best Practices

- Ensure the decision is well supported and documented.
- Avoid the “surprise” termination.
- Review any potential risk factors.
- Ensure compliance with company policies and past practices.
Proceeding with Termination - Best Practices (cont’d)

• Communicate to the employee in writing – be specific about reasons.
• Communicate the decision in person – with a witness.
• Consider a severance package and release agreement.
• Carefully draft the release – particularly where the employee is over 40.  (Syverson v. IBM, (9th Cir. 2006) 472 F.3d 1072.)
Documentation Issues

Employee right to review personnel file

- This is not limited to the employee’s “official” file:

  “Every employee has the right to inspect the personnel records that the employer maintains relating to the employee’s performance or to any grievance concerning the employee.” (Labor Code § 1198.5)

E-mail issues

- Every e-mail is potential evidence!
When to Document

- Any significant performance issue, or breach of company policy
- Any complaint regarding discrimination, harassment or retaliation
- Document promptly
How to Document

• State facts, not opinions
• If it’s a communication, clearly state what is required of the employee
• Where possible, use objective goals
• Don’t make commitments you can’t keep
QUESTIONS ??
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