

Medical Staff Leaders and their Legal Advisors: Managing Today's Challenges

Part 3: Sexual Harassment and the Modern Medical Staff + Disruptive Physicians: How to Handle Behavior Concerns with Problematic Physicians

Remaining Medical Staff Webinars

- **Part Four: Friday, March 26th**

Lessons Learned During the Pandemic and other Disasters

Sexual Harassment & the Modern Medical Staff

Alexis L. Angell, Shareholder

We will address:

Define Sexual Harassment

Define Sexual Assault

Hospital Investigations

- Responding to complaints by employed Hospital staff, credentialed staff members, and patients
- How an entity handles complaints, including law enforcement involvement

Risks Analysis

- Criminal Investigations/Charges
- Civil Lawsuits
- Reporting Requirements

Sexual Harassment Definition

Equal Employment Opportunity Commission defines “sexual harassment” as harassment of:

- “A person *** because of that person’s sex.
- Harassment can include ‘sexual harassment’ or unwelcome sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature. ***
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.”

https://www.eeoc.gov/laws/types/sexual_harassment.ctm

Sexual Harassment Can Occur of:

Employed Staff

- Nurses
- Administrative Staff
- Cafeteria Employees

Patients

Third parties

- Visitors
- Vendors

Other Credentialed Providers

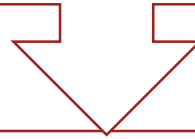
- Physicians
- Advanced Practice Professionals

Sexual Harassment

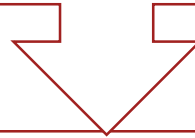
Conduct
or
behavior
that
includes

- unwelcome sexual advances,
- requests for sexual favors,
and
- all other verbal or physical
conduct of a sexual or
otherwise offensive nature.

Occurs when unwelcome comments or conduct based on protected characteristics, unreasonably interfere with an employee's work performance or create an intimidating, hostile or offensive work environment.



Comments and/or conduct must be sufficiently severe or pervasive to create a hostile work environment.



The victim can be anyone affected by the conduct, not just the individual to whom the offensive conduct is directed.

Sexual harassment has the purpose or effect of creating an intimidating, hostile, or offensive work environment

Sexual Harassment is defined with an Objective Standard

Conduct or behavior from the reasonable view of the complaining party

It is not the subjective view of the complaining party

Verbal Harassment:

- Sexual propositions or repeatedly asking someone on a date
- Comments, insults or jokes based upon protected categories
- Questions about a person's sex life or spousal relationship
- Explicit social media comments or communications

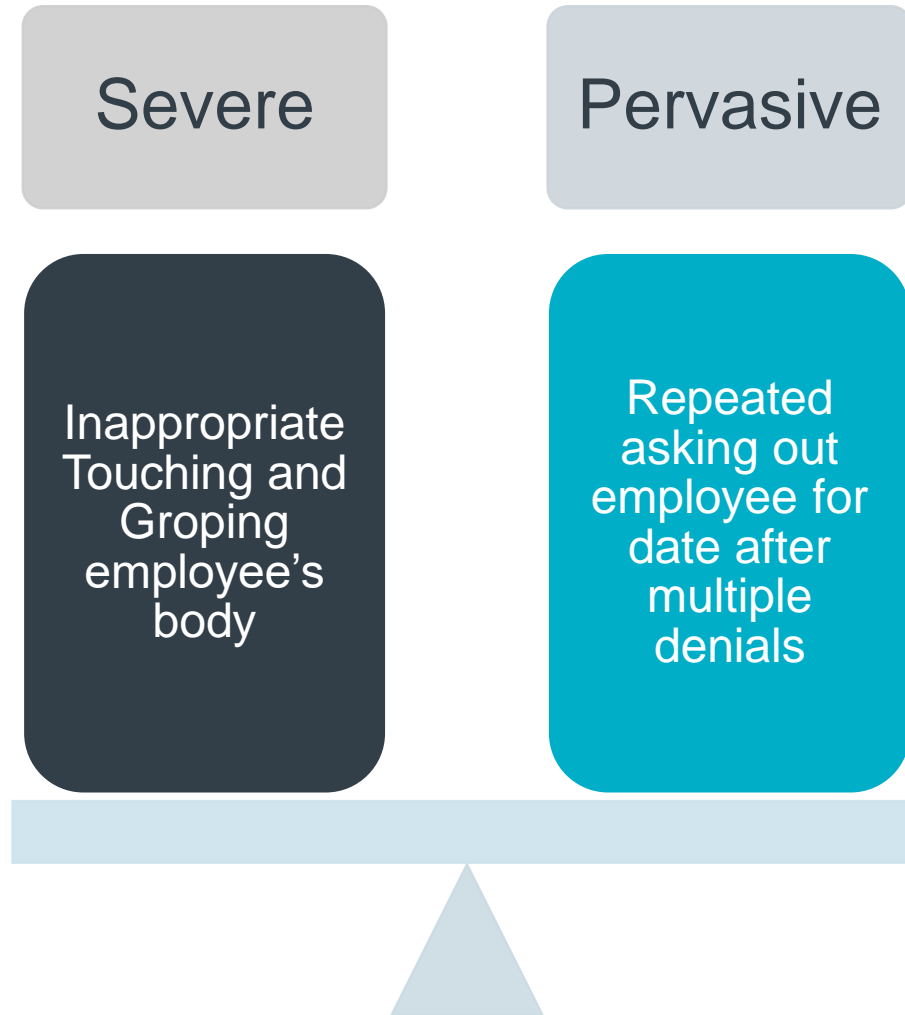
Visual Harassment:

- Leering
- Displays of offensive materials such as calendars or pictures
- Sexually explicit e-mail communications

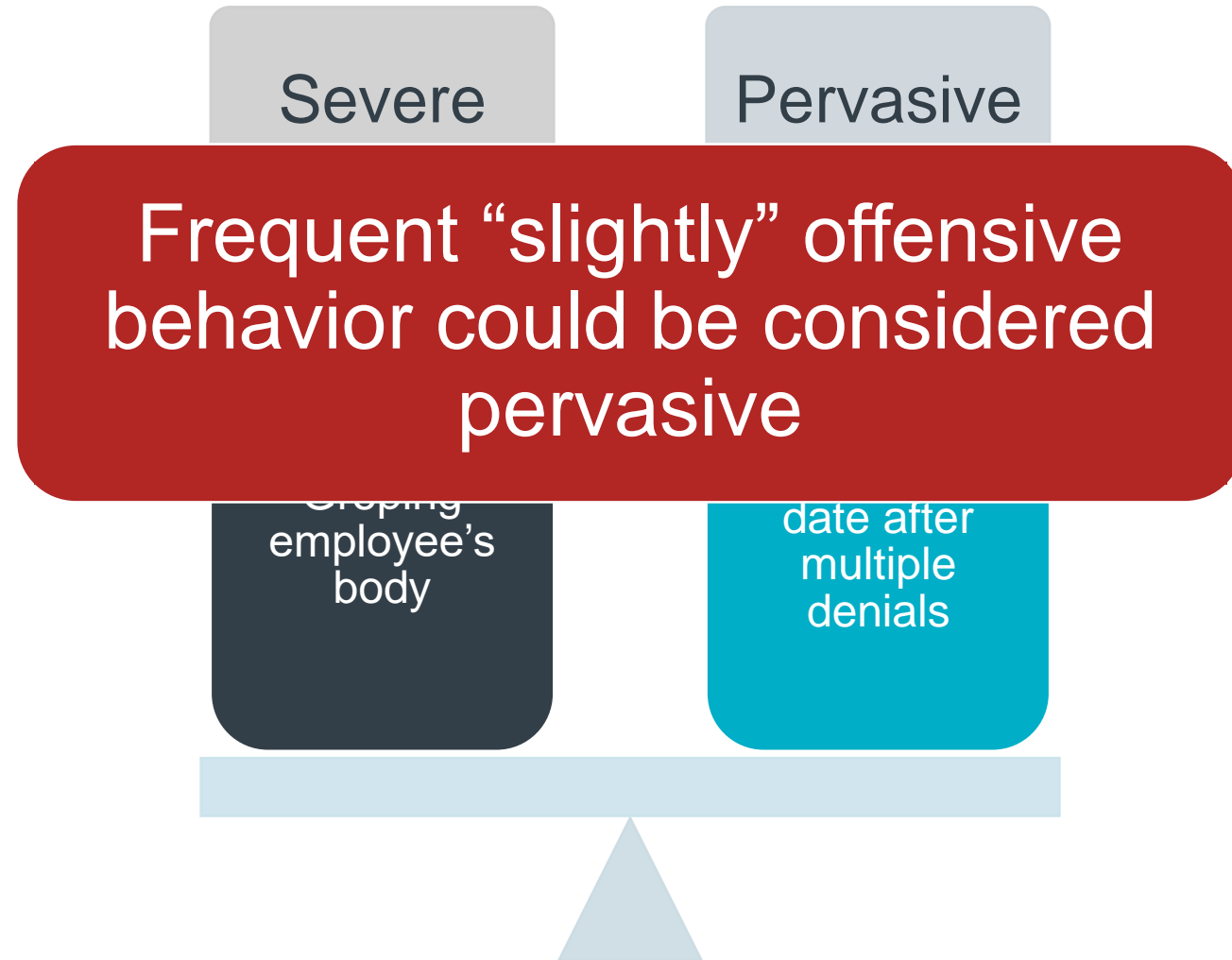
Physical Harassment:

- Touching, massaging, hugging or brushing up against an individual
- Invading personal space

Compare Severe & Pervasive



Compare Severe & Pervasive



Quid Pro Quo Harassment

Submission to such conduct is made either explicitly or implicitly a **term or condition of employment**



“You like working here, right? So let me take you out Saturday. It’ll be fun.”

Quid Pro Quo Harassment

Submission to or rejection of such conduct is used as the **basis for decisions affecting an individual's employment**



CRNA does not attend out-of-state Continuing Medical Education event with Employer Physician.
CRNA is then terminated.

Sexual Assault

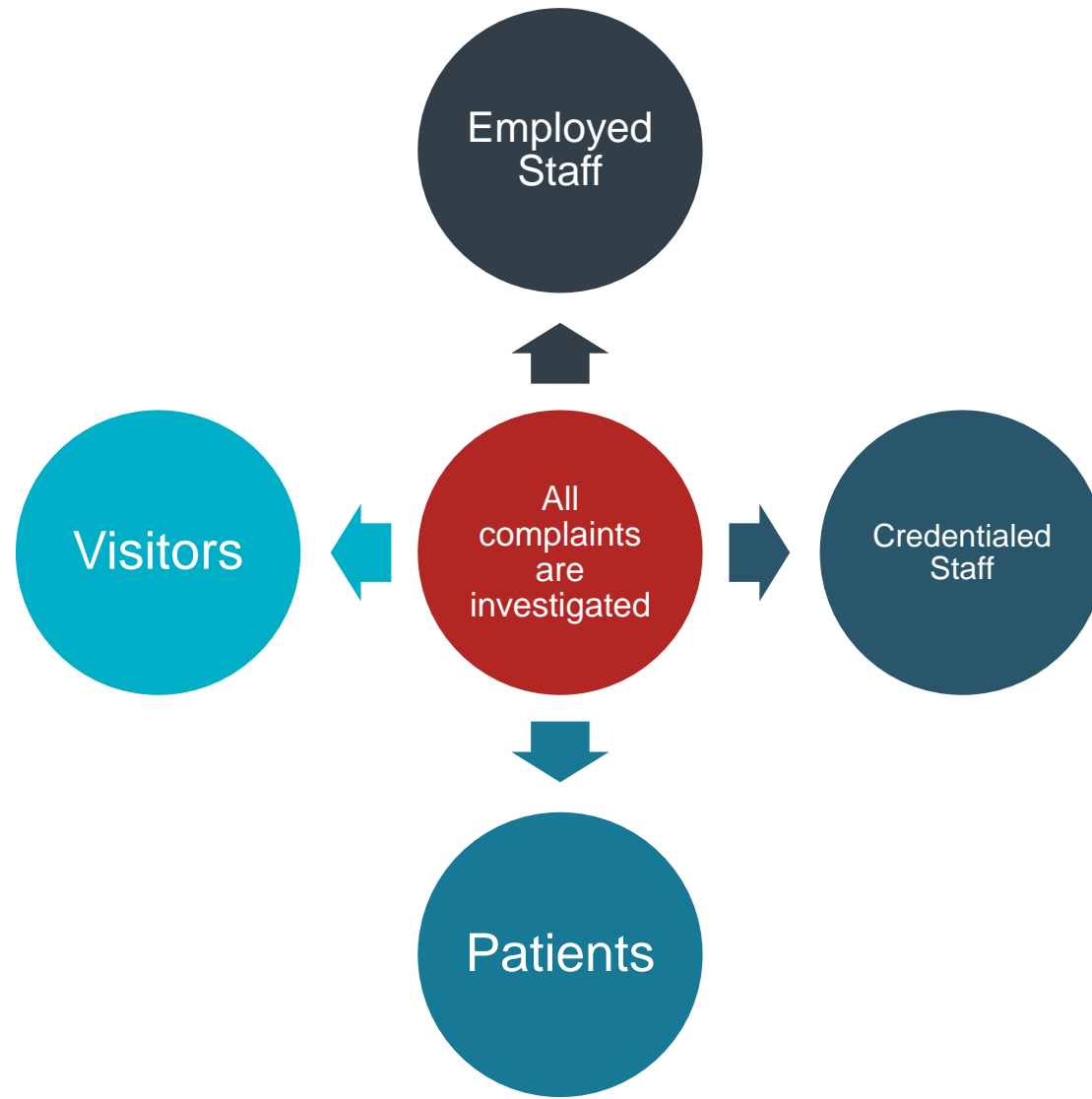
Sexual Assault is
defined by federal and
state statutes

Federal Department of Justice Definition of Sexual Assault

The term
“sexual
assault”
means

“any nonconsensual sexual act proscribed by Federal, Tribal, or State law, including when the victim lacks capacity to consent.”

Investigate All Complaints



Med Staff Investigation Process



Step 1: Document Complaint



Date

Time

Place

Persons Present

Description of Inappropriate
Conduct

Step 2: Identify Key Documents

Examples are specific to each hospital:

- Professional Conduct Policy
- Sexual Harassment Policy
- Behavior Policy
- Code of Ethics
- Professional Practice Evaluation Policy
- Credentials Policy
- Medical Staff Bylaws

Often see Progressive Discipline Steps

Remember: a **single incident** or continuation of conduct may be **so unacceptable** that progressive steps are inappropriate and **immediate disciplinary action** is required

Step 3: Identify Person(s) or Committee to Conduct Investigation

Examples per the Relevant Policy may be:

- Medical Staff Leadership
- Chief Medical Officer/Chief Executive Officer
- Combination of the above
- A Peer Review Committee
- Medical Executive Committee

Step 4: Review Practitioner File

Goal: Determine if Prior Complaints were Made Against Practitioner

- Was Complaint Investigated?
- Substantiated?
- How Addressed?
- Warning?
- How Severe Was Prior Incident(s)?

Step 5: Conduct Interviews

Who to interview?

- Complainant
- Witnesses
- Accused Practitioner
 - ***Warning to Practitioner: Do Not Retaliate***

Step 5: Interviews Continued

Best Practices

- **At least two** Hospital Representatives should attend each interview
- Do not include a Hospital Representative that arguably can waive peer review privilege – *e.g.*, H.R. Director
- Prepare Written Summary of Interviews
- Provide Summaries to Decision Makers

Range of Investigation Results

No action
Physician is
Cleared



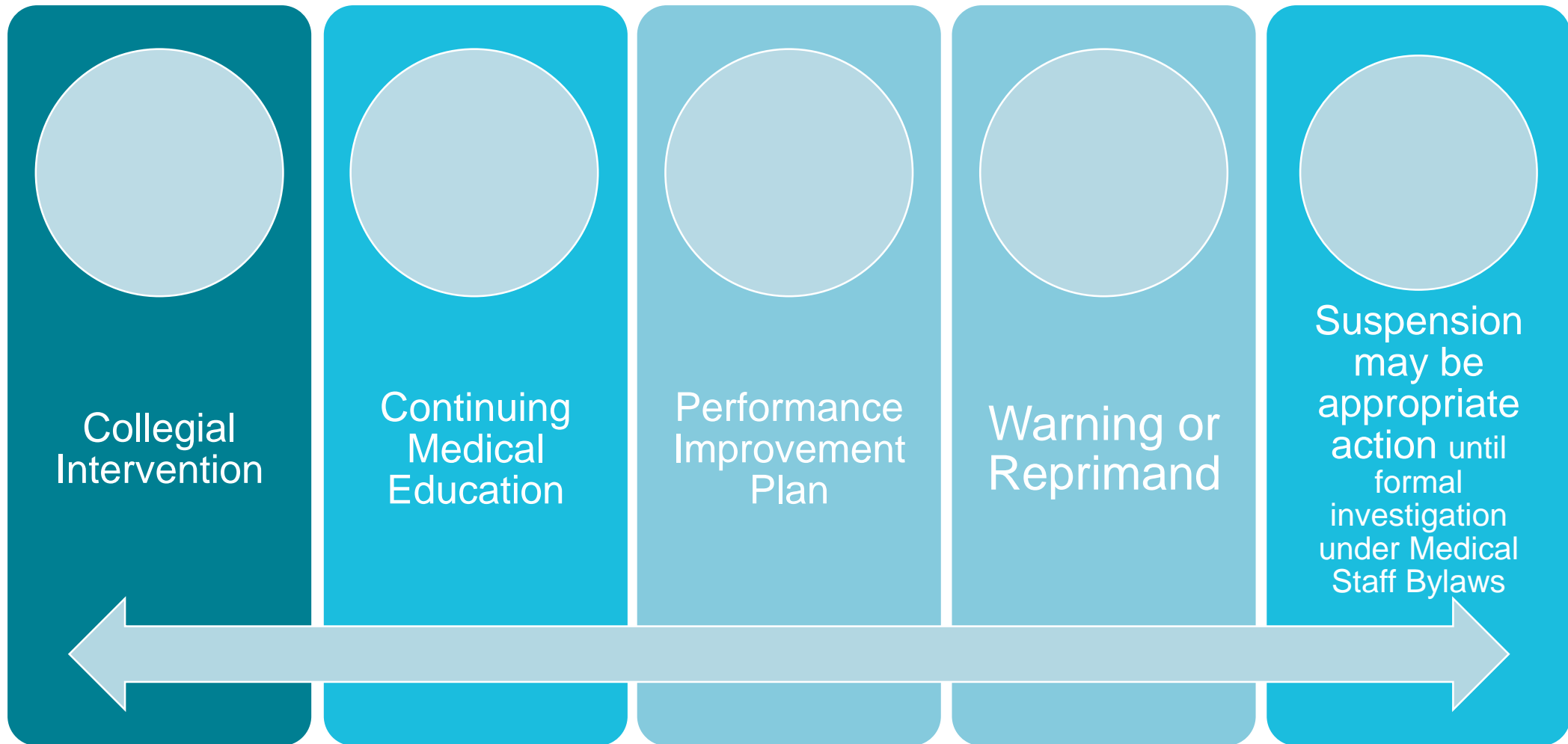
Range of Investigation Results

No action
Physician is
Cleared

Many Options in
Between

Termination

Range of Investigation Results



Peer Review Policy Outcomes

Ultimate responses to complaints with merit may be on a continuum

- No Action, But Letter of Warning
- Behavior Improvement Plan with Letter of Warning
- Formalized Boundaries Training with Letter of Warning
- Suspension of Privileges (less than or greater than 30 days)
 - If greater than 30 days, triggers right to hearing
- Recommendation to Terminate Privileges
 - Triggers right to hearing
- Reporting Criminal Acts to Authorities

Factors to Consider

History of past concerns

How severe is this conduct?

Was conduct witnessed or proven by other conclusive evidence?

Investigate



Gathering Facts

- Patient Interviewed
- Practitioner Interviewed



Decision may be to

- Take no action
- Defer to police investigation
- Initiate a Formal Investigation

Peer Review Outcome Examples

Minor Infraction



Physician makes a comment to a patient that was intended to be harmless, but offended the patient



Potential Result:
Physician placed on a Behavioral Improvement Plan

Peer Review Outcome Examples

Extreme Violation: Hospital confirms physician committed sexual assault of patient or employee

Potential Result: ***Immediate suspension*** of privileges and ***MEC recommends termination*** of the physician's medical staff privileges and membership

Termination is not finalized until after physician afforded notice and hearing rights.

Consider National Practitioner Data Bank ("NPDB") and state reporting requirements deadlines.

Report to local police authorities

Avoid retaliatory action

- Do not move an employee who made complaint to a different, less desirable shift to avoid the subject physician.

Consider employee's request

- What if the employee requests not to be placed in room with reported physician?

Criminal Conduct

Conduct of a criminal nature, including but not limited to, assault and battery, rape, or theft ***shall be handled through local law enforcement officials*** in accordance with Hospital policy, local and State Law.

Investigate


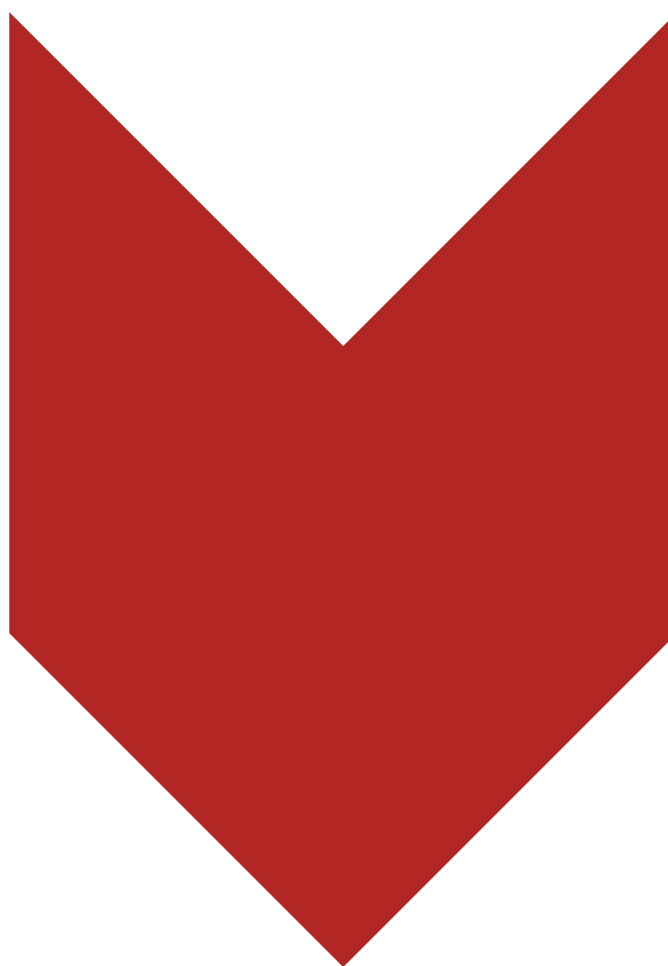
Patient makes
police
complaint for
sexual assault

- Fact Gathering
- Patient may be credible
- Patient may be misconstruing credible medical exam
- Patient may be providing inaccurate report

Result of police
investigation
will be
considered

The background of the slide is a dense field of 3D cubes in various shades of red, creating a textured, geometric pattern. The cubes are arranged in a way that they appear to be floating or stacked, with some in the foreground and others receding into the background, giving a sense of depth.

HR & Peer Review

- 
- 
- Why is the Peer Review process generally privileged by law where the HR process is not?

State legislatures want to encourage healthcare practitioners to police their peers' competence and professional conduct.

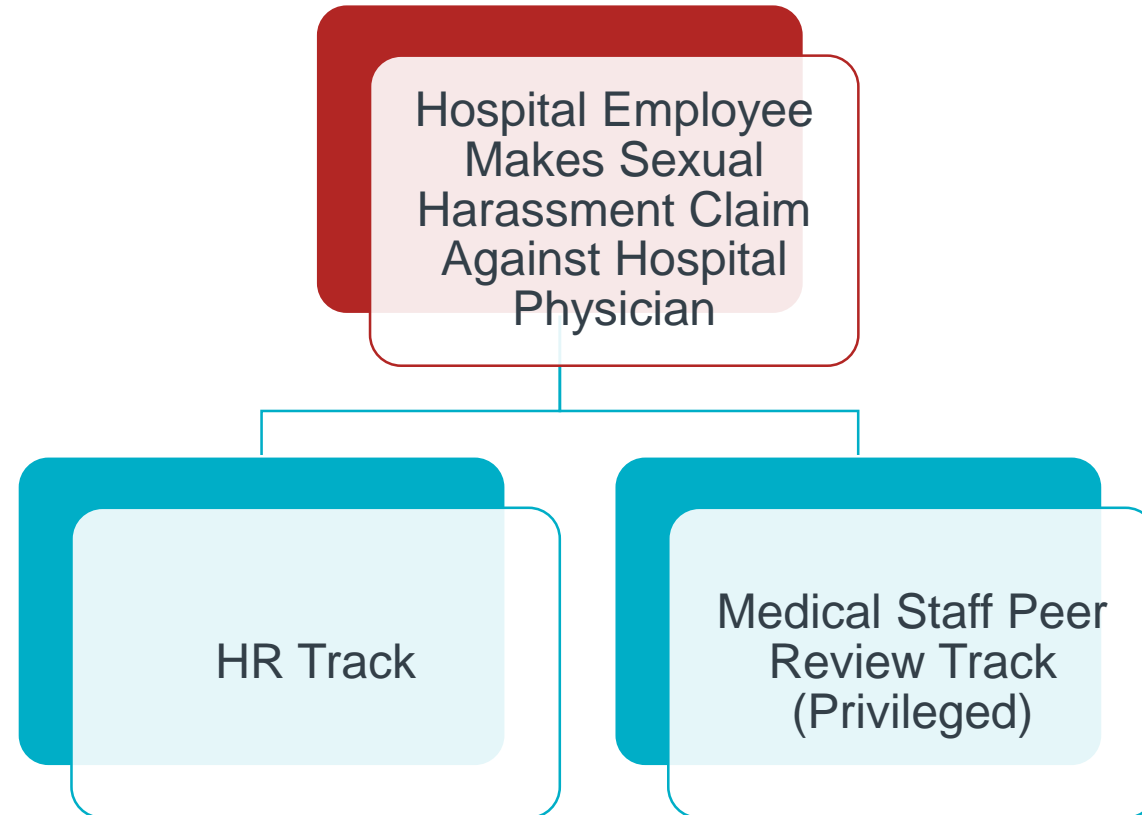
Communications to and records and proceedings of Medical Peer Review Committees (a/k/a, Professional Review Bodies) generally will be privileged by state law from disclosure, with some exceptions.

Texas law example

Except as otherwise provided by this subtitle, each *proceeding or record of a medical peer review committee is confidential*, and *any communication made to a medical peer review committee is privileged*.

- Tex. Occ. Code, Sec. 160.007(a).

- That's why there will be two investigations if the complainant is a hospital employee.



Physician Sexually
Assaulted Patient

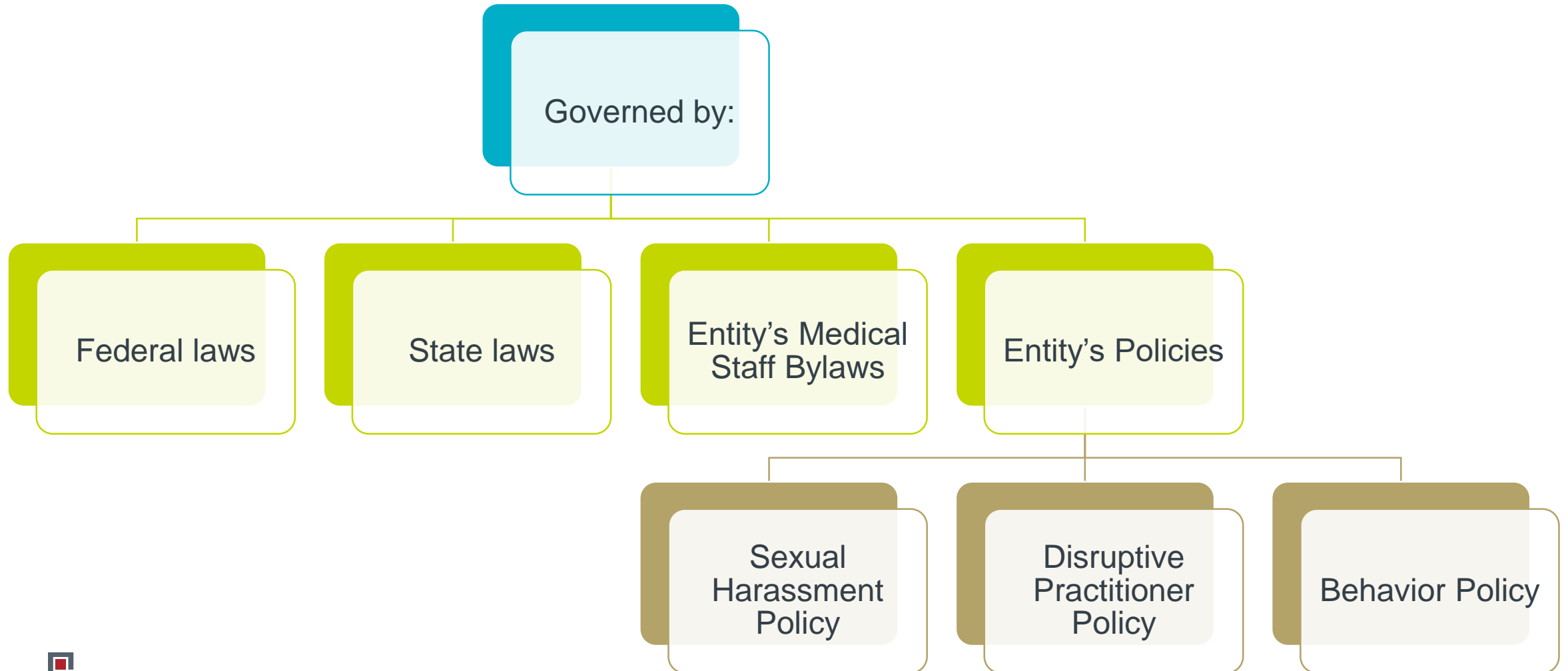
Physician Sexually
Assaulted Another
Medical Staff
Member

Medical Staff Peer
Review Track Only
(Privileged)
No HR Track

The background of the slide is a solid red color with a pattern of 3D cubes of varying sizes and orientations, creating a textured, geometric effect.

Protecting the Peer Review Privilege

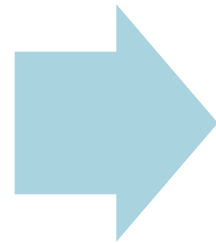
Peer Review Process is Separate from HR Review



Peer Review Process is Separate from HR Review



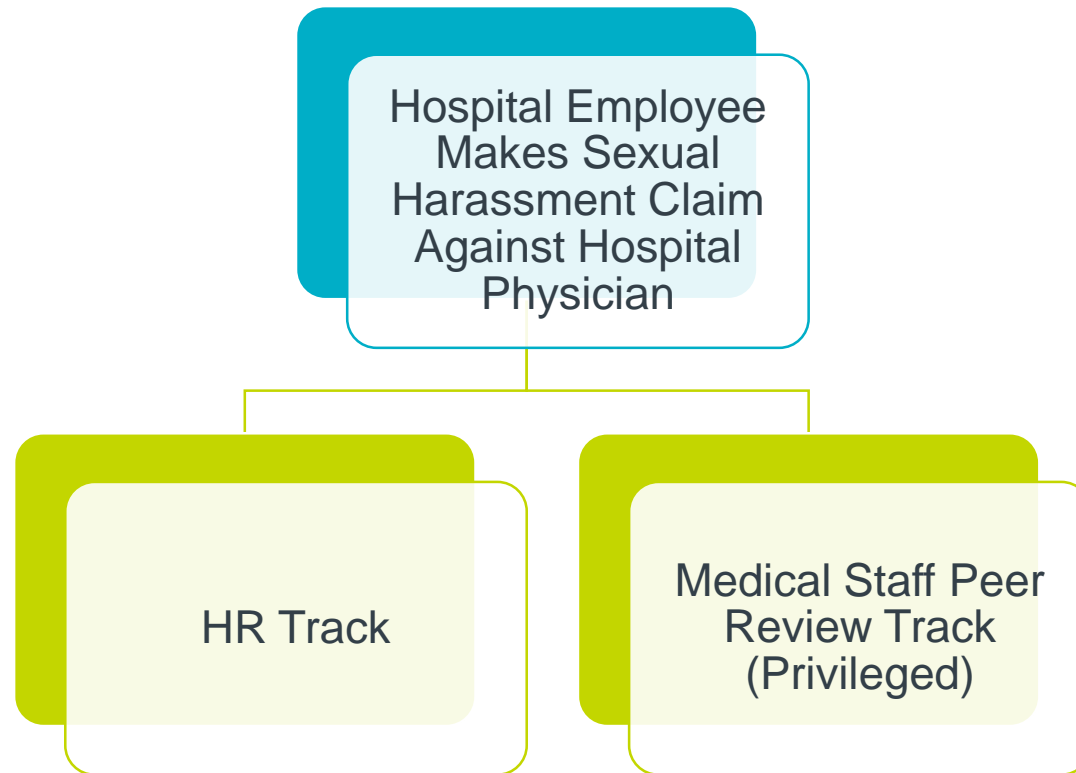
Physician tells a nurse sexually charged jokes while performing a surgical procedure.



Two issues:

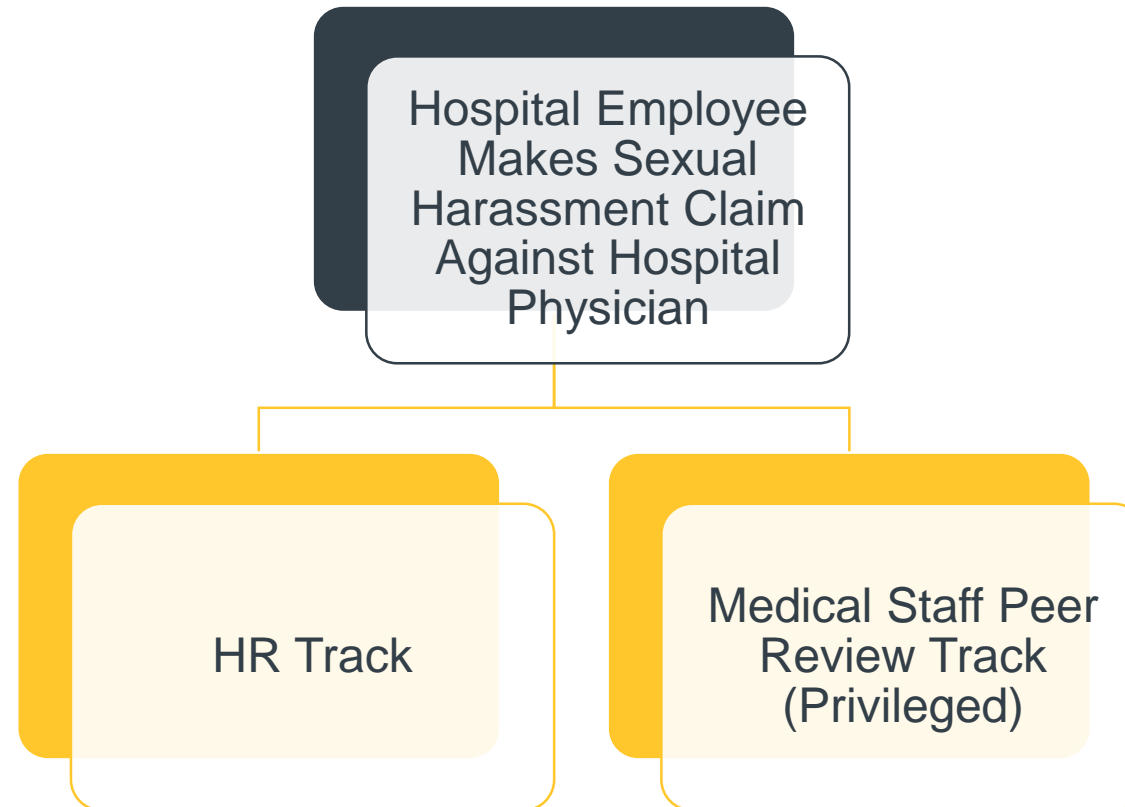
- What is the hospital's duty with respect to protecting the nurse from the unwanted conduct?
- Were the inappropriate sidebars a distraction such that they interfered with the physician's or nurse's focus on providing care to the patient?

- Must protect the Peer Review Privilege
 - For example, minutes from a peer review meeting concerning a physician should not be placed in any HR file.



- Why the separation?

- The HR File is subject to discovery through a subpoena



Protecting the Peer Review Privilege

- Complainants will expect to learn the outcome of the investigation.
- Peer Review is confidential under Texas state law.
- Employee or patient complainants will not learn the results of a peer review investigation.

Protecting the Peer Review Privilege

- Develop standard language for responding to questions about peer review evaluations/investigations.
 - Inform the complainant that the evaluation/investigation will take place, without disclosing specific findings or outcomes.
 - Provides consistency.
 - Prevents members of the investigative team from disclosing more than they should and potentially jeopardizing the peer review privilege.

Protecting the Peer Review Privilege

Sample language:

- *We take your concerns seriously. We will address your concerns through the peer review process. Because the peer review process is privileged and confidential under state law, we are unable to inform you of the outcome of the peer review process.*
- *The Hospital prohibits disruptive behavior and retaliation related to an employee's reporting such behavior. Please let me know immediately if disruptive behavior occurs or if you believe you are being subjected to retaliation for having reported any such situation.*
- *Thank you for bringing your concerns to our attention.*

What happens if the EEOC wants to view your peer review privileged documents?
Likely exception under state law (not federal).



Confidentiality
Relating to Medical
Peer Review
Committee

- (c) A record or proceeding of a medical peer review committee or a written or oral communication made to the committee may be disclosed to *** an appropriate state or federal agency ***
- Tex. Occ. Code §160.007.

The background of the slide is a dense field of 3D cubes in various shades of red, creating a textured, geometric pattern. The cubes are arranged in a way that they appear to be floating or stacked, with some in the foreground and others receding into the background, giving a sense of depth.

Reporting Requirements

Reporting Requirements

Various reporting requirements to state agencies regarding sexual assaults committed by a health care provider

- In December 2018, Michigan's Governor signed legislation to include physical therapists, physical therapist assistants, and athletic trainers among the individuals who must report suspicions of child abuse or neglect

State agencies may require reporting suspected sexual assault of a minor (child abuse) or elderly patient (elder abuse)

Reporting Requirements

Be aware of penalties for failure to report

- In Florida, a mandatory reporter who fails to report as required by law can be charged with a felony.
- In 20 states, upon conviction, a mandated reporter who fails to report can face jail terms ranging from 30 days to 5 years, fines ranging from \$300 to \$10,000, or both jail terms and fines.
- In 7 states, in addition to any criminal penalties, the reporter may be civilly liable for any damages caused by the failure to report.
 - <https://www.childwelfare.gov/pubpdfs/report.pdf>

Reporting Requirements

State Medical Board Reporting

- Vary state to state

NPDB Reporting (Competence/Conduct)

- Suspension of privileges > 30 days
- Recommendation to terminate privileges
 - NPDB Guidebook, Chapter E, Q&A 46
- Physician resignation while under or to avoid investigation
- Physician leave of absence while under or to avoid investigation
 - NPDB Guidebook, Chapter E, Q&A 23
- Physician self-restriction of privileges while under or to avoid investigation
 - NPDB Guidebook, Chapter E, Q&A 22



Test Your Knowledge

Dr. Robin

- Dr. Robin has asked Nurse Ted out on a date on several occasions and she has declined.

Stop Here

Dr. Robin

- There is a letter in Dr. Robin's confidential peer review file from 2 years ago admonishing him for pervasive sexual harassment.
- She had previously asked out a Cafeteria employee on several occasions who declined each time and reported Dr. Robin to HR.

Stop Here

Dr. Robin

- When Nurse Ted ends his 7:00 p.m. shift, Dr. Robin is waiting by his car in the Hospital parking lot.
- Dr. Robin gropes Nurse Ted on the behind and Nurse Ted gets in his car. There is video surveillance of the parking lot. Nurse Ted immediately texts his friend, Nurse Bonnie, to say what happened and reports Dr. Robin to the CNO the next day.

Dr. Barney

- Dr. Barney pulls Nurse Victoria into a hospital supply closet and sexually assaults her.
- Nurse Victoria immediately tells her Charge Nurse and files a police report.

Dr. Marshall

- Dr. Marshall is a long time 70 year old member of your medical staff who comes into your hospital every morning at 6:00 am to perform H&P's on patients who have been admitted to the Behavioral Health Unit overnight.
- He is very well known on the floor and often brings treats, snacks and gifts.
- The staff often joke with Dr. Marshall and share personal stories and he does the same in return.

Dr. Marshall

- Recently, a new nurse, Nurse Lilly, has been hired and Dr. Marshall greets her on her first day with a warm hug.
- She is uncomfortable and pulls away.
- On subsequent mornings, Dr. Marshall comes in and places his hand on her neck to show how cold his hands are. He laughs and believes it is a joke and also does it to other staff members.
- Although Nurse Lilly has told him that it makes her uncomfortable, he does not stop. She then files a complaint with HR who forwards the complaint to the MSO.

Stop Here

Dr. Marshall

- The Chief of Staff receives the complaint and counsels Dr. Marshall to avoid any interactions that are not professional.
- Dr. Marshall takes the warning to heart and now will not speak with Nurse Lilly and often makes loud comments to other nurses that *they* are his friend.

Stop Here

Dr. Marshall

- Over the following weeks, Dr. Marshall brings breakfast for everyone except for Nurse Lilly.
- At the holidays, he hands out gifts to everyone except for Nurse Lilly.

Stop Here

Dr. Marshall

- Nurse Lilly complains again to HR and HR starts an investigation and interviews other nurses.
- The interviews are forwarded to the Medical Staff Office and support Nurse Lilly's complaints.
- The nurses state that while Dr. Marshall's behavior is disruptive and harassing, his behavior does not affect their ability to provide patient care.

“

Thank you!

”

Disruptive Physicians – How to Handle Behavior Concerns with Problematic Physicians

Presented by:
John T. Synowicki, JD
jsynowicki@polsinelli.com

Speaker



John T. Synowicki, Shareholder

Polsinelli PC, Dallas TX

jsynowicki@polsinelli.com

(214) 661-5504

Disruptive Conduct

1. Identifying Disruptive Conduct
2. Strategies in addressing disruptive conduct
3. Maintaining Privilege and Application of HCIA

Disruptive Conduct

Identifying disruptive conduct: what does unprofessional or disruptive conduct look like?

Disruptive Conduct

- Unprofessional Conduct Includes:
 - Rude, intimidating, threatening or abusive behavior or comments to personnel, patients, practitioners, etc.
 - Negative comments to patients about other practitioners, nurses, or Hospital personnel
 - Verbal attacks
 - Inappropriate comments, drawings, illustrations
 - Lying, cheating, false allegations
 - Harassment and bullying through words, gestures, or actions

Disruptive Conduct

- Unprofessional Conduct Includes:
 - Criticism that is addressed to A recipient in such A manner as to intimidate, undermine confidence, belittle or imply stupidity or incompetence or some other type of public humiliation
 - Disruption of hospital operations, hospital or medical staff committee(s) or departmental affairs

Disruptive Conduct

- Unprofessional Conduct Includes:
 - Conduct or behavior that causes a hostile or offensive work environment
 - Behaviors that engender a hostile or offensive work environment (including offensive comments, jokes, innuendos, etc.)
 - Sexual Harassment
 - Criminal Conduct
 - Could result in a hostile work environment
- Could be a single incident or a series of incidents

Disruptive Conduct

- Every disruptive physician situation is unique
- The goal of peer review for unprofessional and disruptive conduct is to:
 - (1) Bring the physician into compliance, or
 - (2) Determine that the physician is unable or unwilling to act in a professional manner

Strategies to Handle Disruptive Conduct

Strategies in addressing disruptive conduct:
how do you handle disruptive physicians?

Strategies to Handle Disruptive Conduct

General Principles

- Address the problem sooner rather than later
- Document efforts to correct the problematic behavior
- Increase pressure on the physician – makes compliance more likely and builds a record (e.g., progressive discipline)
- The doctor will either fix the problem or be removed
- Strong leadership is crucial

Strategies to Handle Disruptive Conduct

What should you do when disruptive or unprofessional conduct is reported?

Strategies to Handle Disruptive Conduct

Specific Actions to Take When Disruptive Conduct Is Reported

- Find out what happened
- Meet with the complainant
 - Make sure the individual feels heard
 - Thank them for providing the information
 - Remind them that this matter is peer review protected
 - Ask them to report any retaliation
- Are there witnesses?
- Meet with the physician – there are two sides to every story

Strategies to Handle Disruptive Conduct

Key Considerations:

- Can the behavior be substantiated?
- Is there a history or pattern of this behavior by the physician?
- Note – is the physician complaining about tangential issues?

Strategies to Handle Disruptive Conduct

Possible Peer Review Actions

- Collegial Intervention
- Letter of Reprimand/Education/Correction
- CME
- FPPE
- Formal Investigation
- Performance Improvement Plan
- Behavior Contract
- Required Anger Management Course
- Conditional Reappointment
- Suspension
- Termination

Strategies to Handle Disruptive Conduct

- Be creative
- Hold the physician accountable
- Try to identify why the disruptive conduct occurs
- Progressive discipline
 - If the prior action was unsuccessful, consider additional or alternative action
 - How many times should the hospital have to correct the conduct?

Strategies to Handle Disruptive Conduct

- Anger Management Courses
 - Require a specific course (or require approval prior to registration)
 - Deadline to register and provide notice of registration
 - Physician pays for the course
 - Provide all necessary releases
 - Deadline to attend
 - Requirement to attend and complete any additional training recommended by anger management program
 - Requirement to provide certificate of attendance and completion
- Performance Improvement Plan
- Practice agreement
 - How does the Agreement address additional reported incidents?

Health Care Quality Improvement Act (HCQIA)

■ History-

- During the 1970s and 1980s, rising number of medical malpractice suits
- Contributing factors:
 - Ability of physicians to relocate to other states without disclosure of past medical malpractice payments or adverse actions
 - Physicians were reluctant to engage in peer review activities and increase overall legal liability [malpractice insurance premiums were skyrocketing]
- The Health Care Quality Improvement Act of 1986 (“HCQIA”) was enacted:
 - To create a national tracking system of physicians with a history of medical malpractice payments or adverse actions National Practitioner Data Bank (“NPDB”)
 - To provide immunity from civil money damages to encourage physician involvement in peer review
 - In response to *Patrick v. Burget. et al.*

HCQIA

HCQIA provides immunity from civil liability –

A professional review body, members or staff of the body, persons under contract with the body and persons who assist the body are immune from liability of damages so long as they provide due process to a ***physician*** in a professional review action as set forth in 42 U.S.C. §11112(a)

42 U.S.C. §11111(a)(1)

Note: This immunity does **not** extend to civil rights actions and may be lost if a person/entity (a) knowingly provides false information; or (b) fails to comply with reporting requirements of HCQIA [only if HHS publishes name in Federal Register].

Requirements for Immunity –

A professional review action must be taken:

- (1) in the reasonable belief that the action was in furtherance of quality health care
- (2) after a reasonable effort to obtain the facts of the matter
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances [may be met by safe harbor]; and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)

42 U.S.C. §11112(a)

HCQIA

A health care entity is deemed to have met the adequate notice and hearing requirement of HCQIA if:

- Practitioner is given notice of proposed action.

If hearing is requested:

- Practitioner is given notice of hearing.
- Practitioner is provided a fair hearing.

42 U.S.C. §11112(b)

Notice of Proposed Action—

The physician must be given written notice stating:

- an adverse action has been proposed [MEC's recommendation]
- the reasons/basis for the proposed action [include chart numbers]
- the physician has the right to request a hearing [within 30 days]
 AND if the physician does not request a hearing, right to hearing is waived
- the physician's rights at the hearing

42 U.S.C. §11112(b)(1).

PRACTICE TIP:

The physician should also be provided a copy of Fair Hearing Plan.

HCQIA

HCQIA Addresses Actions Related To Competence Or Professional Conduct Of A Physician That Adversely Affect Or Could Adversely Affect The Health And Welfare Of A Patient

Leal v. Sec'y, U.S. Dept of Health & Human Servs., 620 F.3d 1280 (11th Cir. 2010)

- Hospital Suspends Physician For 60 Days Based On Behavioral Concerns And Reported Suspension To NPDB
- Hearing Completed
- Dr. Leal Sued To Have The Report Removed

Leal v. U.S. DHHS

According To The Hospital, Dr. Leal Became So Angry He:

- 1. Broke A Telephone**
- 2. Shattered The Glass On A Copy Machine**
- 3. Shoved A Cart Into The Doors Of The OR Suite So Hard It Damaged Them**
- 4. Threw Jelly Beans Down The Hallway In The Surgical Suite**
- 5. Flung A Medical Chart To The Ground**

According To Dr. Leal's Affidavits, He:

- 1. Accidentally Broke A Telephone When He Tripped On Its Cord**
- 2. Closed The Lid Of A Copy Machine With "Some Force" And The Glass Cracked**
- 3. Move A Cart That Was Blocking The Doors Of The Operating Suite**
- 4. Ate Jelly Beans, Some Of Which Fell To The Floor When He Tried To Throw Away The Undesirable Flavors**
- 5. When He Was Handed A Chart, Some Of The Loose Papers Fell To The Floor**

Leal v. U.S. DHHS

The Court said:

“In other words, this urological surgeon, who earns his living wielding a razor-sharp scalpel on some of the most delicate parts of the body, does not have a bad temper – he is just clumsy”

Leal v. U.S. DHHS

- Dr. Leal argued that his suspension was not reportable because “he was not suspended for conduct which affects or could affect adversely the health or welfare of a patient or patients.”

Leal v. U.S. DHHS

The Court said:

“The fact that no patients were hit by pieces of the broken telephone, or by the shattered copy machine, or by the careening metal cart, or by the flying jelly beans, or by the airborne medical chart, is not dispositive.”



Leal v. U.S. DHHS

- “The hospital was required to report its disciplinary action to the Data Bank, even though its halls were not littered with injured patients.”
- “...**Disruptive and abusive behavior by a physician, even if not resulting in actual or imminent harm to a patient, poses a serious threat to patient health and welfare**. A physician must work collaboratively with other members of a medical staff in order to provide quality care to patients.”

Strategies

- Document *every* collegial discussion and intervention or a pattern may never emerge
- Escalate the actions taken against the provider if the conduct continues
- Providers that “get away with it” do not change their behavior
- Be affirmative in addressing retaliation
- Are you prepared to enforce the remedy?

“

Thank you!

”

Remaining Medical Staff Webinars

- **Part Four: Friday, March 26th**

Lessons Learned During the Pandemic and other Disasters

Polsinelli PC provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we obtain for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

© 2020 Polsinelli® is a registered trademark of Polsinelli PC. Polsinelli LLP in California. Polsinelli PC (Inc.) in Florida.

[polsinelli.com](https://www.polsinelli.com)