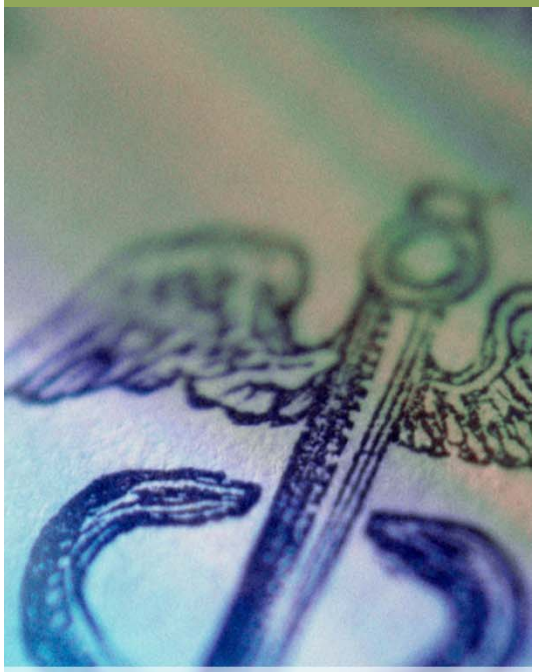

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Impact of Recent Revisions to Medicare Conditions of Participation

Dealing with Disruptive, Impaired or Aging Practitioners

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Medicare CoPs – Impact on Medical Staff

Governing Body

- The Board of Directors is permitted to oversee and control each hospital in a multi-hospital system
  - But need to consult state law to see if separate boards are required
- CMS initially proposed but backed down on a requirement that each Board have at least one physician representative

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Medicare CoPs – Impact on Medical Staff
(cont'd)

- In a single Board system, hospital must directly consult with individuals responsible for the organized medical staff, or designee, of each hospital within the system
  - The number of consultations is flexible but should be based on relevant factors such as scope and complexity of services offered, patient populations served, identified patient safety and quality of care issues and timely responses to issues raised by medical staff

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Medicare CoPs – Impact on Medical Staff
(cont'd)

Medical Staff

- Except where hospitals in the same multi-hospital system operate under the same CCN number, each hospital must have it own independent medical staff and set of bylaws
- The medical staff must be composed of physicians (as defined under state law) and may include other categories of non-physicians (i.e., APNs, PAs) if determined as eligible and approved by the Board

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Medicare CoPs – Impact on Medical Staff
(cont'd)

- CMS views this as best model for overseeing delivery of patient care and improving quality
  - This is not a requirement
  - If not granted membership, they can be granted clinical privileges
- Podiatrists can be a medical staff leader if state law permits membership on the medical staff

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Medicare CoPs – Impact on Medical Staff (cont'd)

Food and Dietetic Services

- In the past, only physicians (and sometimes APNs and PAs) were permitted to prescribe/order a patient's diet
- If permitted under state law, "qualified dietitians" can now prescribe diets
- Dietitians must be processed in accordance with the bylaws, rules and regs and can, but are not required to be, of the medical staff

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Medicare CoPs – Impact on Medical Staff (cont'd)

Outpatient Services

- Can be ordered by all practitioners on the medical staff who are privileged to write such orders and non-medical staff members if they are
  - Responsible for the care of the patient
  - Licensed in the state where he or she provides care to the patient
  - Is acting within their scope of practice under state law, and
  - Is authorized by policies adopted by the medical staff and approved by the board to order these services

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Medicare CoPs – Impact on Medical Staff (cont'd)

Medical Record Services

- Previous requirement was that all orders must be signed by the ordering practitioner. CMS granted an exception until January 1, 2012, allowing another practitioner responsible for the patient's care to authenticate orders
- Verbal orders had to be authenticated within 48 hours unless state had a more restrictive standard
- Exception is now permanent and the 48 hour requirement has been removed but orders must be dated and timed promptly. If not authenticated by the ordering practitioner, authenticating practitioner must be acting in accordance with state law and applicable bylaws, rules, regs and policies

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What is Disruptive/Impaired Behavior?

- Joint Commission now refers to such conduct as:

  " Behavior that intimidates others and affects morale or staff turnover undermines a culture of safety and can be harmful to patient care. (Rationale for LD.03.01.01)."

- LD.03.01.01, EP 4

  " Leaders develop a code of conduct that defines acceptable behavior and behaviors that undermine a culture of safety"

- AMA distinguishes between

  " Inappropriate behavior" defined as "conduct that is unwarranted and is reasonably interpreted to be demeaning or offensive and "disruptive behavior" which is prohibited and defined as "any abusive conduct including sexual and other forms of harassment, or other forms of verbal or non-verbal conduct that harms or intimidates others to the extent that quality of care or patient safety could be compromised."

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What is Disruptive/Impaired Behavior? (cont'd)

- Examples include, but are not limited to:
  - Verbal abuse including swearing, yelling, threats, intimidating language whether oral or written
  - Sexual harassment, inappropriate or unwelcomed physical contact
  - Spreading rumors and disclosing confidential information to the detriment of others
  - Repeated failures to abide by required procedures and policies and cooperative behavior
  - Passive/aggressive conduct
  - Throwing instruments, charts and other physical items

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Main Impediments to Addressing Unprofessional Behavior

- Insufficient training to address behavior
- No clear definition, policies or procedures for reporting, collecting and reviewing incidents
- Conflicting procedures for Code of Conduct, Wellness Committee, disruptive behavior and disciplinary action
- Little appreciation of the adverse impact that these behaviors have on morale, employee turnover and patient safety

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Main Impediments to Addressing Unprofessional Behavior (cont'd)

- If we ignore the problem it will go away
- Everyone has bad days
- No one wants to take responsibility
- Fear of repercussions
- Inconsistent enforcement of standards

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Components of Successful Policies

- Leadership must come from the top. While Board and management support is important, strong physician leaders are needed to motivate physician buy-in and in order to develop a positive and collaborative culture of patient safety
- Clean definitions and descriptions must be identified so as to give appropriate guidance of what is unacceptable conduct
- Definitions need to be incorporated into a Code of Conduct/Disruptive Behavior Policy/Medical Staff Bylaws

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Components of Successful Policies (Cont'd)

- Policy should include the following procedures:
  - A set form for collecting objective facts regarding the incidence/occurrence including day, time, location, nature of the occurrence, witnesses, statements heard and/or actions observed and reactions from patients, employees or others
  - A point person(s) must be identified as the individual responsible for immediately reviewing the report in order to recommend or determine next steps

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Components of Successful Policies (cont'd)

- If a determination is made that no investigation will be triggered, then reasons to support this decision should be documented and decision reviewed by a higher authority, i.e. Chief of Staff, CMOVPMA
- Any investigation should be objective and conducted under confidentiality protections under state and/or federal law

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Components of Successful Policies (Cont'd)

- If reviewer(s) has a business or personal conflict of interest, they should recuse themselves
- Information, interview, documents, etc. should be collected and made a part of the confidential file
- A meeting with the individual should be set up. Refusal to meet can be grounds for remedial action
- Information should be shared in advance out of fairness to physician. Names of parties to be withheld at this time unless prior permission obtained

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Components of Successful Policies (Cont'd)

- Emphasis should be on remedial and rehabilitative efforts and not on disciplinary action except in the most extreme circumstances. Levels include:
  - One on one informal decision for a single incident
  - A repeat event which suggests a possible pattern of unacceptable behavior should trigger a second meeting which stresses the importance of the physician being made more aware of both the impact of this conduct and the ramifications of repeated behavior

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Components of Successful Policies (cont'd)

- If the pattern continues, the basic message is that one more violation will result in disciplinary action. A meeting before the MEC may be in order
- Disciplinary action imposed

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A Legal Perspective

Legal issues to be Addressed

- Compliance with Joint Commission and Bylaw Standards
- State Reporting Obligations
- National Practitioner Data Bank Reporting Obligations
- Negligent Credentialing/Malpractice Issues
- HR Employment Issue Impact
- Peer Review/Confidentiality Issues
- After Care Obligations and Considerations
- Responding to Third Party Inquiries

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Joint Commission and Bylaw Standards

- Must determine health status of applicants and existing members of the Medical Staff their ability to physically perform requested privileges and members must attest to same (MS.06.01.05, EPs 2 and 6)
  - Must make inquiry as part of appointment/reappointment process.
  - Bylaws should contain provisions that accomplish the following:
    - Burden of producing any and all information regarding history of disruptive/impaired behavior is on physician.
    - Failure to disclose requested information from whatever source shall result in withdrawal of application from consideration.
    - If information not discovered until after appointment/reappointment has been completed, physician can be terminated – Data Bank reporting implications.

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Joint Commission and Bylaw Standards (cont'd)

- Ongoing obligation to monitor physician conduct and behavior.
- Definition of "professional behavior" and "disruptive behavior" tied to adopted Code of Conduct and/or Disruptive Behavior Policy needs to be included in Bylaws or cross referenced to Policies.
- Physicians should be obligated to disclose any impairment or actions taken at another hospital regarding impaired or disruptive behavior.
- All disruptive behavior needs to be identified and reported via incident report or other method and assessed with direct involvement by and communication with the physician and persons reporting the event.

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Joint Commission and Bylaw Standards (cont'd)

- Any "reasonable suspicion" of impairment also must be reported to Department Chair, CMO, VPMA, President of Medical Staff and CEO.
- Failure of physician to cooperate in review or to submit to assessment/evaluation/fitness for duty review may result in disciplinary action.
- Bylaws should make clear that overall goal of any disruptive behavior/impaired physician policy is to work collaboratively with the physician in order to identify source of issues and to develop a plan to help the physician achieve compliance with standards and policies, in order to remain on Medical Staff.

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Joint Commission and Bylaw Standards (cont'd)

- Corrective action should be the last option considered after other remedial measures have failed unless action needs to be taken immediately to protect patients, employees and the general public.

- Joint Commission accredited hospitals must have adopted a Disruptive Behavior Policy by January, 2009 for all hospital personnel – not just physicians.
  - Issues and Complications:
    - Some hospitals have adopted a Code of Conduct applicable to physicians, a Disruptive Behavior Policy applicable to all, a Physician Wellness Committee, an HR Policy applicable to employed physicians as well as a standard for recommending corrective action.

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Joint Commission and Bylaw Standards (cont'd)

- A review of these different policies often times reveals conflicting definitions of what is described as "unprofessional" or "disruptive behavior" or "impaired conduct".
- The result can be confusion about what pathway to follow and possible challenge by physician if corrective action is taken in lieu of progressive discipline set forth in Code of Conduct or Disruptive Behavior Policy.
- Policies need to be reviewed and possibly consolidated and behavior which triggers application of resulting policies or Physician Wellness Committee involvement needs to be made uniform.

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Joint Commission and Bylaw Standards
(cont'd)

- All affected individuals should be treated in same manner irrespective of whether they are independent or employed – easier said than done.
- Application of different behavior standards and consequences standards may result in legal challenge from physicians/employees as well as different standards of patient care if independent physicians are given more latitude than employed physicians – corporate negligence issues if harm to patients results from inaction.

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Data Bank and State Reporting Requirements

- Remedial measures taken with respect to disruptive/impaired behavior are not reportable to Data Bank and usually not to the state unless:
  - Action involves involuntary termination, suspension or reduction of privileges resignation while under investigation or in lieu of reportable corrective action, or a mandatory consultation requiring prior approval and
  - Conduct has or may have an adverse impact on patients.
- Leaves of absence, voluntary reduction of temporary privileges, monitoring, proctoring, mandatory consultations not requiring prior approval are not reportable.

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Data Bank and State Reporting Requirements (cont'd)

- A physician under any of these remedial measures who returns with the ability to exercise full privileges is not reportable even if determined to be impaired.
- If, however, privileges are terminated or reduced or suspended after the leave or because physician refused to cooperate or participate or did not comply with remedial action plan, decisions are reportable to Data Bank.
  - Must decide if physician does or does not receive a hearing as part of the after care or well-being if terminated plan.

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Data Bank and State Reporting Requirements (cont'd)

- If no hearing, but is reported, hospital and medical staff cannot access HCQIA immunity protections provisions.
- A better alternative would be to provide at least some form of hearing. Scope could be limited. More likely than not physician may simply resign.

- Must check state laws on reportability.
  - In Illinois, any determination that impairment exists must be reported even if physician successfully participates in a plan and privileges are maintained or restored.
  - This difference on how a state versus the Data Bank handles reporting can sometimes complicate effort to get the physician to willingly participate in a plan.

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Negligent Credentialing/Malpractice Issues

- Hospital has the legal duty to make sure that physician is currently competent to exercise each of the clinical privileges given to him or her. If the hospital and medical staff knew or should have known that physician's behavior or conduct, whether disruptive or impaired, presented a risk to patients and no appropriate remedial measures were taken, a hospital can be held independently liable in the event that a patient is injured as a result of physician's conduct.
  - Disruptive behavior can cause break down in communication, can interfere with timely delivery of appropriate care and can cause some care givers to treat the patients of the disruptive physician differently. Injuries resulting from such conduct can expose hospital to corporate negligence claim.
  - As per studies of Professor Gerald Hickson, disruptive physicians can give rise to higher incidence of malpractice.

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Confidentiality Issues

- Need to make sure that all necessary steps are taken to maximize protection of disruptive/impaired physician minutes, reports, analyses, etc. under state peer review confidentiality statutes/PSO protections.
- Patient Safety Organization ("PSO") complications:
  - If a hospital is participating in a PSO under the Patient Safety Act and is collecting peer review information, including disruptive behavior/impaired physician materials as part of its Patient Safety Evaluation System, such information is strictly privileged and confidential and not subject to discovery or admissibility in state and/or federal proceedings.

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Confidentiality Issues (cont'd)

- Once reported to a PSO, it cannot be used for disciplinary purposes against the physician meaning it cannot be relied on if seeking to terminate or suspend the physician for all or some of his or her privileges.
  - There is an exception which would allow hospital to remove information before it is reported to PSO so that is could be used for disciplinary purposes but this action could under mine "just culture" goal of trying to convince physician to acknowledge rather than deny behavioral problems.
- Must remember that if protected under state and/or PSO confidentiality and privilege protections, hospital cannot introduce information to assert a defense in corporate negligence or other liability action (Frigo v. Silver Cross Hospital).

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HR Employment Issues

- Need to compare “disruptive behavior” and “impaired physician” standards as applied to employed physicians and other hospital employees to those applied to independent medical staff members.
- It is fairly common to see employed physicians held to a higher or different standard then independent physicians.
- Process for dealing with disruptive behavior of employed physician also can be different and remedial measures can be imposed with less process and terminations imposed more quickly.

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HR Employment Issues (cont'd)

- Although these disparate and conflicting standards may be legally enforceable under contract law but can result in claim that two standards of care or conduct are permitted. If lesser standard applied to independents, who otherwise might have been disciplined or terminated if employed, a patient who is impaired by a disruptive/impaired independent physician would have stronger grounds to bring corporate negligence or similar theory against hospital.
- Terminated employed physicians seldom get same hearing rights as independents but also are rarely reported even though hospital is required to do so under Data Bank requirements.

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HR Employment Issues (cont'd)

- Failure to report gives rise to possible liability claims depending on how hospital responds to third party requests regarding physician's disruptive behavior/impairment.
- If physician is reported but without first receiving a hearing, then hospital cannot seek HCQIA protections.

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After Care Issues

- Physicians whose disruptive behavior, whether the result of some form of impairment or not, oftentimes are required to participate in some type of educational or rehab program as a condition of maintaining privileges.
- Terms of program can be imposed by the program itself, i.e., Hazelden or Illinois Health Professionals Program, and/or the hospital through its Physician Wellness Committee.

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After Care Issues (cont'd)

- It is imperative that the hospital monitor compliance with all elements of the program or Well-Being Agreement.
- Continued membership and privileges should be generally made contingent on continued compliance with the program. Should probably also consider monitoring, or proctoring and/or concurrent review of cases to make sure there are no new or continuing problems as well as to enforce strict internal incident reporting requirements about behavior.

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After Care Issues (cont'd)

- If violation of plan does not trigger removal from staff then need to document why not and what additional remedial measures will be imposed to effectuate compliance.
- Termination/suspension for violation of program would be reportable to Data Bank and probably to the state.
- Must also decide if violation will result in automatic termination with or without a hearing for the reasons previously given with respect to HCQIA protections.

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Responses to Third Party Inquiries

- At some point in time, hospital is going to receive a third party inquiry about the physician as part of another appointment, reappointment or employment decision by another facility.
- Hospital needs to decide how it is going to respond, if at. The circumstances might dictate different responses, i.e., physician resigns before disruptive or impaired behavior is confirmed; physician resigns in middle of investigation; physician resigns after findings confirmed; physician terminated for failure to cooperate or to comply with after care plan; physician is successfully complying with program but is seeking appointment/reappointment elsewhere.

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Responses to Third Party Inquiries

- There is no duty to respond to any third party inquiry Kadlec Medical Center v. Lakeview Anesthesia Associates (527 F.2d 412 (5th Cir. 2008)) (Circuit Court of Appeals overturned District Court decision that such a duty existed in light of knowledge of hospital and group that employed physician was impaired on Demoral because Louisiana law did not impose such a duty).

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Responses to Third Party Inquiries (cont'd)

- Although no duty to respond, if one is provided, hospital cannot purposefully nor negligently misrepresent the circumstances of physician's status or mislead the third party (See attached advisory letter).
- Steps to consider if responding
  - Make sure that physician signs separate waiver of liability form – this is standard practice.

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Responses to Third Party Inquiries (cont'd)

- Consider having physician sign absolute waiver form.
  - Use of such form was commented on favorably in recent 7th Circuit opinion. See Botvinick v. Rush University Medical Center (574 F.3d 414 (7th Cir. 2009)).
  - Even if absolute waiver is viewed as unenforceable, should be able to rely on existing state peer review immunities.

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Responses to Third Party Inquiries (cont'd)

- Hospital should argue that any response to a third party inquiry is a privileged peer review communication and therefore if sued by the physician, response will be deemed inadmissible. See Soni v. Elmhurst Memorial Hospital
- Additional argument to utilize is that most hospitals also have an immunity clause in Medical Staff Bylaws for peer review decisions and communications which applies to this situation.

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