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Challenges in Navigating Disability Discrimination and Privacy Laws in Addressing Physician Health

*Federation of State Physician Health Programs 2019 Annual Education Conference
The Worthington Renaissance Hotel, Fort Worth, TX
April 25, 2019*

Procopio, Cory, Hargreaves & Savitch, LLP

Learning Objectives

- Correctly and efficiently assess the legal implications of an impaired practitioner on the Medical Staff
- Appropriately determine potential accommodations to satisfy ADA requirements while ensuring continued patient safety
- Place effective screening procedures to pro-actively monitor practitioner for potential impairment

Dr. Jones

- Dr. Jones is a well respected and very productive sixty-three year old surgeon. On two occasions, two months apart, he is reported to have difficulty completing surgeries at Forrest Medical Center.
- In the second surgery, he is assisted to the ground by OR Staff during the surgery because of complaints of fatigue and dizziness. The assistant surgeon completes the case.
- Dr. Jones takes a leave of absence from his medical group and provides a letter to the Forrest Hospital Medical Staff that he is enrolled in a recovery program. He tells his medical group that he will provide the results of all future laboratory tests to them.

Dr. Jones (cont.)

- The events of the surgery are reported to the hospital through the quality reporting system. The Medical Executive Committee sends a letter to Dr. Jones asking him to authorize access to his prior medical records regarding any treatment he received for the incidents in question and any condition bearing upon his ability to safely practice.
- Dr. Jones retains an attorney who writes the MEC and advises that Dr. Jones will provide reports from the physician that treated him for the events in the OR, but that his prior medical records are confidential and will not be provided.

The Impaired Practitioner

The Dilemma: Privacy v. Quality of Care

- When is an entity charged with the responsibility of ensuring quality of care entitled to:
 - Gain access to health information regarding physical or mental conditions that may be related to the ability of the physician to practice
 - Restrict the ability of a physician suffering from a physical or mental disability to practice

Impaired Physician Policies

- *Impaired* – Unable to practice medicine with reasonable skill and safety to patients because of a physical or mental illness, including deterioration through natural causes or loss of motor skill, or excessive use or abuse of drugs, including alcohol

Impaired Physician Reporting: American Medical Association

- AMA Opinion 9.031 - Reporting Impaired, Incompetent, or Unethical Colleagues
 - Physicians have an ethical obligation to report impaired, incompetent, and/or unethical colleagues in accordance with the legal requirements in each state.
 - The AMA believes privacy and confidentiality of a physician's health and treatment history must be paramount in the relationships between PHPs and ill physicians, and other licensed health care professionals to allow those in need of help to come forward without fear of punishment, disciplinary action, embarrassment, or professional isolation.
 - Confidentiality enhances the opportunity for recovery, is an incentive to participate in early intervention.

Challenges to Identifying and Addressing Physician Impairment

- Fear of consequences of reporting/referral
 - Applies to both self-referrals and reporting by others
- Lack of awareness of how disability discrimination and privacy laws apply
- Lack of policies and procedures to guide process of addressing practitioner impairment

The Multiple Layers of Physician Oversight

- Licensing Boards
- Regulatory Agencies
- Hospitals/Medical Staffs
- Medical Groups
- Health Plans

Impaired Physician Policies

- Every healthcare facility should have a policy for acting upon concerns that a practitioner is impaired
 - To assure patient safety by providing guidance on how to identify, report, and treat impaired practitioners
 - To provide assistance and rehabilitation to aid impaired practitioners
 - To provide practitioners with information and education regarding potential issues surrounding impairment

Impaired Physician Reporting

- Physician willingness to self-report or report colleagues is highly variable
 - DesRoches, *et al.* – 2009
 - 64% of surveyed physicians agreed with the professional commitment to report physicians who are significantly impaired or otherwise incompetent to practice.
 - 17% had direct personal knowledge of a physician colleague who was incompetent to practice medicine in their hospital, group, or practice.
 - 67% reported this colleague to the relevant authority
 - Campbell, *et al.* –
 - 45 percent of those with direct personal knowledge of a physician in their hospital group or practice who was impaired or incompetent did not always report that physician.

Impaired Physician Reporting (cont.)

- State Laws
 - Some states contain some variation of mandate to report impaired colleague, often referring to the state statute setting forth grounds for discipline
 - Arizona:
 - Any person may, and a doctor of medicine, the Arizona medical association, a component county society of that association and any health care institution shall, report to the board any information that appears to show that a doctor of medicine is or may be medically incompetent, is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine.

**Does HIPAA Impact My Ability to Get
Records From a Potentially Impaired
Practitioner?**

HIPAA & Privacy

- General prohibition on the disclosure of Protected Health Information (“PHI”)
 - Exception: Treatment, Payment, Health Care Operations - 45 CFR § 164.506
 - (1) A covered entity may use or disclose protected health information for its own treatment, payment, or health care operations. . . .
 - (4) A covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is:
 - (i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or
 - (ii) For the purpose of health care fraud and abuse detection or compliance.

HIPAA & Privacy (cont.)

- 45 CFR § 501 Definition of Health Care Operations:
 - **Health care operations means** any of the following activities of the covered entity to the extent that the activities are related to covered functions:
 - (2) **Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance**, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, **or credentialing activities**

Privacy and Confidentiality Protections Can be Waived

- Bylaws and/or policies should have a provision regarding practitioner obligation to provide authorization and release medical records in the context of health issues giving rise to patient safety and quality of care concerns
 - *Inform appropriate leadership when he/she obtains credible information to suggest a practitioner may have engaged in unprofessional or unethical conduct or may have a health condition that poses a significant risk to the well-being or care of patients*
 - *Continuously meet the qualifications for and perform the responsibilities of membership as set forth in these Bylaws. A member may be required to demonstrate continuing satisfaction of any of the requirements of these Bylaws upon the reasonable request of the MSEC.*
 - *Supply requested information and appear for interviews with regard to his/her membership or Privileges.*
- Application process should require practitioner to agree to authorize release of medical records in the same context

What Does the Law Say About Impairment?

The Americans With Disabilities Act

Americans with Disabilities Act (“ADA”)

- **Title I**
 - Prohibits employers from discriminatorily terminating an otherwise qualified individual due to a disability
 - Must make “reasonable accommodations” unless would cause an “undue hardship” to employer
 - Must engage in interactive process with employee to find ways to reasonably accommodate

Americans with Disabilities Act (“ADA”)

- Title II
 - Prohibits discrimination by state governments regulating entry into and membership in licensed professions.
 - “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits, services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
 - State medical boards have a greater obligation to protect the public from harm than other licensing agencies, e.g., Bar Associations

Americans with Disabilities Act (“ADA”)

- **Title III**

- Prohibits discrimination on the basis of disability with respect to public accommodations
- No employment relationship requirement
- Title III of the Act prohibits places of “public accommodation” from discriminating against any individual on the basis of disability “in the full enjoyment of [its] goods, services, facilities, privileges, advantages or accommodations.”
- Courts usually rule that physicians are not employees in cases involving claims of discrimination based on Medical Staff membership where the physicians are not employed by the healthcare entity
- Usually ADA applies to non-employed Medical Staff members through Title 3

Disability Defined

- A person is an individual with a disability under the ADA when he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of a substantially limiting impairment; or (3) is regarded (treated by an employer) as having a substantially limiting impairment.
 - ADA mandates reasonable accommodations for a qualified individual with a disability, if the individual can perform all of the essential functions of his or her job

Disability Defined (cont.)

- *Kirbens v. Wyoming State Board of Medicine*
 - A physician diagnosed with bipolar affective disorder, narcissistic personality disorder claimed his misconduct resulted from his disabilities. Challenged license revocation by Wyoming Medical Board.
 - The Supreme Court of Wyoming held that a physician who poses a risk to the health or safety of patients was not a “qualified individual” with a disability within the meaning of the ADA. The Board therefore was not required to make an accommodation under the ADA by either accepting his resignation, or by placing him in a state-sponsored rehabilitation program (such as those authorized by state law for “doctors with an alcohol or drug dependence issue.”)

Is Alcohol Abuse A Disability?

- It depends.
 - Alcoholism is recognized as an impairment under the ADA
 - But the courts continue to struggle in finding a definitive answer to whether alcoholism substantially limits a major life activity that may qualify as a disability under the ADA
 - In order to show that an alcoholic is substantially limited in a major life activity, he/she must establish that he/she (1) is unable to perform one or more major life activities that the average person in the general population can perform or (2) is significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
 - In determining whether an individual is substantially limited in a major life activity, the court considers the following factors: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or expected long-term impact, of or resulting from the impairment.

Is Substance Abuse A Disability?

- Current Users
 - Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of an "individual with a disability" under the ADA when an employer takes action on the basis of their current use
- Individuals With History of Illegal Drug Use
 - It depends. Casual drug use is not a disability under the ADA. Only individuals who are addicted to drugs, have a history of addiction, or who are regarded as being addicted have an impairment under the law.
 - In order for an individual's drug addiction to be considered a disability under the ADA, it would have to pose a substantial limitation on one or more major life activities. In addition, the individual could not currently be using illegal drugs

ADA Limitations on Disability-Related Inquiries

- Job related and consistent with business necessity
- Generally, a Medical Staff can request an examination and documentation from a member regarding a disability so long as it is **reasonably related to job functions and based on reliable information that clinical performance and/or safety may be impaired.**

The ADA and Medical Staff Applications

- The ADA prohibits employers from asking questions that are likely to reveal the existence of a disability before making a job offer. Employers are allowed to ask these questions after extending a job offer but before the employee begins work.
- Does the ADA prohibition against asking for personal health issues or asking about alcohol and illegal drug use apply in the Medical Staff context?
 - Some organizations have advised Medical Staffs not to ask these questions until after a conditional offer of Medical Staff membership is made
 - However, it is still unclear if Title 1 of the ADA applies, and if it does not apply, Medical Staffs are not restricted from asking questions about an applicant's health or potential disability

The ADA and Medical Staff Applications (cont.)

- Joint Commission M.S. 06.01.05
 - 2. The Joint Commission requires that the hospital, based on recommendations by the organized medical staff and approval by the governing board, establishes a criteria that determines a practitioner's ability to provide patient care, treatment, and services within the scope of the privilege requested, including:
 - » Evidence of physical ability to perform the requested privilege
 - 6. Applicant must also submit a statement that no health problems exist that could affect his or her ability to perform the privileges requested

Reasonable Accommodation

- The ADA requires that qualified individuals are provided a reasonable accommodation, unless to do so would cause undue hardship
- Accommodation is any change in the environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities
- Examples:
 - Making existing facilities accessible
 - Part-time or modified work schedules
 - Providing qualified readers or interpreters
 - Reassignment to a vacant position

Direct Threat

- Modifications are not required if doing so would pose a “direct threat to the health and safety of others”
 - Cannot be eliminated or reduced by a reasonable accommodation
- Question of whether practitioner poses a direct threat must be based on individualized assessment of employee's ability to safely perform job duties
 - *Haas v. Wyoming Valley Health Care System* (465 F. Supp. 2d 429 (M.D. Pa. 2006))

Undue Hardship

- "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.
- Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.
- An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

Creating an Interactive Process To Address An Impaired Practitioner

So You've Identified an Impairment

- If screening uncovers an impairment ADA requires:
 1. Interactive process for addressing impairments
 2. Reasonable accommodations
- Healthcare facility must determine if practitioner can safely practice with reasonable accommodations
- Goal is to be supportive and respectful and to suggest resources to assist the practitioner

Mary Morgan, M.D.

- Dr. Morgan is hospitalist. She suffers from arthritis in her hands. She cannot write or type her progress notes/orders and has been directing her physician assistant or nurse practitioner to transcribe all of her notes and orders. Recently the notes and orders have not been transcribed accurately and the Dr. Morgan has received a number of occurrence reports. Dr. Morgan's PA tells her about a new technology that allows physicians to dictate the notes and orders orally.
- On April 9, 2019, Dr. Morgan was invited to meet with the Medical Staff regarding the occurrence reports. At the meeting, she requests this technology from the Hospital.

What Kinds of Reasonable Accommodations Are Available to Practitioners?

- This Depends on the Context
 - Example: Hospital Medical Staffs/Medical Groups
 - Leave of Absence
 - Co-management arrangements
 - Reduction in call coverage
 - Change in Membership category
 - Offer more administrative tasks and reduction in clinical practice
 - Others?

Is a Reasonable Accommodation by a Peer Review Body Reportable?

- Reasonable accommodation vs. surrender/restriction of privileges
 - Are reasonable accommodations a restriction or surrender of privileges?
 - If yes, is the restriction reportable?
 - Restriction based on “physician’s professional competence or professional conduct”?
 - If the practitioner voluntarily relinquishes his/her privileges or medical staff membership, is that reportable?
 - Was the practitioner under “investigation”?

Judith Taylor, M.D.

- Example: Judith Taylor, M.D., a well respected OB physician at Forrest Hospital is unable to complete a delivery. The on call OB takes over the case and safely delivers the baby. There was no harm to either patient. The incident was reported to the Medical Staff, which inquired as to what caused the incident. Dr. Taylor explained the incident was related to back pain and exhaustion. A similar incident happened the following week. This time Dr. Taylor supplied the Medical Staff with a letter from Dr. Pierce (a orthopedic surgeon) stating Dr. Taylor was currently undergoing treatment, including potential surgery to correct her back pain. Following the two incidents and a conversation with one of her physician group partners, Dr. Taylor decided it would be best if she took a leave of absence to treat her back pain. She now requests reinstatement to the Medical Staff.

Sam Sawyer, M.D.

- Dr. Sawyer is cardiothoracic surgeon. A year ago Dr. Sawyer was in a serious skiing accident that resulted in a severe back injury. Over the course of treatment, Dr. Sawyer became addicted to opioids and can no longer sleep without the use of Ambien. On the morning of March 5, 2019, Dr. Sawyer began a surgery. Dr. Sawyer's assisting surgeon noted that Dr. Sawyer seemed off but could not initially find reason for concern. Dr. Sawyer began to lose balance and was not suturing correctly. Dr. Sawyer's assisting physician became concerned and had Dr. Sawyer removed from the OR and completed the surgery on her own. The patient suffered no adverse harm or outcome.
- The incident was reported to the hospital Medical Staff who asked Dr. Sawyer about the incident. Dr. Sawyer blamed the incident on lack of sleep, stress, and burnout. Dr. Sawyer had not taken a vacation in over three years and worked long hours.

Adam Scott, P.A.

- Two years ago, PA Scott underwent a painful divorce from his wife. During that time, he began to self-medicate with alcohol. One morning, he was scheduled for a shift in the ED, but was still drunk and tired from his night out the night before. He called in sick to the hospital. The hospital learned that he was unable to make his shift because he was still drunk from the night before. They suspended him and terminated his employment.
- He now applies for a job at your healthcare facility.

Thank you!

Questions?

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