

## Crisis Management for Physician Leaders: What to do When a Good Doctor Goes Bad

by James B. Lynch, J.D.

**D**ealing with a colleague's misconduct is never pleasant. No matter how unpleasant the task, however, the failure to address a problem promptly and appropriately significantly increases the legal, financial and reputational risks to your organization.

As a physician leader, the odds are that you will have to deal with one or more events that expose your organization to potential legal liability. In 2001, more than 4,000 state board actions were taken

that were prejudicial to physicians' licenses.<sup>1</sup>

With the ever-increasing emphasis on quality of care and the ongoing publicity surrounding deaths allegedly resulting from medical mistakes, review of alleged misconduct is likely to become even more intense in the coming months. In addition, patients are increasingly prone to question physician behavior and are less forgiving of adverse events than they were in years past.

Physician leaders play an essential role in protecting the organization and its assets. Although the laws vary from state to state, at a bare minimum physician leaders have a legal duty to their colleagues to exercise appropriate business judgment in any matter involving possible misconduct within the organization.<sup>2</sup> A strong leader, however, will do more to protect the organization than simply exercise a minimal level of business judgment. In this article, we highlight some of the potential

risk areas facing medical practices and offer a checklist to help you deal effectively with problems when they arise.

<sup>1</sup> Federation of State Medical Boards of the United States, Inc., Summary of 2001 Board Actions, April 9, 2002. Available at <http://www.fsmb.org/>

<sup>2</sup> All officers and directors are subject to the business judgment rule, as well as other obligations, such as the duty of loyalty, the duty to avoid conflicts, etc.

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**HERE IS A LAUNDRY LIST OF POTENTIAL PROBLEMS THAT YOU MIGHT NEED TO CONFRONT:**

- A physician is charged with a felony or a misdemeanor.
- Revocation, suspension, restriction, limitation, or other disciplinary action against a physician's medical license in any jurisdiction and/or privileges at any facility.
- Practicing medicine without a license, e.g., engaging in telemedicine in circumstances where the patient is a resident of a state in which the physician is not licensed.
- Violation of a rule promulgated by the Board of Medicine or an order of the Board of Medicine, a state or federal law which relates to the practice of medicine, or a state or federal narcotics or controlled substance law.
- Engaging in any unethical conduct, such as conduct likely to deceive, defraud, or harm the public, or demonstrating a willful or careless disregard for the health, welfare or safety of a patient or staff.
- Engaging in a medical practice which is professionally incompetent, in that it may create unnecessary danger to any patient's life, health, or safety.
- Performance of any medical or surgical procedure without having obtained appropriate informed consent or, if applicable, the permission of the group or an institution.
- Failure to supervise a physician's assistant or failure to supervise a physician under any agreement with the Board of Medicine or corrective action plan of the group.
- Adjudication as mentally incompetent or mentally ill, or as a chemically dependent person, a person dangerous to the public, a sexually dangerous person, or a person who has a sexual psychopathic personality by a court of competent jurisdiction.
- Inability to practice medicine with reasonable skill and safety by reason of illness, drunkenness, use of drugs, narcotics, chemicals or any other type of material or as a result of any mental or physical condition, including deterioration through the aging process or loss of motor skills.
- Becoming addicted or habituated to a drug or intoxicant.
- Revealing a privileged communication from or relating to a patient except when otherwise required or permitted by law.
- Improper management of medical records, including failure to maintain adequate medical records or to comply with a patient's request or to furnish a medical record or report required by law.
- Exhibiting chronic tardiness in the completion of records such that either the care of a patient might be compromised or the group might be exposed to an increased risk of liability.
- Falsification or alteration of medical records.
- Fee splitting, improper referrals and financial conflicts of interest, including: (1) paying, offering to pay, receiving, or agreeing to receive, a commission, rebate, or remuneration, directly or indirectly, primarily for the referral of

patients or the prescription of drugs or devices; (2) dividing fees with another physician or a professional corporation, unless the division is in proportion to the services provided and the responsibility assumed by each professional and the physician has disclosed the terms of the division; (3) referring a patient to any health care provider in which the referring physician has a significant financial interest unless the physician has disclosed the physician's own financial interest; and (4) dispensing for profit any drug or device, unless the physician has disclosed the physician's own profit interest.

- Engaging in abusive or fraudulent billing practices, including violations of the federal Medicare and Medicaid laws or state medical assistance laws.
- Prescribing a drug or device for other than medically accepted therapeutic or experimental or investigative purposes authorized by a state or federal agency or referring a patient to any health care provider for services or tests not medically indicated at the time of referral.
- Misconduct in connection with treating a peer or a colleague, especially in connection with prescriptions for controlled substances.
- Engaging in conduct with a patient and/or staff which is sexual or may reasonably be interpreted by the patient or staff member as sexual, or in any verbal behavior which is seductive or sexually demeaning to a patient or to staff.
- Engaging in conduct which might reasonably be interpreted to create a hostile environment in the workplace.
- Engaging in behavior that is disruptive or contrary to the atmosphere required for the collegial practice of medicine.
- Providing false or misleading information that is directly related to the care of a patient unless done for an accepted therapeutic purpose such as the administration of a placebo.
- Making derogatory or potentially defamatory comments about (1) another health care provider or group practice, (2) a hospital, nursing home, other health care facility or (3) a third party payor.
- Being disciplined by any national, state or local medical society.
- Failure to meaningfully participate in required internal training on matters including, but not limited to, billing and coding, HIPAA compliance, quality improvement and patient safety.
- Failure to maintain board certification if required under any managed care contract or to maintain hospital privileges.
- Failure to respond appropriately while on call or failure to respond to pages.
- Failure to comply with any corrective action plan.
- Failure to comply with terms of the organizations' partnership or shareholder agreement and/or employment agreements.
- Encouraging or participating in a group boycott or other anticompetitive conduct.
- Misappropriation or misuse of any of the trade secrets or confidential business information of the organization.
- Misconduct while "moonlighting" or acting as an expert witness.



## WHAT CAN YOU DO EVEN BEFORE A PROBLEM ARISES?

The list of potential problems is daunting, and no doubt readers can think of items that they might add. At the risk of stating the obvious, the best time to think about such potential problems is **before** they arise. Physician leaders should examine existing policies and procedures to determine whether they adequately address this list of potential problems. If your examination exposes gaps in the existing policies and procedures, you should close the gaps now. Consider adopting specific rules prohibiting the misconduct listed above and spelling out the due process procedures that will apply and the potential discipline that might be imposed. It would be wise to work with an experienced health care attorney to ensure that your policies are comprehensive and enforceable under the laws of your state.

It is also important to have an experienced insurance agent or broker review your insurance policies to see if coverage is adequate to protect the organization. All too often, organizations find that their malpractice coverage is sufficient (albeit too expensive!) but that they are not adequately covered for other legal risks that could be equally devastating to the financial health of the organization. Is your organization covered if a physician

is discharged and then files a defamation action or a charge of discrimination? How large is the deductible on the policy? Are the coverage limits appropriate for the size of the organization and its assets?

You should also evaluate the possibility that you might be too insulated from any problem areas in the organization. If staff is reluctant to bring problems (e.g., the physician who is making unwanted sexual advances) to your attention or to the attention of some other responsible person, such as the HR director, the entire organization is at risk. You need to emphasize to everyone—either through a memorandum or a specific office policy—that the reporting of problems is encouraged and is essential to the continued well being of the organization.

You also need to examine your own behavior and that of any other physician leaders. Are you or some other physician leader sending the wrong message through your behavior? After all, it is difficult to expect others to be on their best behavior if they think that the rules are there to be “bent” or do not apply equally to everyone.

Finally, as you think about the potential problems that might arise, give some careful consideration to the existing structure of the organization. If the organization is sufficiently large and complex, rather than placing all of these responsibilities on a physician leader, there should be a risk management committee or some other subcommittee of the board with the specific charge of managing risks. The key is to be clear as to where the buck stops.

## DEALING WITH PROBLEMS WHEN THEY ARISE

One recurring theme is the difficulty of knowing when to intervene. You may be aware of tidbits of information or have been alerted to a potential problem through the grapevine. The information might be quite vague or uncorroborated. When do you have enough information to “connect the dots” and formally start the process? There is no easy answer, but keep in mind that if you fail to act and someone is injured, your failure to have responded to warning signs will be subjected to intense scrutiny. Indeed, you will be second-guessed using 20-20 hindsight, particularly if some serious harm comes to pass.

There are also minefields to navigate in dealing with a valuable contributor who is generally well liked and respected. Inevitably, there is a tendency to cut some physicians a fair amount of slack due to their historic contributions to the organization (e.g., highly profitable practices) or their standing in the community. For example, you might be tempted to gamble that a drinking problem won't adversely impact job performance. Or you may run into pressure from colleagues to go easy on an offender. Keep in mind that if you make exceptions in certain cases, you are gambling with the assets of the organization, and you are sending a message to everyone that rules—or at least some of them—can be broken with little or no consequences. Finally, assuming you do intervene, how do you best ensure that a valuable contributor will improve his


or her behavior and still be left with the impression that he or she was treated fairly? There are no easy answers, but keep in mind that the worst approach is to ignore a problem and hope that it will go away on its own.

### A CHECKLIST

Once you have credible indications of a problem, the way that you respond will be crucial in determining the outcome. The following checklist is not ideal for every situation, but it should provide useful guidance:

- ✓ Take immediate steps to address any harm already caused and to prevent further harm. If, for example, there are credible allegations of incompetence, take immediate steps to protect patients of that physician. Don't wait for a second or third patient to be harmed.
- ✓ Alert legal counsel to the situation. Waiting too long to involve counsel can increase the expense and reduce the options available to counsel. In addition, involving counsel may enable the organization to assert the attorney-client privilege as to parts of any investigation.
- ✓ If the event is one that must be reported to the police or some other authority such as the Board of Medical Practice, do so at once. You should be familiar with the reporting requirements in your state and keep

*Emphasize to everyone that reporting problems is encouraged and is essential to the well being of the organization.*



the pertinent statutory provisions in a convenient place for quick reference. If you don't know what must be reported, ask your state board or check with legal counsel. Keep in mind that the failure to report on a timely basis can jeopardize your own license.


- ✓ Review all internal policies and procedures to determine which ones might apply to the event. Unless there is a compelling need to depart from those policies and procedures, be sure that they are faithfully observed by everyone acting on behalf of the organization.
- ✓ Start an internal investigation, taking pains not to compromise any other investigation, such as that of law enforcement personnel. This investigation might be best conducted by or under the direction of legal counsel. Most internal investigations will include interviews of the participants and any witnesses.
- ✓ Ensure that no one alters, destroys or discards evidence. Not only is tampering with evidence itself a criminal act, but it makes it very difficult to defend any civil lawsuit that might be filed, and might be the basis upon which punitive damages are awarded to an injured party.
- ✓ Carefully review all potential insurance coverage and provide any formal notice that is required under the policy or policies. Delay in providing notice may jeopardize your coverage.

- ✓ If there is the possibility of publicity, figure out **before** the reporter calls whether you will comment. If the decision is made to comment, be sure the spokesperson is prepared and that possible responses have been screened by legal counsel and/or a public relations consultant. If the decision is not to comment, have an appropriate reason to offer, such as “we cannot comment due to the privacy rights of the patient” or “we don't comment on pending litigation.”
- ✓ Commence appropriate peer review activities so that the facts can be ascertained and appropriate discipline can be imposed in the event that wrongdoing is established.
- ✓ Maintain appropriate confidentiality throughout the process. Minimize office gossip and involve only those with a need to know.
- ✓ Depending on the nature and extent of the problem, determine whether remedial action is appropriate. If a member of the organization needs help, make sure that he or she gets help.

Throughout the handling of the event, the physician leader needs to demonstrate strong leadership skills. You need to maintain control of the situation, and to deal with the problem directly and fairly. Don't rush to judgment, but don't fail to be decisive.

Be sure that the accused wrongdoer is afforded due process if that is required. If the misconduct breaches a written contract between the physician and the organization, there might not be any

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right to a hearing, and the organization may have the right to impose discipline or even terminate the contract. For example, the loss of an unrestricted license to practice medicine might be grounds for immediate discharge with no right to a hearing. At the other end of the spectrum, depending on the nature of the allegations, some organizations may have a hearing process that allows the accused the right to counsel and to call witnesses and present evidence in defense of the charges. Once again, it is essential to work with counsel throughout the disciplinary process, especially if the physician is an employee who may have certain statutory protections or is a member of a protected class.

Sweeping matters under the rug, or letting a wrongdoer off too lightly, is risky behavior. Look at the event and your response to it from the perspective of an outsider to see if the response passes the “smell test.” If the organization is ever sued, you can be sure plaintiff’s counsel will scrutinize the organization’s history to see if there were prior similar events or any other red flags that might have enabled the organization to prevent the problem that gave rise to the litigation. Juries do not look kindly upon organizations that failed to fix problems or ignored warning signals.

At all times, be mindful of the fact that documents created during the investigation and conversations about the issue will be subject to discovery unless they are protected by a valid privilege, such as the attorney-client privilege or a

peer-review privilege. Everyone involved should take care in what they say and write. Email messages are subject to discovery unless some valid privilege applies, so take care not to vent or otherwise put something in writing that might come back to haunt the organization.


Finally, when the dust has settled, discuss the issues with the Board of Trustees and figure out if this event has exposed any gaps in your policies and procedures. Is there a need for additional training or gentle reminders to the staff?

Being in a position of physician leadership means that you will have to deal with unpleasant situations. Your leadership when problems arise will be a crucial factor in determining both the short term and long term impact on the organization. Careful preparation and a systematic approach to problem solving will go a long way toward protecting the organization and minimizing legal risks.

#### **ABOUT THE AUTHOR**

**Jim Lynch** is a partner in the Health Law Department of Dorsey & Whitney LLP. He may be reached at 612.340.8763 or [lynch.jim@dorseylaw.com](mailto:lynch.jim@dorseylaw.com)

*You need to  
maintain control  
of the situation,  
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Dorsey Health Strategies LLC  
Telephone 612.492.6411  
Facsimile 612.340.2644  
[www.dorseyhealthstrategies.com](http://www.dorseyhealthstrategies.com)  
[dhs@dorseylaw.com](mailto:dhs@dorseylaw.com)

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Dorsey Health Strategies LLC  
Suite 1500  
50 South Sixth Street  
Minneapolis, Minnesota 55402-1498

