

# Medical Ethics & Boundaries Issues



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# MEDICAL ETHICS AND BOUNDARIES ISSUES FOR PHYSICIANS AND OTHER HEALTHCARE PROFESSIONALS

Presented by:



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# Objectives For Today

- Understand the Regulation of Healthcare
- Understand the regulation of Physicians and the practice of Medicine
- Understand the Disciplinary Process

# Objectives (cont.)

- Understand How to Respond to Disciplinary Investigations
- Risk Management and Avoiding Violations
- Develop a Culture of Ethical Practice with An Effective Compliance Plan

# **I. Regulation of Healthcare**

# Regulation of Healthcare overview

- Federal Government



# Regulation of Healthcare overview

- Federal Government
- State Government

# Regulation of Healthcare overview

- Federal Government
- State Government
- Local Government

# Regulation of Healthcare overview

- Federal Government
- State Government
- Local Government
- Third Party Payers

# Federal Government

- **Statutes – SSA, HIPAA, HITECH, ADA, ETC.**
- **Affordable Care Act-** most profound change in regulation of healthcare since original Medicare.

# Federal Government (cont.)

- Power to Tax and Spend-Medicare, Medicaid, Medicare Advantage, TRICARE.
  - Conditions of Participation
  - Conditions of Payment

# Federal Government (cont.)

- **Federal Agencies**
  - DEA, FDA, OCR, OIG, DOJ

# State Government

- Statutes & Rules
  - Medical Practice Act.
  - Facility Licensing.
  - Certificate of Need.

# Local Government

- Ordinances.
  - Business Tax (Occupational License) (refusal to grant)
  - Zoning



# Third Party Payers

- Medicare A, B, C, and D
- Medicaid and Medicaid Managed Care

# Third Party Payers (cont.)

- Various Payment Models Used to Drive Physician Practice
  - Fee for service
  - Prospective payment system
  - Risk sharing HMO
  - Outcomes base: ACO, Medical Home

## **II. Regulation of Physicians & Practice of Medicine**

**Practice of Medicine is primarily regulated by state law through licensure**

# Board of Medicine

- Created by legislature
- **Purpose:** THE PURPOSE OF THE BOARD IS TO PROTECT THE PUBLIC
- Rule-making Authority
- Rules cannot exceed statutory authority

# Board of Medicine (cont.)

- Establish the minimum standards/qualifications for licensure and practice
- Responsible for enforcing compliance with laws, standards and rules
- Declaratory statement- Advisory Opinion

# Board of Medicine (cont.)

- Factors Influencing Board (not in order of importance)
  - Bad press
  - High profile
  - Recurring problem/never event (wrong site surgery)
  - Other government agencies (DEA)
  - Economic issues (protection)

# Standard of Care is statutory in Florida

- The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. Section 766.102, Florida Statutes (2015)



# Standard of Care is statutory in Florida (cont.)

- The Standard of Care is more uniform across jurisdictions due to improved communication.
- The Standard of Care still varies based upon the resourced available to the physician-Advanced procedures are not always available.

# Professional Organizations

- AMA-Code of Medical Ethics
- State Medical Societies- Laws & Rules Courses with our without State Board
- American Board of Medical Specialties
  - Continuing competency (MOC)

# Organized Medical Staff- Peer Review

- Hospital (Accrediting Organization)
- Specialized Facility (Accrediting Organization)
- **CMS deemed status.** The Joint Commission and others that have been approved by CMS as having standards and a survey process that meet or exceed Medicare requirements

# III. Disciplinary Process

# Complaint

- The complaint can originate from anywhere: patient, family, employee, partner, law enforcement, regulatory agency, Medicare, Medicaid, Private Insurance, competitor, facility, NPDB, civil suit, another jurisdiction, impaired practitioner program, **NEWS ARTICLE**

# Complaint (cont.)

- The Board investigates all legally sufficient complaints. (456.073, F.S. other states similar)
  - legally sufficient is very low bar and includes anonymous complaints  
(legally sufficient - contains ultimate facts showing a violation)

# Complaint (cont.)

- most boards will not investigate economic disputes between competitors
- the Board will investigate anything listed as grounds for discipline.
- Board/Department may coach complainants

# Investigation

- Confidential Investigation
  - Notice to Subject generally required but exceptions
  - Board has authority to obtain documents, information
  - Probable Cause Determination - Formal Complaint
  - Subject's right to participate is limited



# Investigation (cont.)

- Subject's right to participate may be very limited
  - no discovery authority or subpoena power

# Investigation (cont.)

- Protecting subject's rights during investigation
  - 5th Amendment Right to Remain Silent
    - (1) some states require the subject to give a statement
    - (2) does not attach to records required to be kept by law
    - (3) does not apply to compelled mental/physical examination

# Investigation (cont.)

- Right to Counsel - get experienced counsel immediately.
- Board's objective - prove the violations - not protecting the subject

# Possible Board Action

- Dismissal
- Citation-available for some compliance violations

# Possible Board Action(cont.)

- Formal Administrative Compliant (may include any of the following)
  - Settlement Agreement
  - Informal Hearing
  - Formal Hearing
  - Surrender License (might avoid costs)
  - (a, b, and c usually require appearance before the Board)

# Possible Board Action(cont.)

- Emergency Suspension (Board must show immediate threat to public-expedited hearing rights)

# Board Action in Detail

- Dismissal - Might still be disclosed to another licensing agency
- Citation - Usually a fine (don't commit same violation again)
- Letter of Guidance (not discipline)

# Board Action in Detail (cont.)

- Board must approve
- Board may ask questions-subject under oath
- Public meeting including press, complainants, peers
- Board may reject settlement (counter proposal)



# Informal Hearing

- All allegations admitted
- Only allowed to present mitigating evidence
- Subject Under Oath
- Public meeting

# Formal Hearing

- Administrative Law Judge
- Subject finally has some ability to obtain documents and information
- Subject may interview/depose witnesses

# Formal Hearing (cont.)

- Burden of Proof
- Special Rules - Hearsay allowed
- 5th Amendment Privilege-if invoked may prevent licensee from introducing evidence at formal hearing

# Formal Hearing (cont.)

- Get experienced counsel
- cooperate with your counsel
- Administrative Law Judge-Final Order  
Authority (not in FL)

# Appearance before Board on Recommended Order

- Exceptions
- Board will rule on exceptions

# Appearance before the Board

- Deference
- Candor
- Professional

# Appearance before the Board

- Concise Relevant Facts
- Proper Attire
- Take responsibility for mistakes
- If appropriate discuss corrective measures

# Board of Medicine Summary

- THE BOARD'S PURPOSE IS TO PROTECT THE PUBLIC
- SHOW THE BOARD YOU ARE CURRENTLY SAFE TO PRACTICE
- SHOW THE BOARD YOUR CORRECTIVE ACTION TO PREVENT RECURRENCE



# **IV. Practice after Board Discipline**

# Probation

- Monitor
- Written Reports
- Continuing Education
- Fines & Costs
- Other restrictions

# Notice to other authorities

- License in another state - know the specific time limits
- Medicare & Other third-party payers

# Notice to other authorities (cont.)

- Renewal Applications
  - Insurance
  - Privileges
  - Carriers

# **V. Risk Management & Avoiding Violations**

# Document

## B. Patient Selection & Management

- family and friends
- litigious individuals
- chaperones

# Scope of Practice

pain management

## D. Adding Ancillary Services

- Questionable Revenue Schemes & Management Agreements
- adding ancillary services without proper training
- laser (fill in the blank)

# Effective Compliance Program

- Policies and Procedures
- Internal Audits
- External audits
- Billing Audits



# Summary

# Who Regulates Healthcare?

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- Third Party Payers

# Physicians are Primarily Regulated by?

- State Law



# What is the purpose/mission of the Board of Medicine?

- Protect the Public

# What should a Physician Remember when appearing before the Board?

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- Prepare

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- Deference
- Demonstrate current ability to practice safely
- Focus on the issues of concern to the Board
- Prepare
- Have experienced legal counsel

# What is the most effective way to protect your practice and license?

- Document



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# What is a good reference to develop an effective compliance program?

- HHS- OIG
  - Guidance for Physician Practices
  - 65 FR 59434 (2000)

# Who is ultimately responsible for a medical practice's compliance?

- The Physician



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