

MEDICAL DEFENSE AND HEALTH LAW

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Litigation involving mental health providers and institutions is often based upon circumstantial evidence only and further complicated by conflicting renditions by the patient versus the provider. This pattern of "he said she said" is addressed with risk management solutions to aid in curbing these ever-growing claims.

Mental Healthcare Challenges in the Hospital Setting: A Risk Management Strategy

ABOUT THE AUTHOR



Constance A. Endelicato is an accomplished trial lawyer with over 30 years of litigation experience in defending professional liability claims. She defends physicians, hospitals, and skilled nursing facilities, as well as legal and accounting professionals, among other service providers. She also defends physicians in Medical Board of California licensure matters and hospital and long-term care employers in wrongful termination and discrimination actions. She is experienced in handling class actions, mass tort litigation, appellate and federal matters. She is admitted to practice in the United States District Court, Central, Northern, and Southern Districts of California. She is an active member of the IADC Medical Defense and Health Law Committee and acts as Vice Chair of Newsletters. She can be reached at cendelicato@wshblaw.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



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Litigation sounding in abuse and assault continues to soar against mental health institutions and skilled nursing facilities and often becomes a game of “he said she said”. The health care provider is placed in a vulnerable position when faced with a violent, combative, or disruptive patient. The provider has a duty to protect the patients from injuring themselves and from injuring others, often requiring forceful or extreme measures, thereby subjecting the provider and the institution to criminal investigation and costly litigation.

Devising preventative measures, defensive tactics in dealing with an altercation, and post-incident strategy in anticipation of patient retaliation, can reduce the risk of injury and increase patient safety. In such industry, where credibility is often the deciding factor, we must strive to reduce the number of incidents, prevent errors in handling these circumstances, and proactively devise a plan to preserve evidence in anticipation of potential litigation.

Hence, devising a Risk Management Plan consisting of preventative measures to reduce the number of incidents of such claims as abuse, assault, battery, and discrimination, by mental health patients during necessary take downs and other interventions is crucial to the cause. Employing defensive tactics, in dealing with an altercation or other aberrant behavior can help prevent errors in handling these circumstances.

If we consider post-incident strategies relative to patient retaliation and if we proactively create a plan to preserve evidence in anticipation of potential litigation, we can reduce the lawsuits.

I. How to Prevent Escalation of Behavior Leading to Physical or Medical Intervention

The key to preventing escalating behavior which leads to the necessity of a physical intervention such as a take down or pharmacological intervention, such as injection of a sedative, is to prevent situations from ever occurring. By employing Risk Management strategies, many incidents can be avoided.

Preventative Measures

1. Prediction and Risk Assessment

Comprehensive risk assessment regarding the history, mental health diagnoses, and potential for risk of harm. One should also know the provocation of triggers in the patient. Knowing the warning signs. One should also consider the demographics of the patient and his or her personal history. There are also clinical variables that should be considered. This is in contrast to situational variables which can also be invaluable.

2. Advance Statement

Many institutions are now using an advance statement which is a questionnaire or similar to a consent form. This document should be introduced to the patient at the outset of his or her admission to set the stage for a

mutual understanding as to what the patient will consent to and the limitations of behavior modification techniques that may be employed. The Advance Statement contains instructions setting the patient's requests for intervention. It contains a simple questionnaire to be used pre and post incident. Preferences are indicated as well as unwanted treatment modalities. Finally, it can contain persons in case of an emergency.

3. Care Plan

The Advance Statement and the information gained from prediction and risk assessment should be incorporated into a care plan for each individual patient. The care plan should include any sensitive information known about the patient including the trigger points and any potential for escalating the unwanted behavior.

4. Policies and Procedures

Each facility must have policies and procedures that incorporate procedure guidelines for intervention. Further, there should be a focus on patient and staff safety. In-service training should be incorporated in the policies for risk assessment.

5. Training

Policies should include training the staff regarding management of disturbed and violent behavior. This would include training on observation of patients and recognizing key signs for behavior that might be escalating and require de-escalation technique. Competency training should also be employed to recognize risk factors.

Training for medications so that the staff has an understanding as to the common psychotropic medications so that they understand the impact if the patient has abruptly stopped his medication without titration. Additionally, the provider must have training as to the appropriate combination of medication that is safe to be used as a sedative in an urgent take down setting. Lastly, it will be important to provide training to staff to know the contraindication of using pharmacological intervention in certain patients who have comorbidities or other medications for which they consume that may have an interaction. Lastly, training is essential as to the diverse population that currently exist. We face racial, cultural, social and spiritual differences between all patient and staff that need to be recognized.

6. Search

Upon admission, a search of the patient and of his or her belongings must be conducted for the safety of the patient and staff. These searches must be conducted routinely as patients can acquire dangerous objects from visitors, from outside pass, and from access to various items within the facility. The consent to conduct a search must be obtained at the beginning of the admission. The facility should employ policies as to confiscation of dangerous or inappropriate paraphernalia. Policies are necessary for the storage and return, or disposal of the items. This also can be discussed and agreed upon at the time the advance statement is written. Lastly, sensitivity and respect for the dignity of the patient during any search

and seizure must be employed. Reasoning and explanation should be used to keep the patient calm and to respect privacy rights.

7. Environment

Providing a designated area or room for reducing arousal has been proven to be successful in reducing irritating behavior. Providing activity rooms for physical activity and personal interaction will help to reduce the stress level among the patients. Providing access to fresh air and daylight has been proven to elevate mood.

II. Employment of Physical or Medical Intervention to Combat Escalated Behavior

Defensive Tactics

Although all of the best training and policies can be helpful in calming patients and lessening the stress and aggression, there certainly are many situations that arise when patient's behavior becomes uncontrollably agitated. There are various techniques that can be employed to lessen the situation and lead to a smooth transition.

1. De-Escalation

De-Escalation is a well-known technique in dealing with mental health patients. It involves listening and acknowledging the grievance of the patient and avoiding any words or behavior that would provoke the agitation or enhance the attitude toward the grievance. The staff must be trained to control his or her own verbal and non-verbal behavior despite the words or attitude displayed by the patient. The staff must

attempt to swiftly remove all other patients from the area when it is sensed that a patient's behavior is escalating. It is also wise to enlist assistance from colleagues for not only their own protection but to assist in restraining the patient and to provide a witness. The staff should use clear brief instructions to the patient in a calm voice. Addressing the patient by their name will show respect and provides a familiarity. One should move toward a safe place and avoid being backed into a corner. The staff should maintain an escape route. Establishing rapport is essential to gain the trust of the patient.

2. Observation

The staff should assess the mental status of each patient at least once per shift. Knowing the history of the patient will keep the staff aware of the risk. Policies and procedures and care planning should include observation.

3. Physical Intervention/Restraint

The take down and restraints should only be used when de-escalation fails. Nevertheless, the staff must continue to utilize de-escalation technique when commencing a take down or using restraints. The physical intervention or restraint must be discontinued at the earliest possible opportunity. It is important to maintain the dignity of the patient, to explain the use of the restraint so that the patient understands his behavior that has caused the need. Once physical intervention is needed or has been used, a physician must be notified. One can

use justifiable force only. When a takedown is being used, one person must protect the head and neck of the patient to ensure that he or she is monitoring the airway and observing the vital signs to ensure patient safety.

4. Seclusion

Placing a patient in seclusion can be a safe mechanism for de-escalating the patient's behavior. However, it may only be employed for the shortest time possible. The status of the patient must be reassessed very two hours and a decision made as to whether the patient requires further seclusion. While in seclusion, the patient must have his or his needs met. A doctor must be available on the premises in the event an urgent medical situation arises. Once a patient requires seclusion or any other physical intervention, the care plan should be updated. Some recommend seclusion with windows to aid in claiming the patient.

5. Pharmacology

When pharmacological intervention is necessary, the staff must be aware of the risks of sedation. He must be able to manage the patient and be aware of the patient's risk factors. Oral medication must be offered to the patient first. If the patient refuses or is otherwise escalating, such that Intravenous medication is necessary, it is preferred that intramuscular injections versus intravenous injections. Once medication is used to sedate the patient, the vital signs need to be monitored.

6. Documentation of Behavior Incidents

Maintaining a behavior flow sheet for each patient that particularly documents the patient's behavior such as self injury, or outbursts or violent behavior, can assist in knowing what to expect from the patient. Updating the care plan is recommended.

III. Prevent/Defend Litigation Following Physical or Medical Intervention

Post-Incident Strategy

Once an incident has taken place, there is a risk that the patient will complain that he or she was injured, discriminated against, bullied, singled out, ridiculed or humiliated. The staff needs to take measures from a risk management perspective to preserve evidence and document the reasons justifying the physical or pharmacological intervention and the safe techniques employed when implementing the safety measures.

1. Documentation

Of course immediately documenting the details of the event leading to the intervention when it is fresh in the mind of the provider is crucial. Timely documentation carries more weight than documentation on a later date particularly after the patient had lodged his complaint.

2. Witnesses

Noting who witnesses to the event are and ensuring that the full names of the staff who happened to see the event occurring

whether or not they assisted will also be helpful. Often these witnesses are considered more unbiased if they did not participate in the altercation.

3. Medical Examination

If it appears as though the patient could have suffered any type of injury while the take down occurred, the patient should be seen by a physician or nurse for an examination to ensure that he has not been injured. Documenting an objective medical examination can prove to be helpful.

4. Preserve Evidence

If there is any evidence that can be maintained to show that the patient was combative, such as a broken glass, torn shirt, etc. this evidence should be maintained by turning it over to risk management. Risk Management should have policies in place for lodging evidence.

5. Video Surveillance

Video surveillance can be helpful so long as it is available and the equipment works. Surveillance cameras that only maintain tape for 12 hours or does not have capability of saving, it is best to remove the cameras as it can hamper litigation as it will look as if the

facility has negative footage that they are fearful to turn over. It should be made known what the purpose of the cameras are.

6. Post-Incident Interview

The patient should be interviewed one he has calmed down. It is best to explain to the patient what had happened to help the patient understand what had happened. It is also helpful to get input as to whether the patient is injured or not.

7. Photographs

Taking photographs of any known injuries or damages can be very helpful as long as HIPAA privacy is protected.

IV. Conclusion

Implementation of risk management strategies can reduce the potential for litigation. We can assist our clients by ensuring that they are taking necessary measures to aid in de-escalation of incidents and post-incident investigation that will minimize the "he said she said" aspect of claims in the mental health arena.

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