When does disruptive behavior cross the line into being a potential legal liability for a health care facility?

DK. Of course, disruptive behavior can run the gamut from disrespect to more serious behavior. First of all, an organization may face legal liability if the disruptive behavior is linked in any way to discrimination on the basis of age, sex, race, disability, or religion. For example, if a person is demeaning or critical of a staff member by saying, “You’re too old to learn this new technique,” you could have an employment claim on your hands.

Second, if there is disruptive behavior that can be viewed as either sexual harassment or contributing to what is called “a hostile work environment,” that could be the basis for a very strong employment liability problem for the facility.

A hostile work environment may arise when an employer maintains an environment where: a) offensive conduct of a sexual nature (eg, uninvited touching or groping, lewd comments, dirty jokes, etc) is either tolerated or encouraged; and b) that conduct makes others feel uncomfortable and unreasonably interferes with an employee’s performance in the workplace. A hostile work environment can also exist on the basis of racial discrimination, sexual orientation discrimination, religious discrimination, disability discrimination, or age discrimination.

For example, an employee could make a claim against an employer for a hostile work environment if the employee is within hearing distance of sexually harassing conduct, even though that employee is not the target of the harassment.

Another way in which disruptive behavior could lead to legal problems is if it occurs in front of patients and families. Consider the example of a physician who criticizes or demeans a nurse in the presence of a patient or family. If there happened to be an adverse outcome from that care, the disruptive behavior could plant a thought in the patient’s or family’s mind: “Maybe something is wrong here. Maybe there was substandard care.” In that situation, the disruptive behavior could contribute to the patient filing a malpractice suit.

Because disruptive behavior can be hard to define, how do you make it clear what is unacceptable?

DK. It is generally recommended that you have very clear language about disruptive behavior in your personnel policies and in the medical staff bylaws. The policy should describe precisely what behavior is unacceptable and detail the consequences of conduct that would violate the policy or bylaw. That language should be presented to new personnel when they join the institution. It also should be discussed during the annual review. That way, you establish and maintain a clear and reasonable expectation of acceptable professional conduct with new personnel.

When an incident occurs, when is it time for a manager to get higher-ups involved?

DK. I think managers are best served by going through appropriate channels to contact their legal department or lawyer relatively early in a situation and without hesitation. That way, managers can get any guidance they may need and know where the facility stands. It also gives the legal department a heads-up that there might be a problem that needs to be addressed. As an attorney, I would rather
hear about a situation in its infancy, while there is some opportunity for intervention and remedy, than later at a fulminate stage. I think most legal departments would feel that way.

**What is important about documenting disruptive behavior?**

DK. I think the manager is the one who should document the behavior. As a manager in this situation, you need to guard against rushing to judgment. You need to be objective: Is this a legitimate complaint? Are we unfairly targeting the person considered disruptive?

You need to document these incidents because you need to discern whether there is a pattern of disruptive behavior. For the most part, a single incident does not make a disruptive person—we all have had our bad days. It is the pattern that is most concerning, and that’s what documentation can help make clear. You need it because people do not have good memories (“Uh, what was it that happened last June to one of the other nurses?”) and because people who’ve been victims may no longer be employed at your facility. If they’re not there anymore, you don’t have their story.

Documentation can also help your direct dealings with the disruptive individual who seemingly doesn’t get it—the person who doesn’t understand that his or her behavior is disruptive and the destructive impact that it has. In this case, you can get out the documentation and say to the person, “Well, on March 13, this happened, on April 20 this happened,” and so on. This kind of data is far more persuasive than poorly substantiated anecdotes of allegedly disruptive conduct.

Finally, if there is a bad patient outcome, documentation may be able to help establish whether there was a link between the outcome and disruptive behavior.

**It’s one thing to have a disruptive behavior policy and another thing for employees to trust it. What makes a policy effective?**

DK. Three things make a policy effective:

- content
- dissemination
- enforcement.

First, for content, your best bet is to have a clear code of conduct stating what is acceptable and unacceptable behavior.

Second, the code of conduct must be widely disseminated to the staff and physicians. This means you present it, you talk about it at staff meetings, and you discuss it at annual reviews and exit interviews. Your staff should know you have a policy, and they should be able to articulate it. They should be able to say how they can report their concerns. This promotes conversation and awareness. Many organizations offer training about behavior expectations.

Third, there must be clear consequences for violations that are spelled out in your policies and procedures and in your medical staff bylaws. If the disruptive behavior provision of your policies or bylaws has been violated, you must act. You’ve talked the talk—now you must walk the walk. When you enforce what’s on the books, it sends a clear and unambiguous message to the staff that the facility is serious about addressing disruptive behavior.