

Editorial

Sham Peer Review: Abuse of Incident Reporting Software

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Over the past few decades, nearly everything in medicine has transitioned from paper to an electronic format. Hospitals have adopted incident reporting software in order to comply with requirements of the Centers for Medicare and Medicaid Services (CMS) and the Joint Commission. Hospitals are required to track adverse events (patient harm) that occur in hospitals and to demonstrate how they are managing events to ensure patient safety.¹

Hospitals are also required to track and analyze adverse events as a condition of participation in Medicare.² Federal regulations require hospitals to develop and utilize a Quality Assessment and Performance Improvement (QAPI) program.² Incident reporting software is also used in behavioral facilities, rehab centers, emergency/urgent care centers, and clinics, as well as in physician practices, especially those owned by hospitals.

To standardize adverse event reporting, the Agency for Healthcare Research and Quality (AHRQ) developed Common Formats, which include a set of event definitions and incident reporting tools.² Hospitals use incident reporting systems in multiple ways, often in modules, to ensure patient safety and quality care. This is an integral part of a hospital's risk-management strategy, and these incident reports are also used in peer review.

According to a Department of Health and Human Services (HHS) Office Of Inspector General (OIG) report, one of the major limitations of incident reporting systems is that "research suggests that incident reporting systems capture only a small percentage [estimated 14%] of adverse events and that some categories of events are underrepresented."²

The information presented below is based on my study and observations. I am not an attorney and do not provide legal advice or opinion. Physicians are encouraged to consult with their attorneys for legal advice and opinion.

Software

There are a variety of incident reporting software systems. Most require a secure login on a hospital computer, while some allow reporting using smartphones or tablets. Some examples include MIDAS+ Incident Reporting System (Medical Information Data Analysis System), Healthcare Safety Zone®, RiskQual, and Purple Button Medical Event Reporting System. Certain data collected is often shared, in de-identified form, with Patient Safety Organizations (PSOs).

Separate forms in the software may be used to report such things as patient experience (complaints, concerns, compliments), patient behavior, general liability (slips and falls), patient privacy, medical care and treatment, surgery and other procedures, medications and chemotherapy issues, lab/specimen issues, diagnostic imaging issues,

obstetrics, infection, and unprofessional behavior.³

Anonymous Complaints Used in Peer Review

According to one software developer, "The key to reporting more events is having a system that allows the staff to report events easily and quickly and not feel that the information is being used punitively."¹ Unfortunately, there are apparently always people who are inclined to abuse the system for purposes other than furthering quality medical care. As incident reporting software enables anonymous reporting, it offers the perfect vehicle for filing false and malicious complaints against physicians or others for the purpose of harming them. Those who work in the hospital, nurses and hospital-employed hospitalists, for example, have easy access to the software. They can even file complaints against someone they dislike while being paid for their time.

Anonymous complaints offer the purported benefit of encouraging people to raise patient safety issues or other patient concerns without fear of retaliation by the person against whom the complaint was filed. But, those with malicious intent quickly figured out that anonymous complaints could be abused so as to harm an intended target.

When anonymous complaints are filed against a physician, using incident reporting software, a hospital will often claim that the complaint is peer-protected. When these anonymous complaints are used in peer review, a hospital may refuse to provide the accused physician with the specifics of the complaint or the name of the person who filed the complaint. It should be noted, however, that filing a complaint typically requires a login on the hospital computer system, and therefore a hospital has the ability to determine who filed the complaint.

When the complaint involves a specific patient or patients, the hospital may even refuse to provide the names of the patients to the accused physician. Without knowing the specifics of the complaint or the names of patients involved, the accused physician has no chance of mounting a meaningful defense of his care. This situation typifies peer review done in bad faith—sham peer review. The Health Care Quality Improvement Act (HCQIA) requires that the physician be provided "adequate notice" of the adverse action or proposed action to be taken against him. This includes "reasons for the proposed action" (42 U.S.C. §11112 (b)(1)(A)(ii)). If there is more than one reason, then the hospital must disclose all the reasons for the adverse action. Failing to disclose all the reasons for an adverse action or proposed action places the accused physician at a severe disadvantage in defending charges brought against him; it is another indicator of sham peer review.

A physician undergoing peer review has a fundamental right of due process to know the specifics of the charges brought against him and to know and be able to cross-examine his accuser at a peer review hearing. HCQIA §11112 (b)(3)(C)(iii) specifies that in a peer review hearing, the physician involved has the right “to call, examine, and cross-examine witnesses.” It is a blatant violation of due process and fundamental fairness when a hospital introduces the existence of a software incident report at a peer review hearing and keeps the specific charges secret from the accused physician and provides no opportunity to cross-examine the accuser. This tactic is reminiscent of the Star Chamber proceedings of Henry VIII, with a predetermined outcome.

‘General-Nature-of-Charges’ Tactic

A medical staff that allows a hospital to hire a law firm to write or amend its medical staff bylaws often ends up with bylaws that impair or violate due-process rights of physicians in peer review. One such provision which is characteristic of sham peer review is the “general-nature-of-charges” tactic.

Some medical staff bylaws specify that the accused physician needs only to be told about the general nature of the charges against him. Typically, everyone at a peer review committee meeting, except for the accused physician, knows exactly what the specific charges are and the names of patient cases involved. This is an ambush tactic. The “general nature of charges” told to the accused physician is subject to editing and “spinning,” often to meet a predetermined objective. When the accused physician appears before a peer review committee to explain, discuss, and rebut the charges made against him, he is not able to offer specifics because specifics were withheld from him. The peer review committee may then document in its meeting minutes that the physician failed to offer specific information to justify his care.

The “general-nature-of-charges” tactic clearly violates due process and fundamental fairness in peer review. The vagueness of unspecified charges also represents a procedure that is arbitrary and capricious.

Can Incident Reporting Software Developers be Held Liable for Damages?

In the current environment, gun manufacturers are at risk for being sued over abuse of their product,⁴ and opioid manufacturers have been sued over abuse of their product.⁵ Abuse of incident reporting software in peer review can ruin or end the careers of good physicians. Did software developers engage in deceptive marketing practices, touting the benefits of anonymous reporting using their software without disclosing the risks of abuse?

Conclusion:

Hospitals are constantly finding new ways to violate due process and fundamental fairness for physicians in peer review. The use of anonymous reporting in incident reporting software is the latest tactic characteristic of sham peer review, and it seems to be spreading nationwide. The question of holding software developers liable for damage to the careers of good physicians requires further consideration.

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REFERENCES

1. Inglesby T. Incident reporting systems, adverse events: reporting and prevention. *Patient Safety & Quality Healthcare*, Oct 13, 2014. Available at: <https://www.psqh.com/analysis/incident-reporting-and-prevention/>. Accessed Aug 3, 2022.
2. Office Of Inspector General. Department of Health and Human Services. Hospital Incident Reporting Systems Do Not Capture Most Patient Harm; January 2012. Available at: <https://oig.hhs.gov/oei/reports/oei-06-09-00091.pdf>. Accessed Aug 3, 2022.
3. Marshfield Clinic. RL Incident Reporting; Mar 21, 2017. Available at: <https://www.marshfieldclinic.org/education/ResidentsAndFellows/Documents/RL6-UserGuide.pdf>. Accessed Aug 3, 2022.
4. Mai-Duc C. California governor Gavin Newsom signs bill allowing citizens to sue gun makers. *Wall St J*, Jul 22, 2022. Available at: <https://www.wsj.com/articles/california-gov-gavin-newsom-to-sign-bill-allowing-citizens-to-sue-gun-makers-11658498491>. Accessed Aug 3, 2022.
5. Llamas M. Opioid lawsuits. *Drug Watch*; Sept 24, 2021. Available at: <https://www.drugwatch.com/opioids/lawsuits/>. Accessed Aug 3, 2022.

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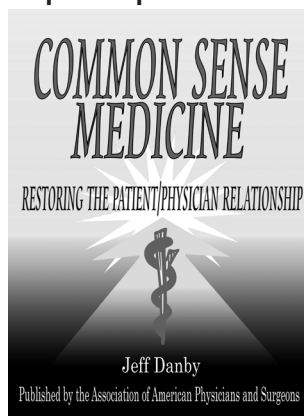
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