

What to Do When Your Partner Starts Acting Erratically?

By: Steven I. Kern, Esq.*

Lately, I've been noticing that one of my partners is routinely coming in late, appears disheveled, and his mind seems to be somewhere else. So far, I haven't had any complaints about patient care, but I'm worried that something's wrong. What should I do and, if I do nothing, what's my liability?

This is a question that is often asked when a partner (or an employee) suddenly seems to be acting erratically. Unfortunately, it is one that may be difficult to answer. Since odd behavior may be attributable to ordinary stressors, such as a domestic dispute, a problem with a child, or a parent dying of cancer, the mere fact that someone is acting oddly doesn't suggest that there is an underlying problem requiring intervention. On the other hand, the odd behavior could be evidence of a more serious problem, including an underlying psychiatric condition, or a substance abuse problem.

Since the practice entity (whether a partnership, Professional Corporation, or LLC) can be sued for the acts of its employees under a legal theory of respondeat superior, or for failure to properly supervise, efforts should be taken to limit any potential liability. Worse, if the practice is operating as a partnership, liability can be joint and several, among all of the partners, even if other partners had nothing to do with the acts of the individual employee. Individual liability may also arise in a situation where an officer of the corporation is aware of the fact that an employee is engaging in aberrant behavior and fails to take steps to eliminate the threat to patient safety. Given these considerations, ignoring aberrant behavior, or any change in behavior, can be risky.

Before deciding on a course of action, be sure that the aberrant behavior you have noticed has not also been noticed by patients. You might want to check with your receptionist or front desk to find out if any patients have made any remarks about the physician's behavior. If so, in addition to a liability issue, you have to worry about the affect of the physician's behavior on the practice's reputation, and more immediate and drastic steps may be necessary, including close supervision of the physician or his immediate suspension from the practice, pending further evaluation.

Assuming that the behavior at issue has not already adversely affected the practice, the best course of action may be to sit down with your partner or employee, tell him or her that there has been a noticeable change in behavior, that you are concerned, and ask if there is anything that you can do. If the answer is no, try prodding a little deeper, and ask what's going on. If the individual is unwilling to discuss it, tell him that you don't wish to pry, but that you expect things to improve and, if they do not, further action may be necessary. Make a note to the file documenting your conversation, the denial, and the promise (assuming one was made) to improve. Also note that the observations of a change in behavior are not related to any patient issues.

Hopefully, this will provide all the impetus necessary and the problem will resolve. Of course, keep a close eye on the individual. If things improve, update your file note to indicate that the previous change in behavior has reversed and there is no continuing issue.

If the behavior does not resolve, it's time for more drastic action. Sit down, again, with the

individual, let him know that things have not improved, and that something must be done to address the problem. Again ask what's going on and what you can do to help. If the individual still refuses to admit that something is wrong, it's now time to take more aggressive action.

If your state has a physician assistance program or an impaired physician program, this can often be a great resource to help evaluate the individual and determine if there is any significant risk to your patients. Since you cannot compel your partner or employee to obtain an evaluation, you may have to threaten the individual with suspension or termination from the practice if he or she will not comply with your demands for an evaluation. Depending upon your corporate documents, you may need to convene a meeting of your shareholders or Board of Directors before compelling this action, or to terminate the employee, especially if he or she is a partner or shareholder.

If the employee is a physician or other licensed health professional, and you believe that patients may be at risk, you may also be obligated to report the individual to the appropriate state licensing board, especially if your suggestion that an evaluation be obtained, is not heeded.

Hopefully, once the evaluation is obtained, either the individual will be cleared or a plan of treatment agreed upon. Assuming that a plan of treatment can be agreed upon, that the employee agrees to having the treatment program provide periodic reports of progress, and that the individual is not found to be a danger, maintaining record of the treatment plan, and progress should provide a good defense in the event of a lawsuit. It is also important to recognize that, regardless of the reason for a person's impairment, so long as that person is effectively dealing with it, in an open and honest fashion, keeping that employee may assure a long term, loyal partner or associate.

****Steven I. Kern is a principal in the healthcare law firm of Kern Augustine Conroy & Schoppmann, P.C., with offices in New Jersey, New York, Pennsylvania and affiliates in Florida and Illinois. He is a nationally recognized expert on Healthcare law, an Editorial Consultant to Medical Economics Magazine, and to ModernMedicine.com, a Member of the Editorial Board of New Jersey Lawyer, and former New Jersey Deputy Attorney General assigned to the State Board of Medical Examiners.**