Berkley Healthcare
a Berkley Company

Risk Mitigation Practices – Sexual Abuse and Misconduct

Prepared for Optima Healthcare Insurance Services

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Situational Analysis and Issue:

The incidence of sexual abuse and misconduct (SAM) is widely thought to be understated for a variety of reasons. Estimated incidence ranges from 9 to 12% of providers, therapists, nurses, optometrists. Reporting by adults is thought to occur at the rate of approximately 1 report per 10 occurrences. In a survey of US physicians, 3-9% of those physicians, mostly men, acknowledge past sexual contact with a patient. (Sindhu et al) The Vanderbilt University Center for Patient and Professional Advocacy identified that of 358,000 documented patient and coworker complaints and concerns, 0.1% suggested a possible sexual boundary violation (Cooper et al). Recently resolved claims values are in the range of $800,000 to $1,200,000 per claimant, resulting in tower losses related to individual providers harming hundreds of abuse survivors. As a result, the healthcare liability insurance industry is finding that this risk cannot be reliably underwritten.

Recommendations, Observations and Berkley Healthcare experiences:

Praesidium, an organization that is dedicated to assisting industries to reduce the risk and to appropriately respond to incidents of SAM, has developed The Praesidium Safety Equation® which Berkley Healthcare believes provides a suitable model for healthcare entities to consider in approaching this risk. We will use this model to frame patient safety/loss control practices suggestions for the healthcare industry. Please note that research regarding the effectiveness of SAM safety and loss control practices is very limited, so we recommend that an individual be designated to monitor the literature for the emergence of scientific evidence and to monitor future case reporting.

The Praesidium Safety Equation®

Policies + Screening & Selection + Training + Monitoring & Supervision + Internal Feedback Systems + Consumer Participation + Responding + Administrative Practices = A SAFE ENVIRONMENT.

1. Policies
    a. Professional boundaries – utilizing professional organization resources on code of conduct and code of ethical behavior. Examples of professional boundary framing:
        i. Prohibition on after-hours and off-site care
        ii. Specific guidelines on personal and sexual relationships (dual relationships) with former patients – reference specialty organizations
        iii. Prohibition on sexual relationships with current patients and parents of patients
        iv. Clarification of professional versus unprofessional boundaries
    b. Professional Conduct – sometimes combined with boundaries policy
        i. Defines acceptable and unacceptable conduct clearly
            1. Clear definitions of sexual harassment,
            2. Clear definitions of sexual misconduct and sexual abuse
        ii. Emphasizes verbal informed consent for procedures and exams, including the occasional need to break down procedures and get consent for stages of the procedure
        iii. Provides guidance on interactions with vulnerable populations such as adults with questionable capacity and minors at various age groups
        iv. Should include a statement of zero tolerance for sexual misconduct (defined term) with respect to patients, employees, visitors, and contractors
        v. Defines appropriate and inappropriate ways of expressing affection with pediatric patients.
    c. Re-evaluate HIPAA privacy and security policies regarding the handling of patient photographs and videos through the lens of reducing the risk of professional boundary violations.
    d. Background check policies should include:
        i. Items in the background report that can or will disqualify an applicant (Praesidium Negligent Hiring)
        ii. Items that will trigger the need for additional information gathering (Praesidium Negligent Hiring)

iii. Who is responsible for reviewing background checks and how the information is considered alongside other screening data.
iv. Clear requirements that all required screening information must be in place prior to extending an offer.

e. Monitoring and supervision policies
    i. Chaperones – protecting the interests of patients and providers or staff. 75-85% of SAM occurs in the absence of chaperones.
        1. Guidelines for various patient age groups: infants and young children, adolescents, adults, and vulnerable adults,
        2. Placement of signage informing patients and parents of the availability of chaperones for any type of exam or procedure.
        3. Opt-out – generally, trained medical chaperones should be provided for any and all sensitive exams/procedures (include the definition of a sensitive exam/procedure).
            a. Handling of patient refusal, including
                i. Allowance for the provider or staff member to politely decline to perform the exam/procedure
                ii. Allowance for a patient emergency condition in which the risk of delay in obtaining a chaperone and consequent delay in the sensitive exam/procedure exceeds the risk of an unchaperoned SAM event
        4. When parents may be chaperones (generally OK for infants and young children, but parents may be present in addition to a medical chaperone for sensitive exams of the older child and at the request of an adolescent).
        5. Outline of training content for chaperones, to include an emphasis on the professional duty to report concerning improper boundary crossings by a healthcare professional (HCP).
            a. Include precursor red flags of behaviors that could constitute grooming behaviors.
        6. Generally, the chaperone should not be a trainee.
        7. Presence of the chaperone including the chaperone's name should be documented in the medical record.
    ii. Utilization of Electronic Medical Record (EMR) functionality
    iii. All staff members are trained to recognize red flags for possible SAM behavior and precursor (grooming) behavior

iv. Culture strengthening so that patient safety responsibilities are valued high enough to exceed the power gradients among staff and providers, with emphasis on the safety culture in outpatient and ambulatory settings.
v. Camps, Day Care, and Special events:
    1. No one-on-one contact in isolation between adults and children.
    2. When one-on-one activities are conducted (such as closed-door counseling), the activity is always conducted in view of other adults
    3. One-on-One sleeping arrangements between adults and children are prohibited
    4. If a need arises for an adult to enter a restroom or shower room occupied by minors, the adult must be accompanied by a second adult
    5. Appropriate attire should be required for all staff and participants.

f. Reporting policies – SAM precursor behaviors tend to escalate in severity over time, so the goal should be to maximize early reporting to minimize harm.
    i. Internal and external reporting responsibilities should be addressed
    ii. We recommend a low threshold for reporting to law enforcement
    iii. Strong statement of non-retaliation
    iv. Allowance for anonymous reporting
    v. Definitions of grooming behaviors that should be identified and reported:
        1. Gift giving, special treatment, sharing of personal information or other acts or expressions meant to gain a patient's trust and eventual acquiescence to subsequent abuse (FSMB)
g. Policies on Response to allegations of abuse and sexual misconduct with clear definitions included in the policy:
    i. Include the necessity of preserving the crime scene and referring the complainant for forensic examination depending on the timing and location of the event and the allegations.
    ii. Removal of the accused until investigation is complete. This may also involve completion of law enforcement and/or licensing board investigations.

2. Screening & Selection – showing respect for the provider/staff member candidate while fulfilling duties to protect patients from harm.
    a. Reference checks from previous employers, residency programs, and sites where privileges have been granted. Quality responses should be expected with follow-up if incomplete.
        i. Minimum of three professional references and at least one personal reference.
            1. "Would you have any concerns about this individual working with children or vulnerable adults and/or having access to financial or personal information?"
            2. "How does the applicant handle stress or conflict"
            3. "Is there anything about the position being sought that gives you pause for this applicant (after explaining the role)?"
    b. Employment Application or Application for Appointment to the professional staff – (may want to use the organization's definition of Sexual Misconduct on the application)
        i. Questions to consider, with follow-up during interview
            1. Have you experienced any disciplinary action from the state medical board (or licensing or certifying authority) or from any healthcare organization with which you were affiliated due to actual or alleged Sexual Misconduct? (discuss during interview) If no, complete attestation
            2. Have you been the subject of investigations by the state medical board, or licensing or certifying authority due to complaints about Sexual Misconduct? Provide details. (discuss during interview) If no, complete attestation.
    c. Attestation – have candidate for appointment or employment sign an attestation statement that the individual has not been the subject of an investigation or disciplinary action relating to Sexual Misconduct. (this statement(s) should be developed with approval by Legal Counsel). Examples:
        i. I have had no misdemeanor/felony criminal charges brought against me.
        ii. No claim of sexual harassment, sexual misconduct, or violation of civil rights has ever been made against me that resulted in receiving any warning, disciplinary action, or civil liability.
        iii. I have not been convicted of a felony or misdemeanor, and am not under investigation with respect to sexual misconduct.

d. Behavioral-based interview questions – designed to assess how a candidate has handled past situations and how they may approach future challenges. Asking candidates to provide specific examples, actions taken, and outcomes (collaborate with physician leaders for sample questions). Possible questions may include:
    i. Tell me about a situation where….. and you handled it well
    ii. Tell me about a time when you or a patient were tempted to stretch or cross the bounds of a professional relationship and how you handled it.
    iii. Give me an example of a time when you had to conform to a policy with which you did not agree.
    iv. Tell me about a time when you made a mistake and wish you'd handled a situation with a colleague/patient differently
    v. Tell me about a time when you were under a lot of pressure at work. What was going on and how did you get through it?
e. Questions about prior allegations/complaints against the candidate:
    i. Patient complaints about SAM or other lesser severity related behaviors
    ii. Complaints about workplace sexual harassment
    iii. History of related/associated issues
        1. Substance abuse
f. Ideally more than one interviewer will meet with the candidate. (Praesidium Negligent Hiring, p. 14)
g. Consider recording the onboarding interview, (must obtain the candidate's permission).
h. Background checks as a condition of hiring/appointment to staff and repeated periodically (every 2-3 years) for all employees, independent contractors, volunteers, including
    i. Types of checks
        1. Criminal
        2. Sex offender registry
        3. Child abuse registry
    ii. Consider that these, although highly recommended, are limited in effectiveness due to juvenile records not being searchable. In addition, 90% of abusers have no prior criminal record, and sex offenders can plea down to a lesser offense.
    iii. Background checks should be performed consistently, regardless of the candidate's or employee's role in the organization. (Praesidium Negligent Hiring)

iv. Seasonal employees or volunteers should be rechecked at the time of rehire, regardless of length of time away from the organization. (Praesidium Negligent Hiring)

i. Screening should consider the frequency and duration of access to patients and the autonomy of the role and should also include:
   i. Volunteers
   ii. Contractors and vendors
   iii. Executives, leaders, and board members.

3. Training – with CME/CE credits, allowing for paid time for completion and offering it even in the absence of regulatory requirements. Employees should be trained annually and emphasize that the training includes interactions with patients, visitors, employees, and contractors.
   a. Based on the most recent assessment of safety culture, training may need to be focused on solutions that improve response and reporting such as lack of communication, respect of peers and pts, and/or a system that holds people accountable for their actions.

   b. Address the reasons that staff/providers exploit patients? List not all-inclusive:
      i. Lacking knowledge of appropriate boundaries
      ii. Situational stress
      iii. Addiction to sex and/or drugs
      iv. Access and privacy
      v. Personality disorders
      vi. Patients' desire for "consensual" sexual relationships with their physicians
         1. Not mentally healthy
         2. Disparities in power, status, and emotional vulnerability rendering consent inapplicable.
   c. Training should be based on policies
      i. Reporting policies should be similar to compliance program, including policy prohibiting retribution for reporting and modalities for reporting
      ii. Modify training content each year to include common policy infractions within the organization as well as those cited in the literature and case reports.
      iii. Reinforce how HIPAA privacy and security policies, especially those governing patient photographs and video, are also a means of reducing the risk of sexual misconduct and violation of professional boundaries.

d. Red flags for grooming or precursor behaviors
e. Professional boundaries
    i. Providers such as physicians and advanced practice professionals should have specific training regarding professional boundaries, specifics regarding expectations for reporting incorporating licensing board requirements/recommendations, and communication before and during sensitive exams regarding the reason for the exam, the process and getting consent in multiple stages of the exam/procedure and incorporating principles of trauma-informed care
    ii. Professional relationships with patients include fiduciary relationships, trust, privacy and confidentiality while recognizing the elements of power and vulnerability which can be abused.
f. Chaperone training - Require training for designated medical chaperones.
    i. Eliminating unnecessary privacy
    ii. Understanding chaperone's obligation to report concerning behavior and training on the process of how to report, modalities available,
    iii. Overcoming barriers to reporting such as:
        1. The provider is considered an excellent clinician
        2. The provider/staff person is a nice person
        3. The provider/staff person is a great team player
        4. The chaperone may tend to second guess what was witnessed
        5. Doubts exist about the credibility of a witness/patient
    iv. Specific training to understand expected parameters and procedures for sensitive exams
    v. Precursor or red flag behaviors
    vi. Part of the chaperone role is to acknowledge that there is a power differential between provider and pt during a sensitive exam and ensure that this "power" does not become a controlling or manipulating force in the relationship.
        1. Content item for training: from the patient's perspective, to question the power means to risk not being treated for disease, cared for when in pain, or cured of a ravaging illness.
    vii. Mandate documentation of chaperone presence in the medical record
g. Investigators' training:

i. Trauma-informed techniques
ii. Law enforcement investigative approaches incorporated into techniques
iii. We have observed that some healthcare organizations use investigators who have experience in sex crimes, for alleged SAM events.

h. Partner with area medical, nursing, and other healthcare career educational institutions to develop model curricula for their trainees regarding awareness of SAM, early identification, professional responsibility to report, etc.

4. Monitoring & Supervision – should include input from Human Resources Department. We believe the risk of employment practices liability to be secondary to the risk of liability related to SAM.
    a. Chaperones for sensitive exams- the policy should be an "opt-out" policy. Children over a determined age (11?) and adults should have a trained employee chaperone. With younger children, the chaperone may be a parent or guardian.
    b. Ongoing identification of coexisting behavioral issues by the provider or staff member such as:
        i. Drug/substance abuse
        ii. Sexual harassment of employees
        iii. Behavioral health concerns such as mood instability
    c. Self-monitoring: Consider a helpline for providers and staff members to utilize if they experience their own desires/compulsions to cross professional boundaries. The helpline should be staffed with professionals who are trained to respond and guide the individual
        i. Coordinate with physician wellness rules and regulations for the medical staff.
    d. Student and trainee considerations in academic and university-affiliated training settings.
        i. Agreements to share information between the healthcare organization and training program should be in place.
    e. Non-patient care settings such as camps, day care, and events that are provided by the healthcare organization: a policy should be in place that includes direct supervision of volunteers or contractors when interacting with children or vulnerable adults. Guidance as to boundaries of physical contact should be defined. (Example: churches do not allow children over age 3 to be held in an adult volunteer's lap or hugged, a minimum of 2 adults must be present in a classroom of children, toileting guidelines are strictly defined).

f. All current employees and volunteers should be required to immediately notify their supervisor and/or HR of any arrests or convictions during employment. (Praesidium Negligent Hiring).

5. Internal Feedback Systems – timely reporting of concerns about sexual misconduct should be strongly encouraged to reduce the number of victims and to stop the possible escalation of grooming behaviors and professional boundary violations. We recommend that senior leadership is visible in promoting and supporting reports in good faith. Elements to consider include:
    a. Just Culture and healthy culture of safety that addresses the power gradient among providers and staff as well as trainee and instructor and the need to report,
    b. Include assessment of psychological safety and remedial measures to reduce fear of reporting,
    c. Elements of TeamSTEPPS training,
    d. Identification of other barriers to reporting and strategies for overcoming the barriers,
    e. Regarding physicians reporting concerns about their peers, consider these reasons physicians are reluctant to report colleagues who appear to have engaged in inappropriate behavior:
        i. The belief that someone else was taking care of the problem,
        ii. Fear of retribution, and
        iii. The belief that nothing would happen as a result of the report.
        iv. In addition, most states do not require physicians to notify the state medical board report of alleged cases of SAM that are revealed to them by a patient. (Sindhu)
    f. The Federation of State Medical Boards states that "reporting to law enforcement must occur for any instance of child abuse, abuse of a minor, and abuse of a dependent adult, regardless of whether the complainant wants reporting to occur".
    g. Evaluation of the effectiveness of policies and training, especially after every SAM allegation or event.
6. Consumer Participation
    a. Patient information/education materials such as those produced by ACOG, the AMA, the state board of medical licensure, or RAINN include documents that set an expectation and inform patients on the process of a patient exam (see references). These should be made available to patients.
    b. Patients should be notified how to access a chaperone for exams that are ordinarily not considered to be sensitive exams as well as specific preferences such as the chaperone's gender.

i. Signage in inpatient, outpatient, and ambulatory patient rooms
ii. Signage on the organization's website

c. How to report any care-related concerns
    i. Child complaint forms made easily available to pediatric patients, especially in behavioral health settings.
    ii. Parents informed how to raise questions about the child's physical appearance or changes in behavior
    iii. Signage in areas accessible to patients such as waiting rooms, in clinic exam rooms, on the website, etc.
d. Adult abuse survivors - reasons related to a low reporting rate
    i. Shame
    ii. Fear of not being believed
    iii. Lack of awareness of the abuse such as a patient under sedation
    iv. Complicity in the violation – such as trading sex for drugs
    v. Confusion as to whether abuse actually occurred and/or worry that filing a complaint will take a personal or professional toll.

7. Responding – in triaging and planning response, consider severity and acuity of the behavioral allegations, roles and relationships of the complainant, respondent, and other affected individuals, and context (Cooper et al).
    a. Develop a policy and flow diagram/checklist for response. One example can be found on pages 11 and 12 of the HIROC checklist at: https://www.hiroc.com/system/files/resource/files/2022-01/Allegations%20of%20Sexual%20Assault%20-%20Incident%20Response%20Toolkit.pdf
    b. Should be coordinated with existing HR processes, medical staff credentialing, fair hearing, and code of conduct policies.
    c. Consider challenges in developing a response process:
        i. The potential to minimize some reports based on characteristics of the complainant or the accused individual.
        ii. Multiple and siloed reporting processes/databases may not allow for identification of prior reports and a determination that additional investigation is not warranted or that interventions to remove the accused from patient care duties are not necessary.
        iii. Conflicting risks within an Enterprise Risk Management perspective: mission and reputational, economic, employment practices liability regulatory, and professional liability.
    d. When applicable, the alleged crime scene should be preserved for law enforcement investigation. Process for referring the complainant for forensic exam should be included in the response plan, as applicable to the allegations.

e. The designated emergency contact or family members of the patient complainant should be notified of the alleged event.
    i. Exception: an adult complainant with capacity who asks that the notification not be made.
f. Respond effectively to "tremors", don't wait for "earthquakes".
g. Treat near misses as free lessons.
h. Do not respond in isolation (this event can't be "just between you and me") and do not assume that each event is an isolated event.

8. Administrative Practices – include key leaders and governing board as a "voice from the top". Best practice is to designate a senior leader champion.
    a. Support a Just Culture and Psychological Safety
        i. The message should be that training, and other strategies that are being put in place are not because of regulatory requirements/(in the absence of those in some cases) but as a reflection of the values of the organization.
    b. Develop a Crisis Intervention strategy
    c. Set clear expectations and model professional conduct with all who may encounter patients and visitors
    d. Designate stakeholders/functional areas to be involved in prevention and response processes
    e. Set clear expectations for internal reporting
        i. Enforce a prohibition of retaliation for good faith reporting
        ii. Emphasize that reporting is a professional and ethical duty, even in the absence of a legal mandate
    f. Notify licensing boards
        i. Some states compel health care organizations to report to a medical licensing or other discipline's licensing board. Other states do not, but we recommend that the best way to prevent recurrence of cases of SAM at additional locations is to voluntarily report to the licensing board.
    g. Assure a low threshold for notification of law enforcement
    h. Assure compliance with other state-mandated reporting
    i. Granting of Privileges – assure a thorough process that is reasonably reliable in detecting a future perpetrator
    j. Approve Response Plan
    k. Designate internal resources to support the prevention and response program including education. In addition,
        i. Consider designating an individual in a coordinator position to oversee the SAM prevention and response program.

        ii. Consider equipping the designee and possibly others, depending on the size of the organization, with in-depth training such as the Certified Praesidium Guardian designation. https://www.praesidiuminc.com/services/academy/guardian/

l. Assure that the rights and responsibilities of the complainant, the accused, and others involved are addressed
    i. Provide for the support of the wellbeing concerns of individuals affected by the reported SAM violation.

m. Assure periodic review of aggregate data and ongoing evaluation of the effectiveness of prevention and response processes. Include various aspects of SAM prevention and response in leadership patient safety rounds.
    i. Prevent and respond to drift from expected compliance with policies

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    - Federation of State Medical Boards: Directory of Physician Assessment and Remedial Education Programs https://www.fsmb.org/siteassets/spex/pdfs/remedprog.pdf
    - Vanderbilt University Medical Center: Online CME Course: Hazardous Affairs – Maintaining Professional Boundaries. https://vumc.cloud-cme.com/default.aspx? https://vumc.cloud-cme.com/default.aspx?EID=22455&P=3000&CaseID=93EID=22455&P=3000&Cas eID=93
    - Georgia Medical Board approved courses: *This list below is not exhaustive; education and training meeting these requirements may include but are not limited to:*
        - Professional Boundaries, Inc. Separate courses for physicians and for other healthcare professionals: (https://pbieducation.com/courses/dr-2/)
        - Georgia Physicians State Board required course 2 AMA PRA Category 1 Credit. www.emedevents.com/online-cme-courses/webcasts/ethical-horizons-navigating-professional-boundaries-and-preventing-sexual-misconduct
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Consumer Participation (Education):

- ACOG "Your First Gynecological Visit" Your First Gynecologic Visit | ACOG Pamphlet for purchase: Your First Gynecologic Visit - Especially for Teens | ACOG
- California State board of medical licensure: education for consumers on Sexual Misconduct: https://www.mbc.ca.gov/Consumers/Sexual-Misconduct.aspx
- California: "Therapy Never Includes Sexual Behavior" https://www.dca.ca.gov/publications/proftherapy.shtml
- Bioethics Research Center (2019) *Sexual Abuse in Healthcare: A Guide for Patients.* Bioethics Research Center at Washington University School of Medicine. Retrieved from: www.preventingsexabuse.org
- American Physical Therapy Association – Pelvic Health (2022). *Physical Therapy Guide to Urinary Incontinence.* Retrieved from: www.aptapelvichealth.org/info/physical-therapy-guide-to-urinary-incontinence
- North Carolina Medical Board. *Undergoing A Physical Examination: Your Rights.* Retrieved from: https://www.ncmedboard.org/resources-information/consumer-resources/smart-patient-toolkit/physical-exam-series
- North Carolina Medical Board. *Know the Signs of Sexual Misconduct.* (This appears to be directed toward patients and healthcare professionals.) Retrieved from: https://www.ncmedboard.org/resources-information/consumer-resources/smart-patient-toolkit/physical-exam-series
- Rape and Incest National Network (RAINN) *Sexual Abuse by Medical Professionals.* Retrieved from: https://rainn.org/articles/sexual-abuse-medical-professionals
- Zero Abuse Project – Body Safety Basics – teaching points for children. Retrieved from: Teachable Moments – Body Safety Basics - Zero Abuse Project
- Zero Abuse Project – Body Safety – Family Safety Night. Retrieved from: Family Safety Night - Zero Abuse Project
- Zero Abuse Project – Recommended readings for parents and caregivers: Recommended Reading - Zero Abuse Project

Responding:

- Cooper, W.O. et al. A proposed approach to allegations of sexual boundary violation in health care. *The Joint Commission Journal on Quality and Patient Safety* 2023;49:671-679. *Includes sample elements of a Huddle Process for Sexual Boundary Reports, sample classification scheme, and sample triage process.*

- Healthcare Insurance Reciprocal of Canada (HIROC). Allegations of Sexual Assault – Incident Response Toolkit For Healthcare Organizations & Providers, November 2021. Retrieved 8/23/2024 from: https://www.hiroc.com/system/files/resource/files/2022-01/Allegations%20of%20Sexual%20Assault%20-%20Incident%20Response%20Toolkit.pdf
- Praesidium Response Tools. Retrieved from: https://www.praesidiuminc.com/respond/
- From the Presentation to Federation of State Medical Boards, April 2022. *Although this is directed to state medical boards, many of the concepts are helpful considerations for responses within healthcare organizations.* https://youtu.be/sLb_PLcxPEs
- Substance Abuse and Mental Health Services Administration: Concept of Trauma and Guidance for a Trauma-Informed Approach (https://store.samhsa.gov/system/files/sma14-4884.pdf)
- Government of Canada, Department of Justice: The Impact of Trauma on Adult Sexual Assault Victims (https://www.justice.gc.ca/eng/rp-pr/jr/trauma/p4.html)

Administrative Practices:

- Praesidium Insights Blog: Administrative Practices. (These are tips applicable across various industries.) Retrieved from: https://www.praesidiuminc.com/category/administrative-practices/
- Refer to general references above.

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