To Blow or Not to Blow: Legal & Ethical Considerations of Whistleblowing
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Disclaimer

This seminar is presented for educational and informational purposes only. Attendees should not consider any aspect of this presentation as legal advice. Specific legal concerns should be addressed by an attorney retained to provide legal services for you.
Current State of Affairs

Health care organizations can have cultures that do not support whistleblower activities and practitioners struggle when confronted by situations at work that they believe need to be reported and corrected. There is a reluctance to report....
OBJECTIVE
Participants will be able to:

Identify potential situations that may require a nurse or other health care practitioner to seek legal and ethical guidance about whether or not to blow the whistle, how to do it, and the legal protections available.
Ethics & Law

What’s the difference?

Provision 3:

“The nurse promotes, advocates for, and protects the rights, health, and safety of the patient.”
Interpretive Statement 3.5 Protection of Patient Health and Safety by Acting on Questionable Practice

Addresses “incompetent, unethical, illegal, or impaired practice or actions that place the rights or best interests of the patient in jeopardy.”
What You Need to Know

- Relevant Federal & State Laws
- Employer’s Policies & Procedures
Code: What You Need to Do

- Express concern to person involved.
- Express concern to responsible manager or administrator or, if indicated, to an appropriate higher authority.
- If it persists, “nurses must report the problem to appropriate external authorities…”
Code: What You Need to Do

External Authorities include:

- Licensing Boards
- Regulatory/Quality Assurance Agencies
- Law Enforcement

"Reporting questionable practice, even when done appropriately, may present substantial risk to the nurse..." but that does not eliminate the need to report.
“All nurses have a responsibility to assist whistleblowers who identify potentially questionable practices that are factually supported in order to reduce the risk of reprisal against the reporting nurse.”

Role of State Nurses Associations
Does the Law require you to blow the whistle?
Overview of Whistleblower Laws

- **Federal**: False Claims Act
- **Federal**: WPA, WPEA, etc.
- **NJ**: False Claims Act
- **NJ**: CEPA, etc.
NJSA 34:19-1 et seq
CEPA

Conscientious Employee Protection Act

Key Terms:

- Employer/Employee
- Public Body
- Supervisor
- Improper Quality of Patient Care
CEPA: Specifically Addresses Improper Quality of Patient Care

“[A]ny practice, procedure, action or failure to act of an employer that is a health care provider” with respect to patient care that violates “any law or any rule, regulation or … any professional code of ethics.”
CEPA: Retaliatory Action

Adverse Employment Action

- Discharge/Termination
- Suspension
- Demotion
- What else?
CEPA: Prohibits Retaliatory Action

- For disclosing or threatening to disclose...
- For providing information to/testifying before any public body...(The law specifically includes licensed/certified HCPs who disclose info about quality of patient care.)
- Objects to/refuses to participate in...
CEPA: Written Notice Required

Must give supervisor written notice and a reasonable opportunity to correct unless it’s an emergency and

- Employee is reasonably certain supervisor knows or
- Employee has reasonable fear of physical harm
CEPA: S/L & Damages

- Statute of Limitations – only 1 year
- Court can impose injunction, reinstatement, full compensation, payment of counsel fees/costs, fines, punitive damages and damages to others such as patients...
CEPA: Dept. of Labor & Workforce Development Notice

- Must be distributed annually.
- Must be posted in English & Spanish.
To Blow or Not to Blow?
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(Adapted from Preparing to Blow the Whistle: A Survival Guide for Nurses from The Journal for Nurse Practitioners 2011)

- What is the problem? How serious is it?
- Gather the information necessary to validate your concerns.
- Consult a knowledgeable attorney, if possible.
- If it’s reportable, determine your reporting options.
- Strategize, prepare yourself for the worst, and execute.
Special Point: Confidentiality Issues

HIPAA Omnibus Final Rule (2013)

Disclosure of PHI to appropriate oversight authorities is permissible if the person releasing PHI “believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public....” 45 CFR 164.502
The Winkler County Case
Recent NJ Cases:

Lippman v. Ethicon

Stark v. South Jersey Transit Authority

Hitesman v. Bridgeway, Inc.


Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq.


Questions/Comments?