



Implementing Patient & Family Engagement: Legal Perspectives

April 9, 2014



Webinar Agenda

- Welcome & Introductions – *Kathy Wallace*
- What are the legal considerations and best practices when incorporating patients and families into patient safety?
 - *Brian C. Betner, Hall Render Killian Heath & Lyman, P.C.*
- Patient and Family Engagement Resource – *Kathy Wallace*
- Plans for 2014 – *Kathy Wallace*
- Wrap-up/ Questions - *Kathy Wallace*

Coalition for Care: P&FE Collaborative

- 7 Part webinar series covering a broad range of P&FE issues and strategies
 - <https://www.ihaconnect.org/Quality-Patient-Safety/Pages/Patient-and-Family-Engagement.aspx>
- National Quality Strategy
- Partnership for Patients
- Patient-Centered Care/Patient Engagement

Why Engage?

“[T]here was an inverse relationship between [patient] participation [in their care] and adverse events . . . [P]atients with high participation were half as likely to have at least one adverse event during the admission.”

Source: Weingart SN et al., Hospitalized patients' participation and its impact on quality of care and patient safety, International Journal for Quality in Health Care 2011; 1-9.

CMS' Measurement of Success

P1— Prior to admission, hospital staff provides and discusses with every patient that has a scheduled admission, allowing questions or comments from the patient or family, using a planning checklist that is similar to CMS's Discharge Planning Checklist

P2—Hospital conducts shift change huddles and does bedside reporting with patients and family members in all feasible cases

P3— Hospital has a dedicated person or functional area that is proactively responsible for patient and family engagement and systematically evaluates patient and family engagement activities

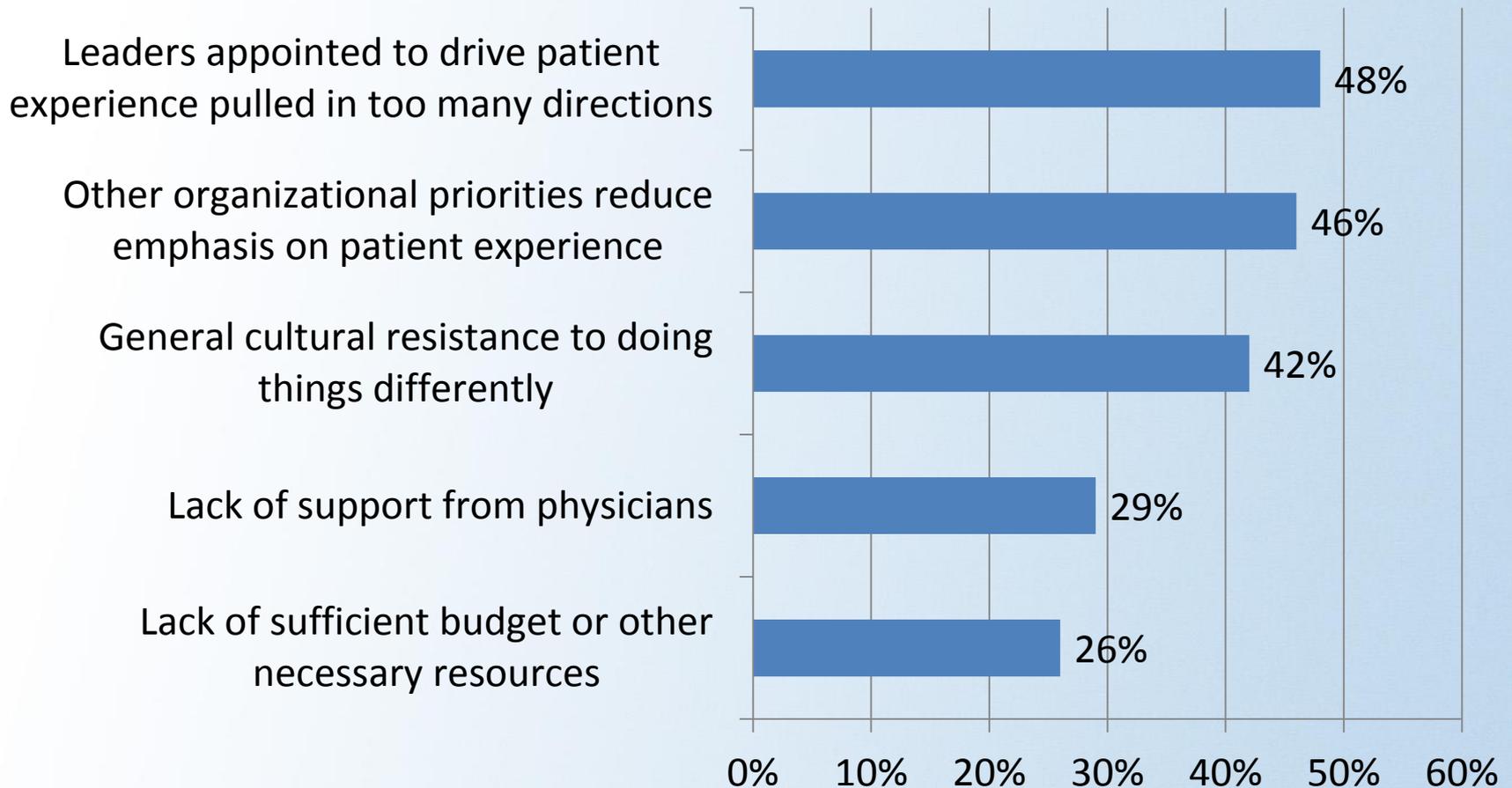
P4—Hospital has an active Patient and Family Engagement Committee OR at least one former patient that serves on a patient safety or quality improvement committee or team

P5—Hospital has at least one or more patient(s) who serve on a governing or leadership board and serves as a patient representative

Culture Eats Strategy for Lunch

- Credentialing, privileging, and quality/peer review projects are typically well intentioned and based on sound principles
- But many of these projects are undermined before they begin because of culture, unwillingness to change or flawed processes/structure
- But, why? → the key is to educate, educate, educate
 - Identify and support quality champion(s) with fundamentally correct processes
 - Engage providers on an “early and often” approach to quality matters and why quality assurance and patient engagement adds value and improves the process (*and supports the bottom line*)
 - Message: the goal is to lift all boats

Common Roadblocks to Patient Experience Improvement



Perceived Barriers

- Resources (including Time)
- Diffusion of Responsibility
- Perception of Value
- Fear/Discomfort
- Operational Considerations (e.g., recruiting advisors)
- ***Risk management concerns and confidentiality***

Significance of Peer Review

- Peer review is required
- Peer review is advantageous
- Peer review confidentiality is extensive (and “comforting”)
- Peer review immunity can be critical
- *Not to mention the substantial business case

Implications of Failed Peer Review

- Failure to achieve the purpose of peer review
 - Increased risk of harm to patients
 - Increased risk of harm to colleagues and other hospital personnel
 - Missed opportunities to rehabilitate
- Financial implications
 - Decreased reimbursement
 - Loss of business
 - Cost of litigation

Implications of Failed Peer Review

- Negligent credentialing risk
- Litigation with third parties
 - Workplace harassment/disruptive providers
 - Compliance/False Claims/Qui Tam
 - U.S. ex rel Rogers v. Azmat, Satilla Health Services CV 507-92, S.D.Ga.
 - Concerns regarding surgeon's high complication rate allegedly ignored
 - Allegedly led to patient harm and wrongful termination of RN complainant

Implications of Failed Peer Review

- Litigation with third parties (cont.)
 - Medical malpractice
 - Incident reports
 - Disclosures creating “admissions”
 - Disclosures defining “standard of care”
 - Negligent failure to disclose/misrepresentation

Implications of Failed Peer Review

- Litigation with subject physician
- Wrongful disclosures leading to damaged professional reputation (defamation)
- Breach of contract
 - Medical Staff Bylaws/peer review policy may be deemed a contract
- Tortious interference with prospective business relationship
- Antitrust allegations

Don't Be Afraid: Patients, Families and Peer Review

Legally speaking, patients and families can be viewed as similar to other external peer review resources while assisting patient safety or quality improvement committee activities

Details Matter: Recognize the Legal Definition of “Peer Review”

- Peer review is defined by state and federal law
- There is a common view that anything quality-oriented is or should be considered “peer review”
- Statutes establish what is and is not peer review
- Courts hold hospitals accountable for compliance with the details

What is "Peer Review" in Indiana?

- Created by Statute – Indiana Code 34-30-15
- Defines:
 - Purpose of peer review
 - Who is a peer reviewer
 - What aspects of peer review are confidential
 - Under what circumstances is immunity available.

Legislative Purpose of Peer Review

Peer review is meant to promote thorough and candid review of medical care, and, in doing so, improve "quality of care"

But not just by anyone...

What is a "Peer Review Committee?"

1. Purpose requirement: A committee that has the responsibility of evaluating:
 - the qualifications of health care providers (credentialing and privileging);
 - patient care rendered by professional health care providers; and/or
 - merits of a complaint against health care providers based on competence or professional conduct

What is a "Peer Review Committee?"

(cont.)

2. Organizational requirement: Committee must be organized by (8 total):

- By Professional Staff of a Hospital
- By Governing Board of a Hospital
- Okay to act on behalf of committee
 - But must be able to establish authority

What is a "Peer Review Committee?"

(cont.)

3. Composition requirement:

- At least 50% of members are:
 - A Governing Board of a Hospital or
 - Individual “Professional Health Care Providers”***

- **Bylaws, resolutions, minutes, policies, etc., are very helpful to establish status as legitimate peer review committee**

Personnel of a Peer Review Committee

"Personnel of a peer review committee", for purposes of IC 34-30-15, means not only members of the committee but also all of the committee's employees, representatives, agents, attorneys, investigators, assistants, clerks, staff, and any other person or organization who serves a peer review committee in any capacity." IC 34-6-2-104

Peer Review Immunity

- Legislature, Congress recognize importance of immunity (qualified, not absolute) HCQIA and Indiana Peer Review Acts
- Indiana:
 - Legitimate function of peer review committee (furtherance of quality of care, etc.)
 - In good faith (w/o malice, reasonable effort to obtain facts, reasonable belief action warranted by facts).
 - Witnesses cannot “knowingly provide false information”
- BUT... counsel must still defend suit, attempt to have defendants dismissed, i.e., *cannot prevent suit from being filed.*

I.C. 34-30-15-15/17

- “ There is no liability on the part of, and no action of any nature shall arise against, the personnel of a peer review committee for any act, statement made in the confines of the committee, or proceeding of the committee made in good faith in regard to evaluation of patient care as that term is defined and limited in IC 34-6-2-44.”
- “ The personnel of a peer review committee shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care as that term is defined and limited in IC 34-6-2-44.”

Evaluation of Patient Care

- “Evaluation of patient care” includes:
 - accuracy of a diagnosis
 - propriety, appropriateness, quality, or necessity of care rendered by professional health care providers; and
 - the reasonableness of the utilization of services, procedures and facilities in the treatment of individual patients

I.C. 16-21-2-6

“ The governing board and the governing board's employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated if the reports or actions are made in good faith and without malice.”

Loss of Immunity

- “In good faith” is presumed, malice must be proven
- Generally defined as without malice, after a reasonable effort to obtain the facts, and in the reasonable belief that the action taken is warranted by the facts known
- Violating state confidentiality requirements!

Confidentiality/Privilege

- Peer Review “proceedings” are confidential
- The communications to, records of, and determinations of a peer review committee are privileged communications and “shall” not be disclosed
- Extends to personnel of the committee and all participants and witnesses

Confidentiality/Privilege

- Communications to Peer Review Committee
 - Written/oral
 - Incident reports***
 - Policies help establish purpose of communication
 - Even conversations made “outside the room” may qualify

Confidentiality/Privilege

- Determinations of Peer Review Committee
 - Should include all conclusions, recommendations, decisions, plans, etc. of a peer review committee related to a particular matter
 - Exception -- does not include “final action taken”

Confidentiality/Privilege

- Records of Peer Review Committee
 - Open to some interpretation
 - “Original Source” documentation

Challenges

- Quality is more an expectation than a goal (becoming condition of payment?)
- Fostering more effective and involved processes for credentialing/re-credentialing/ongoing professional review
- Encouraging meaningful physician participation
- Arrangements for the legitimate sharing of peer review information
 - For appropriate access to, and use of, confidential peer review information

Challenges cont.

- Ensuring compliance with requirements for “legitimate” peer review activities
- Awareness of peer review requirements/responsibilities/implications before engaging in peer review
- Ever-increasing challenges by plaintiffs to the peer review privilege
- Balancing obligations of peer review with increasing pressures/obligations of adverse event reporting and disclosure of unanticipated outcomes

Challenges cont.

- Federal jurisdiction
- Rise in negligent credentialing
- Greater frequency due to medical error reporting and quality monitoring
- Greater frequency due to value-based purchasing shift
- ACOs or ACO-like activities

Best Practices/Practical Take-Aways

- 1) Ensure that all quality assurance/performance improvement activities meet technical requirements for “peer review” in Indiana → there is no safe harbor for good intentions
- 2) Provide explicit flexibility within quality assurance/performance improvement policies for use of internal/external agents (personnel of a peer review committee)
- 3) Ensure all quality assurance/performance improvement activities that are intended to be confidential closely follow established policies/processes
- 4) Consider use of confidentiality statements/agreements
- 5) Use thoughtful “onboarding” of patient/family advisors

Key Resources

- New AHRQ Guide to Patient and Family Engagement in Hospital Quality and Safety
 - *Strategy 1: Working with Patients and Families As Advisors* includes a detailed implementation handbook and 14 tools

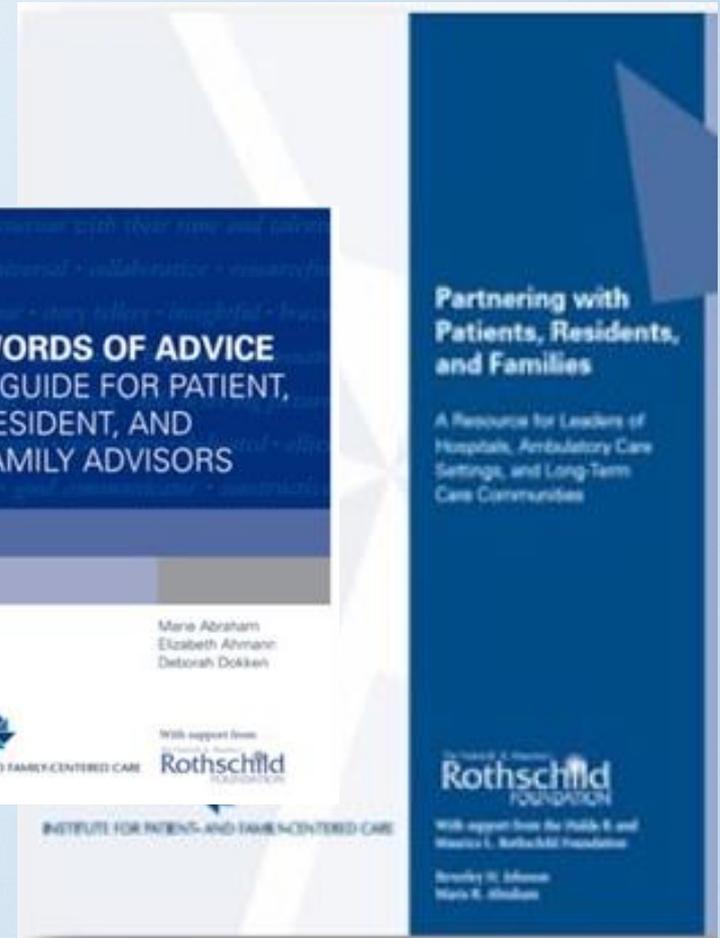
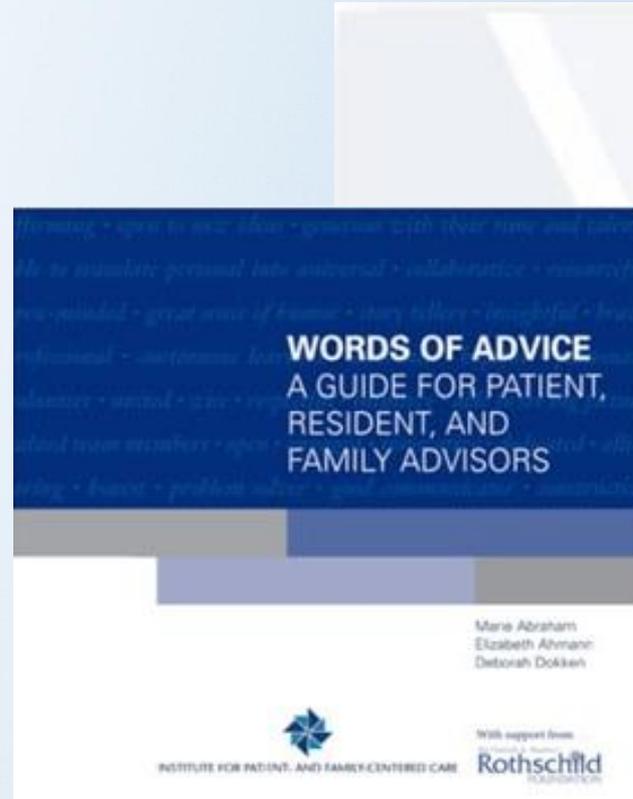
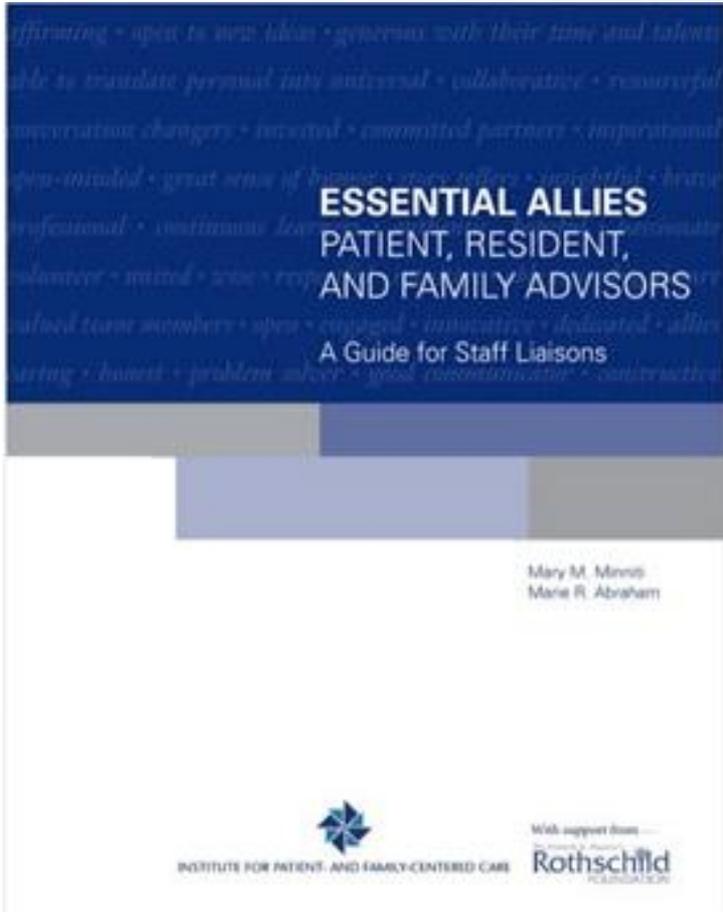
<http://www.ahrq.gov/professionals/systems/hospital/engagingfamilies/patfamilyengageguide/>
- Institute for Healthcare Improvement How-to Guide: Governance Leadership (Get Boards on Board)

<http://www.ihi.org/knowledge/Pages/Tools/HowtoGuideGovernanceLeadership.aspx>



Patient & Family

Engagement Resources





Patient & Family

Engagement Resource Guide

Best Practice Category	PFE Metric Instruction: For each of the following items, indicate if the hospital does this or does not do this. If you do not know, indicate so. <ul style="list-style-type: none"> • Does=1 • Does not=0 • Unknown=u
Point of Care	1. Prior to admission, hospital staff provides and discusses a discharge planning check list with every patient that has a scheduled admission, allowing questions or comments from the patient or family (e.g., the planning checklist may be similar to the CMS Discharge Planning Checklist).
	2. Hospitals conduct both shift change huddles for staff and do bedside reporting with patients and family members in all feasible cases.
Policy & Protocol	3. Hospital has a dedicated person or functional area that is proactively responsible for Patient and Family Engagement and systematically evaluates Patient and Family Engagement activities.
	4. Hospital has an active Patient and Family Engagement Committee (PFEC) OR at least one former patient that serves on a patient safety or quality improvement committee or team.
Governance	5. Hospital has one or more patient(s) who serve on a Governing and/or Leadership Board and serves as a patient representative.



Engagement Resource Guide

4. Hospital has an active Patient and Family Engagement Committee (Patient and Family Engagement) OR at least one former patient that serves on a patient safety or quality improvement committee or team.

- **Committees**
 - [Questions to Ask When Forming a Board Quality Committee](#) — A list of questions, developed by Jim Reinertsen, MD, that is designed to help think through the key decisions involved with forming a Board Quality Committee and formalizing the processes by which the committee will do its work from The Reinertsen Group
 - [Tips for Group Leaders and Facilitators on Involving Patients and Families on Committees and Task Forces](#) — A guide provided by the Institute for Patient- and Family-Centered Care
- **Patient and Family Involvement**
 - Children’s Hospital Colorado: Patient Engagement Case Study (Children’s Hospital Colorado)
 - [The Role of the Patient Advocate: A Consumer Fact Sheet](#) — A fact sheet is designed for patients and describes the role of the patient advocate from the National Patient Safety Foundation [NPSF]
 - [Tips for Patients and Families on Sharing Your Story](#) — A guide provided by the Institute for Patient- and Family-Centered Care
- **Quality and Safety**
 - [Partnering with Patients and Families to Enhance Safety and Quality: A Mini Toolkit](#) — Institute for Patient- and Family-Centered Care [IPFCC])

Plans for 2014

- HRET HEN has established a partnership with the Institute for Patient- and Family-Centered Care (IPFCC) through 2014.
 - Five webinars and eleven office hour coaching calls
 - Newsletter articles and resources
- The first webinar, Engaging and Partnering with Patients and Families is scheduled for April 23rd, 12 – 1p.m. ET.
 - Registration will be upcoming on www.hret-hen.org website.

Evaluation & Follow-up

- Webinar funded by CMS through the *Partnership for Patients*
- CMS reviews results and wants 80% of participants to evaluate educational sessions
- Please complete the simple three question evaluation by April 9, 2014:
<https://www.surveymonkey.com/s/PFEPeerReview>
- Link to evaluation, resource guide, and webinar recording will be distributed to participants within one week

Thank you!