

The legal woes of appraising professional performance

By L.E. and F.A. Rozovsky

Introduction One of the more important aspects of quality assurance is the so-called "Professional Performance Appraisal." Designed to assess the quality of care provided by a nurse/caregiver, the process is seemingly a neutral, objective exercise.

But is it? Can a performance appraisal actually serve as a means for "getting back" at a nursing colleague? Is it really "objective?" Moreover, what are the legal responsibilities of those who complete the professional performance evaluation forms?

Questions such as these are not often addressed from a legal perspective. Nonetheless, it is important to do so in order to make certain that nurses understand their legal rights and responsibilities in such evaluative exercises.

Professional appraisals as a weapon

The operating room nursing staff may disagree with the supervisor. The supervisor may dislike someone on her staff. Friendly discussion does not resolve the problem. Perhaps the problem is too far advanced and any semblance of effective communication has long since ceased to exist. Personal animosities, distrust and anger can all play a part in what may come down to a "them against me" scenario.

One way to vent anger or to redress a perceived wrong is to "get back" at a supervisor or a member of the OR nursing staff through the professional performance appraisal. Few would admit this fact. A particularly negative performance appraisal may raise a few eyebrows in nursing administration. A series of negative evaluations will certainly provoke some action.

For those in nursing administration the seemingly "neutral" performance appraisal eliminates the prospect of biased evaluations. However, the forms and the process of evaluation are not designed to

discern improper motivations on the part of those completing performance appraisals. In the end, the weight attached to professional performance appraisals boils down to a test of credibility. Will nursing administration believe the evaluation reports or the nurse who is the subject of them?

Malice or good faith

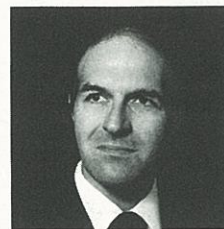
Negative professional performance appraisals are difficult to attack. What can the aggrieved nurse do to right the wrong perpetrated against her by fellow staff members? The answer is little, if anything can be done. The performance appraisal mechanism is based on the belief that staff will complete the forms in good faith. If someone acts with malice to discredit a fellow nurse, little can be done to show that there was a total absence of good faith.

From a legal point of view, the "victim" can

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follow internal appeal mechanisms—if any exist in the health facility. If the nursing staff is unionized, a grievance may be filed. Nonetheless, it remains a difficult task to redress the wrong of performance appraisals completed in the absence of good faith. Nursing careers can be ruined and years of valuable experience in supervisory roles can be given short shrift through an evaluative process ostensibly designed to assure quality patient care.

Legal responsibilities

The legal responsibilities of those completing performance evaluations should not be taken lightly. These evaluations can make or break a career. The same can be said of those whose role in nursing administration can be destroyed through malicious performance appraisals.

If the information contained in the appraisals is untrue, the "victim" may have a cause of action based on defamation. Moreover, if the employer knew or should have known that the information was unreliable but used the appraisals as a basis for firing the nurse, this could serve as valuable evidence in a "wrongful" dismissal lawsuit.

The responsibilities of the person completing the performance appraisals encompass another consideration. Not only do the evaluations afford an opportunity for "getting back" at a colleague, the appraisals allow nurses to "cover up" for the poor professional conduct of friends.

It is very difficult to indicate on a performance appraisal that a friend is not meeting the mark. There may be genuine concern that a negative appraisal may mean a demotion or dismissal. Nonetheless, it is patient care and safety that must be the priority in completing performance appraisals.

Basis for litigation

The failure to fulfill an evaluation properly can be the basis for litigation. If a nurse knew or should have known that a colleague was deficient in her work and the nurse failed to indicate this on the appraisal, the groundwork would be in place for negligence. If it could be proven that as a result of the errant report an incompetent nurse was permitted to carry on and injure a patient, it could be argued that the harm was reasonably foreseeable. This would satisfy the elements of a negligence lawsuit.

The responsibilities are great for those who com-

plete performance appraisals. There is need for professional objectivity with a focus on providing quality patient care. Personal differences and loyalties must be disregarded. Failure to do so can confound the results of professional performance evaluations resulting in harm to patients.

Practical solutions

There are some practical steps that can be followed to avoid the legal pitfalls of professional performance appraisals. What is needed is a system of accountability, education, and verification. The following is a checklist of suggestions for eliminating some of the more serious pitfalls:

1. Evaluation tools should be reviewed carefully to make certain that the forms and questions are indeed as "objective" as possible.
 2. The evaluation tools should be based on a written set of criteria known to all OR nursing staff and supervisory personnel.
 3. The evaluation tools should be designed to support the QA program.
 4. The evaluation process should be examined carefully in view of collective bargaining agreements and union requirements.
 5. A process should be in place for verifying both positive as well as negative appraisals.
 6. If outcome measurements are used, care should be taken to control for confounding variables which might "skew" the results of the appraisals.
 7. A system should be in place for the subject of a negative evaluation to challenge the results.
 8. Staff must understand the legal implications of filing an inappropriate performance appraisal.
 9. The criteria for appraisals should be reviewed periodically and updated as necessary, utilizing the services of legal counsel to make certain that changes are consistent with provincial law.
 10. Administration should develop mechanisms for staff to "vent" disagreements amongst themselves and with supervisory personnel so that professional performance appraisals are not used as weapons of revenge but as important tools for evaluating quality patient care.
- More could be added to this check list. The important point is to develop an action plan that best suits the needs of each facility. Once implemented, the plan should eliminate much of the concern about improper professional performance appraisals.