

## Lessons learned from Winkler County nurses' trial

### *Why privileging errors attracted a national spotlight and what your medical staff can do to avoid a similar situation*

Whether you know it as the case of the West Texas nurses or the Winkler County nurses' trial, chances are you've heard the national news stories about the whistleblowing nurses.

Anne Mitchell, RN, and Vicki Galle, RN, two nurses from West Texas, tried reporting a problem physician's behavior through designated hospital channels. When the hospital allegedly didn't take adequate action, the nurses took the next step and anonymously reported the physician to the Texas Medical Board. It's the type of scenario that could have been played out with any hospital personnel, including MSPs.

When the medical board notified the physician, Rolando Arafiles, MD, of the investigation, Arafiles contacted the local sheriff to file a harassment report. It's noteworthy that the sheriff was a former patient of Arafiles, according to news reports.

The sheriff's investigation led to third-degree felony charges for the nurses in summer 2009. In part, the charges claimed the nurses misused official information when they filed a report with the Texas Medical Board.

Prosecutors eventually dismissed the charges against Galle (the felony indictment on her record will remain), but the trial against Mitchell went ahead. In February, a jury found Mitchell not guilty.

Although the case was filled with many unique factors that set it apart from other cases in which hospital employees have reported a practitioner's inappropriate behavior, it contains valuable lessons for all medical staffs. Here are a few of the noteworthy aspects of the case that contain important lessons.

#### **Practicing outside of the scope of privileges**

One of the charges brought against Arafiles is that he practiced outside the scope of his privileges, including performing a skin graft and suturing a rubber tip to a patient's crushed finger.

The best way medical staffs can avoid practitioners practicing outside the scope of their privileges is to have well-defined privileges, says **Kathy Poppitt, Esq.**, a shareholder at Cox Smith, PC, Attorneys in Austin, TX.

If practitioners practice outside the scope of those well-defined privileges, medical staffs need to take swift and decisive action. "Whenever you're taking any type of peer review or corrective action, you start off with the least stringent action that would be potentially a good fit," says Poppitt. "Unless the facts warrant it, you don't start off with an action as onerous as a summary suspension."

Still, practicing outside the scope of privileges is a serious compliance issue with implications for Joint Commission accreditation and, potentially, department of health violations, says **Robin Locke Nagele**, partner in the health law division at Post & Schell, PC, in Philadelphia.

Luckily for medical staffs, most practitioners do not step outside of their privileging boundaries intentionally. "It's often something that is inadvertent and unintentional, and when that happens, it's simply a matter of clarifying the scope of privileges and making sure that everybody is on the same page," says Nagele.

#### **Promoting a practitioner's own products**

Another accusation Arafiles faced was that he was selling herbal medicines to patients.

Generally, if a medical staff has a well-written conflict of interest policy, disciplinary action against a practitioner who is promoting his or her additional remedies to patients on the side could be taken under this policy.

"From a hospital liability perspective, [organizations] would want to make it clear to their physician staff that recommendations for a physician's own products should not be taking place within the context of inpatient hospital care," says Nagele.

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## Privileging errors

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Exceptions can be made in some cases—for example, when a surgeon has developed and patented a new surgical tool. But even in those cases, it's important to disclose the physician's interests to the patient.

When new conflict of interest issues arise, go to existing policies first for guidance, Poppitt says. If none exist, it's preferable to expand existing documents to address the new scenario instead of creating a brand-new policy.

"You don't have to address every single issue as a revision in the bylaws as long as it can be covered by something that's already there and effective," says Poppitt.

### Complaint filed via hospital reporting channels

Before the nurses reported their complaints to the state medical board, they first reported the practitioner's behavior to internal sources at the hospital.

Some observers of the case believe that if the hospital had adequately addressed the nurses' concerns, the buck would have stopped there. The problem could have been corrected internally, and the nurses wouldn't have reported to the state medical board.

"The No. 1 [lesson] is that hospitals need to have a process by which nurses and other personnel, physicians and the like, can raise concerns effectively and without fear of retaliation," says **Louis Clark**, president of the Government Accountability Project, a nonprofit whistleblower protection group in Washington, DC.

"Perception and keeping people informed of things they're entitled to be informed of can be important," says Poppitt. "Almost all whistleblower cases come out of people feeling like they complained about something and they weren't taken seriously."

The hospital or medical staff doesn't necessarily have to take the action the whistleblowers want, but as long as the organization is taking some action and regularly updating whistleblowers about it, they are unlikely to take their accusations to a third party.

Poppitt reminds hospital personnel that there are often several different reporting pathways within a hospital to

explore before turning to outside sources. "If you've told your supervisor about something and it didn't go anywhere, well, you can go to the compliance officer or someone else on the chain of command," she says.

Another notable variable in the Winkler County case is that the hospital is in a small, rural town. It's common for hospitals in similar locations to struggle to find practitioners to practice there. However, just because a hospital has a great need for practitioners does not mean the organization should give practitioners facing accusations the benefit of the doubt; the hospital must follow established policies.

This is a best practice approach not only because of the compliance-related problems that will occur if a hospital doesn't follow its policies. Think about it from another angle. If a hospital lets a practitioner's problems slip through the cracks because it really needs practitioners, the problems may accumulate to the point where the practitioner is not legally able to practice at the hospital. Then the hospital is back to square one searching for practitioners.

However, if the hospital takes appropriate disciplinary and remediation action early on, it may be able to hang on to the practitioner for a longer period of time. In the end, remediation is a win-win for the hospital and the practitioner.

### Complaint filed with state medical board

After the nurses filed a complaint with the hospital and decided that further action was needed, they filed a complaint with the state medical board.

Although it was seen by many as the right thing to do in this case, it shouldn't be interpreted as a reason to bypass hospital reporting. "I wouldn't want this case to be seen as encouragement for bypassing established hospital reporting procedures and going straight to the med board," says Poppitt. "I think the internal process is key in most instances and that going to the med board first is not necessarily the right thing."

Those processes include taking the matter before a peer review committee, quality board review, or another internal hospital process.

Yet there are instances when a whistleblower does not think the hospital is appropriately addressing the situation. A common next step for cases involving a licensed practitioner is for the whistleblower to report the practitioner to the state licensing or medical board.

"That's usually the place where that kind of report could be made, or in some instances, the department of health," says Nagele.

However, states differ on their reporting obligations. Nagele advises medical staffs and MSPs who may want to file complaints outside of the hospital system to research their state's rules on this.

Clark says another option whistleblowers have is to go to the press with their complaints. This course of action may pose the greatest risk for the accused party to accuse the whistleblower of defamation. However, people can send anonymous information to the press, and in some instances, the risks of reporting are outweighed by the benefits of having the issue resolved.

Hospital employees, such as MSPs, should always consult their employee contracts, and possibly legal council, before reporting complaints outside the hospital. If an employee has an employee-at-will contract, there is a possibility that the hospital may terminate the employee's contract for whistleblowing actions, but if the accusations are made in good faith, the hospital's actions may be frowned upon.

"It's not going to play well in front of a jury if you pull out a contract that says you told me I couldn't go to the med board and this person died as a result, or I lost my license because my contract prohibited me from reporting something that I was required to," says Poppitt.

### **The court rules in favor of the nurses**

Although the jury found Mitchell innocent because she acted in good faith when filing her complaints, overall, the case will negatively affect whistleblowers from coming forward, experts say.

"One of the biggest barriers to people coming forward and blowing the whistle is that they don't want that kind of personal attention," says Clark about the case's publicity.

It's not only the attention that the nurses received that deters future whistleblowers, but the threat of liability exposure, says Nagele.

"I always caution my clients that there are downsides to reporting; reports can trigger defamation actions, claims for tortious interference with a physician's patient, loss of professional status, and so forth," she says. Therefore, she advises clients to follow the clearly delineated reporting paths that are sanctioned under state law because they generally offer the most protection.

However, the Texas case suggests a whole new level of risk. "The threat of criminal prosecution would have a severely debilitating effect on a staff member who was considering making a report of quality concerns that she or he might have," Nagele says.

Although the sensational nature of the case may quiet whistleblowers, the innocent verdict confirms the righteousness of the nurses' actions and the ability of reporting laws to protect whistleblowers.

"Over the last couple of years, the federal and state governments have really strengthened what whistleblowers can do—there's a lot of encouragement out there for whistleblowers to go forward," says Poppitt. "This outcome is in line with the trends."

The case of the Winkler County nurses may have sprung from a small town in Texas, but its lessons are wide-reaching for medical staffs. By heeding those lessons, medical staffs can avoid similar high-profile court cases and take a proactive approach for continually improving their practitioners. ■

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