

Physicians Seek Protection When Reporting Errors

There are legal avenues for physicians to pursue if they observe quality problems or wrongdoing.

BY MARY ELLEN SCHNEIDER
Senior Writer

Despite efforts to increase error reporting in medicine, some physicians say they have been targets for retaliation after reporting unsafe or inadequate care in their hospitals and clinics.

W. Harry Horner, M.D., an internist from Waynesboro, Va., said that administrators at the state mental hospital where he worked trumped up charges against him after he raised serious patient safety issues and refused to stop documenting lack of appropriate care on patient charts.

"I just said this is unacceptable," Dr. Horner told this newspaper.

He was dismissed in May 2001 on charges of abuse and neglect of a patient, failing to follow a supervisor's instructions, and violating an employee's confidentiality.

Dr. Horner sued the state on the grounds that the hospital short-circuited the state's normal grievance process by not allowing his immediate supervisor, who disagreed with the charges, to reinstate him immediately.

Last June, the Virginia Supreme Court ruled in Dr. Horner's favor and ordered the state to pay him back wages and benefits and reinstate him at Western State Hospital in Staunton. The state asked for a rehearing of the case, but the Virginia Supreme Court refused.

Martha Mead, director of legislation and public relations at the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, said she couldn't discuss the ongoing litigation concerning Dr. Horner.

But she noted that the Western State facility is fully accredited and was released from oversight by the Department of Justice last year. The hospital is nationally recognized for its work in psychosocial rehabilitation, she said.

During his legal battle, Dr. Horner has been following 35-40 similar cases across the country and says he's not alone in facing retaliation. "This wasn't a personal thing or a local phenomenon," he said.

Although federal law offers whistleblowers some protections, there is little relief at the state level. And it takes years to get a remedy in court, Dr. Horner explained.

"It's a huge problem," said Reuben Guttman, a lawyer in New York who has litigated several cases involving the federal False Claims Act.

But there are legal avenues for physicians to pursue if they observe quality problems or wrongdoing. Physicians can submit a claim under the federal False Claims Act, which protects workers who report fraud.

Protection under the False Claims Act also can include reports of quality problems since it is considered fraud for hospitals to file claims to Medicare and Medicaid if they are not in compliance with a

broad range of regulations that include quality issues, Mr. Guttman said.

Many states have also adopted a general exception to the "employee at will" provision of employment law, stating that an employee can't be terminated if the employee's actions further a public policy such as reporting wrongdoing.

Many physicians just aren't aware that they have these rights, Mr. Guttman said.

But Eric W. Springer, counsel with a

committee made up of hospital administration, physicians, and community members.

The hospital also has in place a telephone hotline for anonymous quality complaints from physicians and the public, a nonpunitive reporting policy for physicians, a joint conference committee that includes physicians and members of the hospital's board of trustees, and an ethics committee composed mostly of physicians, Ms. Karstetter said.

Hospitals have a great deal of financial and other power over physician practices from referrals up to the ability to list physicians in the National Practitioner Data

This system could mimic the Accreditation Council for Graduate Medical Education reviews that already occur in teaching programs.

In addition, if hospitals want to strip physicians of credentials, the institution should allow physicians to call for a review of the entire department by the specialty society, Dr. Powers said.

The American Hospital Association urges physicians and other hospital employees who have seen an error or a potential risk to report that without fear of retaliation, said Don Nielsen, M.D., senior vice president for quality at the AHA.

It is "unacceptable" for hospital administration to punish someone for reporting, he said.

To prevent this, all hospitals have an appeals process in place if privileges are restricted or if a physician is fired, Dr. Nielsen said.

For its part, AHA has been providing tools to hospitals to encourage the creation of a culture of safety.

Changing the culture won't happen overnight, said Paul Schyve, M.D., who is senior vice president at the Joint Commission on Accreditation of Healthcare Organizations.

"Hospitals are making clear positive steps in that direction," he said.

But the legal culture of the United States continues in the name, blame, and shame culture, Dr. Schyve said.

Congress is beginning to address this through patient safety legislation, he added.

In March, the Senate's Health, Education, Labor, and Pensions Committee approved the Patient Safety and Quality Improvement Act (S. 544). The bill would allow hospitals and physicians to report information to a patient safety organization without its being disclosed and used against them in court.

In addition, the legislation would prohibit employers from taking action against an employee who makes a report.

The bill still needs approval from the full Senate and House. In the last Congress, the House and Senate each passed versions of this legislation but could not come to agreement on a final bill. ■



Dr. W. Harry Horner of Virginia says he faced retaliation from administrators at the state mental hospital where he worked after raising patient safety issues.

Pittsburgh law firm that works with hospitals and their medical staffs, said the problem is not widespread.

Although there are legitimate whistleblowers, more often physicians use quality claims as a defense when their behavior is identified as disruptive, he said.

"The disruptive doctor uses the whistleblower flag as a cover for his own behavior," Mr. Springer said.

Danae Powers, M.D., an anesthesiologist working in State College, Pa., said she was labeled as disruptive when she raised quality of care issues at Centre Community Hospital in State College, now renamed Mount Nittany Medical Center.

Even after settling lawsuits that she had brought against the hospital arising from her concerns over alleged negligent care, she concluded that she didn't accomplish what she set out to do—making it easier for physicians to voice their concerns.

"If doctors can't speak up to protect patients then patients aren't getting the best care," Dr. Powers said.

Officials at Mount Nittany Medical Center said Dr. Powers was not the victim of retaliation, and they stand by their efforts to encourage communication between physicians and administrators.

"We are very proud of our patient care and safety at Mount Nittany Medical Center," said hospital spokeswoman Maureen Karstetter. "We pride ourselves on open physician-hospital communications."

The hospital has a patient safety com-

mittee made up of hospital administration, physicians, and community members.

In hospitals with a culture of safety this isn't a problem, Dr. Powers said, but there are some hospitals where economics are placed above patient care.

Dr. Powers proposes doing away with the databank and introducing external, financially independent, and specialty-specific peer review to hospitals.

For example, a thoracic surgeon should be able to call the Board of Thoracic Surgery to request a review of a patient safety issue, she said.

