



Testimony on Interim Charge #10 Relating to Practices of Texas Medical Board Relating to Disclosure of Complaints

Presented to Senate Health and Human Services
Committee, May 12, 2010

By James Willmann, J.D.,

General Counsel & Director Governmental Affairs

Policy Goals of Confidentiality of Reporting and Reporting Laws Generally:

1. Safer patient care by encouraging and protecting legitimate reports
2. Due process for persons reported

Case Study

- Two RNs and an FNP in Winkler County become concerned about a physician whom they believe is not practicing at an acceptable standard of care
- Unable to get concerns addressed through internal review procedures, they report the physician to the TMB in April 2009
 - ❖ The two RNs jointly file an unsigned complaint and the FNP files a separate signed complaint
- The complaints provided patient file numbers (no names) of patients about whose care the nurses were concerned and other specifics about the physician's practice

Concern Expressed

In their letter to TMB the nurses explain:

Due to the “economic climate,” the fact that I am over 50, female, and have been employed by this facility since the 1980’s; I am hesitant to place a signature on this information. Administration has made it clear that there will be no reporting of any problems without Administrative, Medical Staff and Board notification. This would certainly create an opportunity for Mr. Wiley to remove me from employment.

from Letter of Anne Mitchell, RN, & Vicki Galle, RN
reporting a physician to TMB

Consequences to Nurses as Result of Reporting the Physician to TMB

- Physician filed a harassment complaint about the complaint with the Winkler County Sheriff
- Sheriff investigated by interviewing patients, seizing nurses' work computers and securing copy of complaint from TMB and was able to identify nurses
- Once identified by the sheriff, the two nurses were criminally charged with misuse of official information under Penal Code Sec. 39.06, indicted and arrested.
 - ❖ The charges against one were dismissed in February 2010;
 - ❖ The other was tried and found not guilty
- The two nurses were also terminated by the hospital

Consequences to Physician & Hospital

- Because the complaint and investigation are confidential unless and until the TMB issues formal charges against the physician, it is unknown what action will be taken against the physician's license
- TNA filed a complaint with DSHS against hospital based on the termination and the hospital's "self review" policy prohibiting external reporting without permission
 - ❖ DSHS has issued a Notice of Violation against the hospital finding it illegally terminated the nurses and imposing the maximum fine permitted by the Hospital Licensing Act and DSHS fine guidelines which is \$650 for a single incident not involving actual patient harm

Consequences to Physician & Hospital cont'd

- Nurses have filed a civil suit in federal court against the physician, hospital and others based on federal civil rights violations and various state claims which is pending

Things Learned

1. Not protecting confidentiality of persons making a report/complaint can have negative consequences
2. The threat of being criminally charged for reporting to a licensing board is no longer a “that would never happen” event
3. The ability of the regulatory system to enforce laws designed to encourage reporting and protect persons reporting appears limited
4. Significant differences/inconsistencies exist among the reporting/complaint provisions of the various licensing laws

Recommendations

1. Assure confidentiality of individuals making a report or complaint to a licensing board
2. Address threat of individual being criminally charged because made a report
 - For example, prohibit unless a finding by the agency to whom report made that report was groundless and made in bad faith

Recommendations

3. Ensure regulatory agencies have effective enforcement mechanisms for addressing violations of reporting laws
 - How to ensure amount of administrative penalty for retaliation for making a report is sufficiently high to be a deterrent?
 - Should a licensee's filing criminal charges or a lawsuit against the person reporting be grounds for the licensing board to take action against the licensee?
4. Address if inconsistencies between various licensing laws relating to making reports/complaints of unsafe care and/or practitioners are justified