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Oregon MDs study law on peer review

Question its use to stop 'whistleblowers'

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By Steve Twedt, Pittsburgh Post-Gazette

PORTLAND, Ore. -- Twenty years ago, an Oregon surgeon's lawsuit led to federal legislation that allows a hospital to remove a physician from its staff with little fear of being sued. Now, Oregon doctors are investigating an unintended effect of the law -- hospitals using that legal protection to silence whistleblower physicians who report substandard care.

The Oregon Medical Association recently passed a resolution to "explore ways and means to prevent misuse of the 'Disruptive Physician Doctrine,' " a reference to the label hospitals attach to doctors viewed as troublemakers, sometimes unfairly.

Jim Kronenberg, the OMA's chief operating officer, said, "This has happened enough times that there has to be some question about whether, in some cases, that doctrine of the disruptive physician isn't perverted for means that have a chilling effect on the willingness of physicians to speak out on things that aren't right in a hospital."

An accusation of disruptive behavior can lead to a peer review hearing, and a negative finding can have devastating results for the physician, including loss of hospital credentials and a listing in a national data bank of sanctioned doctors. Hospitals believe this is justified if the behavior is so outrageous that it interferes with patient care. But some doctors say the "disruptive doctor" charge is ill-defined and difficult to refute, and can become a handy

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method to go after whistleblowers.

When the OMA resolution came up, said Dr. Russell Faria, of Newport, there were some members "who were generally opposed to the whole thing, who thought that targeted physicians were targeted for a reason, and misuse was extremely rare." Faria then distributed a recent Pittsburgh Post-Gazette series documenting how physicians across the United States have faced reprisals after raising patient care concerns.

"Your newspaper series convinced enough delegates and committee members to get the resolution passed," Faria said.

The original resolution was written by a Medford physician, Dr. Bonnie Lees, who lost her position as chief of the neonatal ICU at Rogue Valley Medical Center last year because, hospital officials said, she was disruptive and hostile.

Neither the hospital nor Lees would discuss her case because of the ongoing peer review. However, Lees' attorney, James Seltzer, said, "There are no allegations whatsoever of any clinical deficiencies or other issues involving her competence."

Jeannette Lisk, a neonatal nurse who worked with Lees for seven years, confirmed that no one questioned Lees' skills. "She is a strong patient advocate," Lisk said in an interview. "She will speak her mind, and she is one to challenge something if it was not in the patient's interest."

"The whole unit ran much better when she was there because she did demand a higher standard of care," said Carol Jackson, another veteran nurse at Rogue Valley. "It frustrates me so much. I don't see how anybody could say she was disruptive."

The Medford dispute and the OMA review echo the Post-Gazette series, which detailed reprisals against whistleblowing doctors, such as loss of admitting privileges and being reported to the National Practitioner Data Bank, a listing of physicians who have been disciplined or have lost malpractice judgments.

Even though no final ruling has been made on Lees' status 18 months after she was forced out, she nevertheless has been reported to the data bank, hampering her ability to find even temporary work in other states.

Now her case may be the basis for rethinking the way disputes between hospitals and physicians get settled.

Hospital officials do not believe that peer review is used to target whistleblowers. For a doctor to be sanctioned for disruptive conduct, "it has to be fairly egregious," said Kent Ballantyne, senior vice president of the Oregon Association of Hospitals and Health Systems. Because of protections in place, including hospital bylaws and involvement of other

doctors in the review, "it would be difficult for a hospital to make that kind of allegation stick."

During the coming months, OMA will gather information on a number of questions: How many Oregon physicians have been affected? Do state whistleblower laws apply? Should they require hearings outside the hospital's jurisdiction to ensure fairness?

Addressing these questions may make this Northwest state the launching pad for fundamental change in how U.S. hospitals work, just as it was a generation ago.

In the early 1980s, surgeon Dr. Timothy Patrick, who had decided to practice independently, came under fire from competing doctors in the northwest Oregon town of Astoria who questioned Patrick's care. The same doctors, acting as the local hospital's peer review committee, also tried to revoke his hospital privileges.

Patrick resigned rather than face what he considered a biased proceeding. He then sued, accusing the other physicians of trying to drive him out of business.

A jury awarded him \$2.2 million, a judgment that the U.S. Court of Appeals overturned on the grounds that peer review was immune from civil suits because it was a state action.

The U.S. Supreme Court then reversed that decision, saying the state does not supervise hospital peer review, so it was not a state action.

The Patrick decision's biggest impact, though, was on peer review, which can be a useful tool for hospitals to monitor and improve the care physicians provide. "The thing we feared the worst was that physicians would quit doing peer review in Oregon" for fear of being sued for anti-trust violations, Kronenberg said. "And, for a time, that's just what happened."

Nationally, that concern was addressed with the passage of the Health Care Quality Improvement Act of 1986, which, in addition to establishing the National Practitioner Data Bank, gave peer review panel members civil immunity as long as they acted "in the reasonable belief that the action was in the furtherance of quality health care." Courts have almost always upheld that presumed immunity, making it difficult for wrongly accused physicians to clear their names.

Physicians such as Lees say hospitals can use that immunity as a shield to go after doctors who fall out of favor.

In her presentation to OMA delegates, Lees said that "if the physician's philosophy regarding the delivery of medical care differs from that of the hospital, he is in danger of being labeled disruptive and being

subjected to the [peer review] process."

In the six weeks since the resolution passed, the OMA has heard from "a couple dozen" doctors, medical officers and hospital administrators, Kronenberg said.

One physician, Dr. Kenneth Lindsey, said he was forced out of a Salem-area hospital, after he tried to push for improved patient care.

The hospital reported him to the National Practitioner Data Bank, and Lindsey says that the hospital has not voided the report, despite a subsequent investigation by the state medical board that cleared him. Lindsey is now medical director of a physician-run health plan based in Bend.

"The internal review, investigation and hearing process within hospitals are extremely biased and very unfair," Lindsey said. The fault, he added, can be traced back to a federal law meant to improve patient care that now sometimes silences physicians who advocate for patients.

The Health Care Quality Improvement Act "is being abused," Lindsey said. "HCQIA has to change, to adopt some fairness, because hospitals have learned to do horrible things because of it."

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