MONOGRAPH

PREPARED BY THE MONOGRAPHS TASK FORCE OF THE AMERICAN SOCIETY FOR HEALTHCARE RISK MANAGEMENT

A call

for federal immunity

to protect

health care employers

… and patients

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ONE NORTH FRANKLIN, CHICAGO, IL 60606 ASHRM (312) 422-3980 W WW.ASHRM. ORG

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INTRODUCTION

The case of Charles Cullen, the registered nurse who has admitted killing several patients in various hospitals where he worked, shocked the nation in 2004 when his crimes were uncovered. However, Mr. Cullen was not the first serial killer in health care, nor will he be the last. Other health care workers – some of them nurses, some not – have been found guilty of murdering patients inside hospitals.

History of the issue

Charles Cullen admitted to the murder of more than 30 patients at five different hospitals He pleaded guilty on April 29, 2004, to the murder of 14 patients at Somerset Medical Center in Somerville, N.J., and the attempted murder of two more. Cullen faces consecutive life sentences, with no possibility of parole, as part of a plea deal struck in order for him to avoid the death penalty. In return, he has agreed to cooperate with prosecutors in five additional counties in which he had worked as a nurse.

Cullen committed these murders by injection of various medications, including digoxin, insulin, nitropresside, norepinephrine, dobutamine and pavulon while on staff at the hospitals. Investigation revealed that Cullen had a history of reported incidents at hospitals in Pennsylvania and New Jersey, but there was no tracking system in place and no mechanism by which his acts could be disclosed as he moved from hospital to hospital. His employment history included termination from several hospitals because of various forms of misconduct, hospitalizations for mental illness and a criminal investigation in Pennsylvania into whether he was administering medication improperly.

In an open letter published in The New York Times on March 14, 2004, Somerset Medical Center asserted, "Mr. Cullen worked at nine other health care facilities over a 16-year period. His former work history problems were not revealed to us. Nor were any state agencies or licensing boards able to provide us with accurate information about his employment history." New Jersey Sens. Frank Lautenberg and Jon Corzine echoed these concerns in a letter to Elizabeth Duke, Administrator of Health Resources and Services Administration of the Department of Health and Human Services, dated Jan.16, 2004:

> *"Mr. Cullen was investigated by three hospitals, a nursing home and two prosecutors for causing the deaths of patients, and was fired by five hospitals and one nursing home for suspected wrongdoing. Yet each time Mr. Cullen was fired he was able to continue his killing spree by finding employment at another health care facility.*
>
> *"Hospital officials continued to hire Mr. Cullen time after time because they had no information regarding his job history, and those who served as a reference for him generally just confirmed his employment record, without providing information on suspensions, dismissals, or other actions taken against him."*

Administrators at hospitals where Cullen had worked responded to inquiries as to why they had not divulged this negative information by stating that the possibility of lawsuits kept them from sharing information about Cullen's employment problems with subsequent employers.

Facing the fear of litigation

Health care employers are subject to suit from a myriad common law and statutory enactments, such as medical malpractice, lack of informed consent, battery, violations of the Emergency Medical Treatment and Active Labor Act and violations of the Health Insurance Portability and Accountability Act, just to name a few. Health care entities are justifiably afraid of litigation at this point in time.

What is needed is nationwide immunity from civil litigation for the provision of adverse information, disclosed in good faith, to prospective health care employers.

CURRENT STATE OF THE LAW

Federal law provides some immunity

The Health Care Quality Improvement Act (HCQIA) provides some immunity for reporters of adverse information, but it does not apply to inter-employer communications and it applies only to physicians. It states:

> *Protection for those providing information to professional review bodies*
>
> *Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false. 42 U.S.C. §11111(a)(2)*

The HCQIA has addressed the issue to some extent, albeit in a different context. What is required is an extension of the logic behind the HCQIA to different applications.

In 2004, the U.S. Senate made an attempt at qualified immunity in S. 720, but the proposal is somewhat narrow, limited to reporting of medical errors, and does not clearly articulate privilege or immunity. (This bill was not re-introduced in the 109th Congress as of March 2005. For updates, visit http://thomas.loc.gov.)

The purpose of S. 720, as stated by its sponsors, is to promote disclosure of medical errors without fear of lawsuits. Known as the Patient Safety and Quality Improvement Act of 2004, the bill sets forth a privilege for "patient safety data," defined as "data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that are collected for or provided to a "patient safety organization," an entity that receives and collates information on medical errors, among other things (S.720 §§921(A) (3)).

In the bill, patient safety data are privileged from discovery in connection with federal, state or local civil or criminal proceedings and cannot be admitted as evidence in such proceedings (S.720 §922(a)). However, the concept underlying this provision suffers from the same drawback as the proposal to expand the National Practitioner Data Bank. There is no requirement in the bill that prospective employers query the patient safety organization about applicants for direct care positions. Even if such a requirement were added, this would create an additional step in the hiring process –one that may well be missed if haste is the order of the day. Further, there is nothing in S. 720 that permits the patient safety organizations to divulge safety data referable to applicants to health care providers seeking to hire non-physician personnel.

S. 720, while a step in the right direction, does not address the issues highlighted by the Cullen case. New York's bill could serve as a model for limited immunity with regard to background checks and references for those who seek to provide direct patient care. However, as seen in the differences between the approaches of New Jersey and New York, leaving the question of immunity to the states will result in inconsistencies that could permit another Charles Cullen to slip through by applying for a position after working in a state that does not have strong immunity laws.

S. 720 is an attempt to create at least some form of immunity for communication of patient safety data at the federal level. It could therefore serve as a platform, with appropriate amendments, for nationwide immunity from civil litigation for the provision of adverse information, disclosed in good faith, to prospective health care employers.

State laws face issue to varying degrees

Various states have passed legislation in the past to address this issue, and more states are passing legislation to address it. Some examples of states that have addressed this issue, or are addressing this issue, include the following.

North Carolina has passed legislation that grants immunity to employers in providing reference information, as follows:

> *Immunity from civil liability for employers disclosing information.*
>
> *An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or upon request of the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when a claimant shows by a preponderance of the evidence both of the following:*
>
> *1. The information disclosed by the current or former employer was false.*
>
> *2. The employer providing the information knew or reasonably should have known that the information was false.*

> *For purposes of this section, "job performance" includes the suitability of the employee for re-employment and the employee's skills, abilities, and traits as they may relate to suitability for future employment; and, in the case of a former employee, the reason for the employee's separation.*
>
> *The provisions of this section apply to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with the provisions of this section. For the purposes of this section, "employer" also includes a job placement service but does not include a private personnel service as defined in G.S. 95-47.1 or a job listing service as defined in G.S. 95-47.19 except as provided hereinafter. The provisions of this section apply to a private personnel service as defined in G.S, 95-47.1 and a job listing service as defined in G.S. 95-47.19 only to the extent that the service conveys information derived from credit reports, court records, educational records, and information furnished to it by the employee or prior employers and the service identifies the source of the information. N.C.G.S. § 1-539.12.*

New Jersey, perhaps in reaction to the Cullen matter, has taken a leading role in this regard. Its Patient Safety Act signed by Gov. James E. McGreevey on April 27, 2004, requires reporting of "serious preventable adverse events" to the state's Department of Human Services, but also sets forth a limited privilege for documents concerning "serious preventable adverse events, near misses, preventable events and adverse events" (N.J.S.A. 26:2H-12.5 §§ (a); (c); (f)).

These documents may not be used in an "adverse employment action" and are not "considered a public record" (*Id.* at §(f)(2)(3)). While, arguably, this provision may have been intended as protection for whistleblowers, the text appears to indicate that the inclusion of such documents in an employment reference cannot be part of a claim against the employer concerning the content of the reference. Guidance from the courts will determine whether the language of the statute will apply to employment references.

Tennessee's provision is as simple as it is direct. T.C.A. § 50-1-105 states that an employer, upon request of a prospective employer, who "provides truthful, fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is granted a qualified immunity for the disclosure and consequences of the disclosure." The presumption, however, is rebuttable upon "a preponderance of the evidence" showing that the disclosure was knowingly false, deliberately misleading, maliciously disclosed, "disclosed in reckless disregard of its falsity or defamatory nature" or disclosed in violation of the employee's civil rights.

Similarly, **Texas** sets forth an unambiguous rationale for state legislative action on this issue in Tex. Labor Code Ann. § 103.001 (Vernon 1999), stating, "The legislature finds that disclosure by an employer of truthful information regarding a current or former employee benefits the public welfare." It goes on to set forth that, by these provisions, the legislature intends that an employer who provides information he or she reasonably believes to be true "should be immune from civil liability for that disclosure." § 103.004 provides for immunity from civil liability for "disclosure or any damages proximately caused by that disclosure" unless it is proven by "clear and convincing evidence" (a higher standard than the "preponderance of the evidence" standard

in the Tennessee statute) that the employer know the information was false at the time the disclosure was made or that the disclosure was made "with malice or in reckless disregard for the truth or falsity of the information disclosed."

New Hampshire will become a party to the Nurse Licensure Compact in July, 2005, but this provision does not go as far as the statutes of Texas and Tennessee. It applies only to registered nurses, licensed practical nurses and licensed nursing assistants (RSA 326-B:34). Its text envisions the laudatory purpose of coordination between multiple, or "party," states. One of the stated purposes of the compact is to "(f)acilitate the exchange of information between party states in the areas of nurse regulation, investigation, and adverse actions (RSA 326-B:34 Article I (b)(3). "Adverse actions" are actions taken by a state from in which the nurse was previously licensed, while "current significant investigative information is defined as information indicating that the nurse is an "immediate threat to public health and safety." Such information is to be exchanged between the signatory states through the state's nurse licensing board and the board's officers, agents and employees are immune from liability "on account of any act or omission in good faith." (RSA 326-B:34 Article IX).

New York has no immunity provision at present, but has taken as proactive approach in its most recent proposal. State Sen. Kemp Hannon, at the behest of Gov. George Pataki, introduced legislation (S07251, May 6, 2004) which would require hospitals, nursing homes and clinics to obtain an employment history for licensed health care professionals involved in direct patient care, (S07251 §(2)) including pending investigations, and would provide immunity from civil litigation for adverse information provided and disclosed in good faith(S07251 §((3)(b). It would also authorize the Department of Health and the State Education Department to share information regarding final disciplinary actions and pending investigations alleging poor patient care against a licensed health care professional with hospitals, nursing homes and clinics and expand credentialing to include all licensed professionals involved in direct patient care (S07251 §(3)(a); (4)(a)).

In ORS §30.178, **Oregon** provides for immunity from civil liability for disclosures "about a former employee's job performance to a prospective employer" made in good faith. Similarly, **Illinois** provides immunity for job performance information related in good faith and includes a presumption of good faith (though the standard for rebuttal is preponderance of the evidence). 745 ILCS 46/10 (West 2004). However, **Missouri's** provision goes further in the protection of employers. In V.A.M.S. 290.512 (West 2004), the employer may "truly state for what cause, if any, such employee was discharged or voluntarily quit service." *Id.* The employer is immune from civil liability unless the response was false or made with reckless disregard of its truth or falsity. In such event, the employer would be liable for compensatory damages only.

However, in spite of these attempts, there is no guarantee of uniformity between the states. Thus, a health care entity in one state may feel free to share information with a health care entity in another state, only to find that it may have no protections under the laws of the other state. Even if the health care entity is not found liable under the laws of the other state, it might still be forced to incur legal expenses to defend itself in litigation. It is clear that a national solution would be preferable to a patchwork of state laws.

CONCLUSION

The solution that is required to help to alleviate this problem is for the federal government to pass legislation that allows health care employers to share employment information regarding former employees openly, candidly and honestly, without fear of reprisal. The legislation should grant employers qualified immunity, as long as their statements are made in the good faith belief that they are true and without knowledge of their falsity.

Many health care employers would seek reference information in the future, whereas they do not at the present time. They believe that they would not get an honest reference if they asked because they know that the previous employer would be reticent to give honest information out of fear of reprisal – of risking the liability associated with giving honest opinions about former employers without assurance of immunity. Consequently, many (if not most) prospective health care employers do not even ask.

The suggested federal legislation would balance the rights of the respective parties. Future employers would receive honest appraisals of their new employees. Employees would be protected from having falsehoods, rumors or innuendoes spread about them, because the protection for employers would come from giving factual information. The rights of patients would be respected because they could have greater assurance that they will receive care from persons who have not been successively terminated by previous employers under very distinct clouds of suspicion.

There is a pressing need for such legislation because the health and safety of the public depends upon it. While it may not be possible to prevent all homicides in health care, such legislation would allow problems to be contained and would help to prevent problems of the magnitude of the Cullen case. The need is pressing because health care services are often provided without supervision by people in whom we place the utmost trust.

Recipients of health care services are often the most vulnerable members of society who are usually powerless to defend themselves. It is incumbent upon society to protect them to the extent that it is possible to do so.

Contributing authors: ASHRM's 2004 Advocacy Task Force.

ADDITIONAL RESOURCES

History and updated status of S. 720
Available at http://thomas.loc.gov (search by bill number under "Legislation," "Search Bills and Resolutions")

ASHRM online glossary of health care risk management terms
Available at www.ashrm.org

"Risk Management Handbook for Health Care Organizations (4th Ed.)"
San Francisco: Jossey-Bass, 2003. (AHA catalog #178161). $135 for ASHRM members, $150 for non-members; call (800) AHA-2626.

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