LAW & MEDICINE

Adverse Event Confidentiality

Imagine being an endocrinologist who has been involved in an adverse event—one that, through no real fault of your own, caused death or serious injury to a patient. Should your future patients have a right to know of your involvement?

That is the issue Florida physicians are dealing with in the wake of a decision by the Florida Supreme Court earlier this year. The case was known as *Florida Hospital Waterman, Inc. etc., v. Teresa M. Buster, etc., et al.* (No. SC06-912).

BY MILES J. ZAREMSKI, J.D.

In November 2004, Florida voters passed a state constitutional amendment titled "Patients' Right to Know About Adverse Medical Incidents." The amendment allowed patients to obtain "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident"—as long as the identity of the patients involved in the incidents wasn't revealed, and other privacy restrictions were adhered to. This included incidents that had to be reported to a government agency, or those that were reported to health care facility review committees. The amendment was to become effective immediately.

About 6 months later, in June 2005, the Florida legislature attempted to clarify the amendment legislatively, stating that existing restrictions on use of records in court cases stay in place and that "discovering such documents does not mean that any of them can be introduced into evidence in a lawsuit, … and [they] may not be used for any purpose, including impeachment, in any civil or administrative action against a health care facility or health care provider."

Because of the legislature's action, two lower courts in Florida were asked to decide whether the amendment passed by the voters was retroactive—that is, did it apply to records that existed before the amendment was passed? One court held the amendment was retroactive; the other did not. The Florida Supreme Court, in a 4-3 decision (with a sharply worded dissent), found that the amendment was indeed retroactive. The court also found that several subsections of new law were in conflict with the amendment passed by the voters, and were therefore unconstitutional.

The Florida high court noted that access to peer review information is not to be limited to only those who are themselves patients, since that restriction is not contained within the amendment. But more importantly, the court also said that because part of the new law allows current laws restricting access to adverse incidents to remain in place, the new law is in conflict with the amendment passed by the voters and therefore "cannot stand."

The dissenting justices argued that the amendment should not be applied retroactively. They noted that hospitals are required to perform peer review as part of medical quality assurance, and that the hospitals should be able to keep peer review records from being used in legal cases. Now that the majority has found the amendment to be retroactive, the dissenters pointed out, that allows for the discovery of records previously kept confidential, a consequence that is "legally unsupportable" and "fundamentally unfair."

The Florida Supreme Court goofed. In its fervor to address the issue of retroactivity, it created more of a problem than it should have. The majority eviscerates what has become the linchpin for a health care facility's ability to ensure quality of care: its peer review function.

For example, let's take a situation in which a hospital's peer review committee obtains documents relating to an adverse medical incident. From those documents, the peer review committee makes a decision about the care rendered by a particular doctor.

Before the *Florida Hospital Waterman* case came down, there was an expectation that documents considered by a peer review committee would be privileged from discovery and not admissible in a legal proceeding. With *Florida Hospital Waterman*, no longer would such documents be cloaked with the protections against discovery provided in Florida. This would be inconsistent with protections against discovery provided in most—if not all—states having peer review statutes.

And, again, according to *Florida Hospital Waterman*, the right to see such evidence can pertain to documents that existed as of the date the Florida voters passed the constitutional amendment. How far back can the documents go? The court never says.

Another problem is that, for example, an accrediting organization such as the Joint Commission—which credentials a considerable portion of our nation's hospitals and other health care facilities—may find some difficulty with the *Florida Waterman*'s majority's decision. One area the Joint Commission looks at in its accreditation process are "sentinel events"—those involving deaths or serious injuries.

What if a sentinel event is intertwined with an adverse medical incident? All such information would be usable in legal cases under *Florida Hospital Waterman*, which may make hospital administrators uncomfortable if the commission asks them to produce sentinel event information during an accreditation or reaccreditation process.

Then there is the privacy issue. If privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA) are to be respected, what good is producing an adverse medical incident report that is required by HIPAA but not including identifying information about the patient? HIPAA would thus destroy much of the good intended by the amendment passed by the voters.

Moreover, since the amendment doesn't specify exactly who is entitled to such records, then anyone can request such information, regardless of applicable state or federal privacy laws.

Last, but certainly not least, are evidence laws relating to adverse medical incident records. The Florida high court blundered when it stated that a restriction on admitting such records in court cannot stand. Surely the decision on whether the constitutional amendment was retroactive was never intended to circumvent Florida's laws regulating the admissibility of evidence. Yet this is a conundrum the court majority has now created.

The law is never precise, and many times its development can raise more issues than it solves. That is what has happened here. What the Florida Supreme Court has done needs fixing—by the court somehow amending its decision, or by the Florida legislature harmonizing state law with the constitutional amendment passed by Florida's voters, or by having Florida voters amend the state constitution in some fashion. Only then can physicians in Florida and elsewhere be assured that the confidential work of peer review committees and accreditation organizations will remain confidential. ■

MR. ZAREMSKI is a health care attorney who has written and lectured on health care law for more than 30 years; he practices in Northbrook, Ill. Please send comments on this column to cenews@elsevier.com.

Experts Urge More HIV Testing in Minority Populations

BY JOEL B. FINKELSTEIN
Contributing Writer

WASHINGTON — Widespread testing would likely blunt the high HIV infection rate among African Americans and Latinos, but little money and effort have been put into prevention, experts said at the National Minority Quality Forum's 2008 Leadership Summit.

"African Americans and Latinos suffer disproportionately from the HIV/AIDS epidemic in this country," said Dr. Madeline Sutton, who helps lead the Heightened National Response to the HIV/AIDS Crisis Among African Americans, a program of the Centers for Disease Control and Prevention.

Dr. Sutton is the latest director of the $45 million effort to expand the use of HIV testing; that effort has suffered from revolving leadership, however, and has so far not had overwhelming impact, according to the AIDS community.

"Test everyone and treat everyone. Those are probably the two things we can do right now," said Dr. John Bartlett, chief of the division of infectious diseases at the Johns Hopkins University, Baltimore.

An HIV test costs approximately $15, which is relatively inexpensive, Dr. Bartlett said, pointing out that it is highly accurate and detects a disease that is lethal if not treated and manageable when it is.

It's a "dream test," yet it's not being used, he said at a meeting sponsored by the Alliance of Minority Medical Associations, the National Association for Equal Opportunity in Higher Education, and the Department of Health and Human Services.

That the test is underused translates to more transmission. The rate of infection is four- to fivefold higher among individuals who don't know they have the disease. Currently, 40% of the people who test positive for HIV have had the infection for 8-10 years, he noted.

Minorities face obstacles that researchers are still struggling to identify. For African Americans, it's not clearly genetics or behavior that is leading to the explosion in the infection rate, Dr. Sutton said.

In part, the CDC's effort is based on forming a better understanding of what the barriers are to testing.

"A lot of issues have to do with stigma and how we get people to the next level," she said.

Latino patients face the same barriers and more, given the inherent stigma created by the immigration debate, said Britt Rios-Ellis, Ph.D., who is director of the Center for Latino Community Health, Evaluation, and Leadership Training, a partnership between the National Council of La Raza and California State University, Long Beach.

"Latinos are the only minority group to see a doubling of HIV infection due to heterosexual contact, from 5% to 12% for males and from 23% to 67% for females between 2001 and 2006. And research in rural Mexico is indicating that most of the women who have AIDS there are married. We're seeing the same pattern here," she said.

For both Latinos and African Americans, the message is the same: By getting tested and treated, they can do something not only for their families and their communities, but for themselves as well.

"We see that 86% of our [federal] dollars have been spent on biomedical solutions, and those people who are receiving testing and care are doing very, very well. If we could get everyone into testing and care, we know that we would make a difference," Dr. Rios-Ellis commented. ■

Pages 32a—32b◊