NIH Office Established to Improve Emergency Care

Kathleen Ream, Director of Government Affairs

The third and final item below should be a warning to all emergency physicians evaluating job offers. Be alert for any clause that includes the words "hold harmless" or that waives your right to due process. Read contracts carefully and have them reviewed by an attorney with experience in medical employment, and always ask about the process for dismissal. Can you be fired on the whim of one person, or does it take the agreement of a majority or supermajority of your colleagues?

— The Editor

To help improve the health outcomes of patients who require emergency care, the National Institutes of Health (NIH) has created the new Office of Emergency Care Research (OECR). The formation of OECR is a result of more than five years of discussions between NIH and the emergency medical community, as well as a response to reports about the nation's emergency medical system issued in 2006 by the Institute of Medicine. Serving as the focal point across NIH for basic, clinical, and translational emergency care research and training, OECR will foster and coordinate all such research and training in the emergency setting.

In announcing the new office, NIH Director Francis Collins said, "NIH has supported research to advance emergency care for years; however, now we have a single office to coordinate and foster our activities in this arena. The NIH Office of Emergency Care Research will focus on speeding diagnosis and improving care for the full spectrum of conditions that require emergency treatment."

Although OECR will not provide funding for grants, it will encourage innovation and improvement in emergency care and in the training of future researchers in the field by:

- Coordinating funding opportunities that involve multiple NIH institutes and centers
- Working closely with the NIH Emergency Care Research Working Group, which includes representatives from NIH institutes and centers
- Organizing scientific meetings to identify new research and training opportunities in the emergency setting
- Catalyzing the development of new funding opportunities
- Informing investigators about funding opportunities in their areas of interest
- Fostering career development for trainees in emergency care research
- Representing NIH in government-wide efforts to improve the nation's emergency care system

While a search is being conducted for a permanent director of OECR, Walter Koroshetz, deputy director of the National Institute of Neurological Disorders and Stroke, is serving as acting director. A steering committee chaired by the director of the National Institute of General Medical Sciences, where OECR is housed, is overseeing the office.

For more information about this new NIH Office, visit: http://www.nigms.nih.gov/About/Overview/ OECR.

From the States

Oregon Workgroup Drafting Tort Reform Legislation Considers Disclosure

When the Oregon Legislature convenes next February, lawmakers are expected to take up tort reform. To get those discussions moving, a Patient Safety and Defensive Medicine Workgroup is developing draft legislation that includes issues such as confidentiality, mediation, dispute resolution, litigation, discovery, and patient safety. Also on the table is disclosure, i.e., informing patients when a serious medical event has occurred in a hospital setting.

Robert Dannenhoffer, a Roseburg pediatrician, told the workgroup that such a disclosure approach has been successful at Mercy Medical Center. Dannenhoffer, who is also CEO of the coordinated care organization Umpqua Health Alliance, explained that all medical staff and employees of Mercy Medical Center have participated since 2001, and are required to disclose serious events in a non-punitive hospital reporting system, while the hospital works in good faith with families to make them "whole." Patients, he said, are not necessarily looking for money, but want their losses covered and want to make certain the same mistakes do not occur again.

Richard Boothman, a former trial attorney, reported to the workgroup on a disclosure program underway at the University of Michigan Health System since 2001. Its quality and safety division is closely tied to the disclosure program, with money invested in improving patient safety, Boothman said. As a result, medical malpractice claims have decreased from 53 to 31 per year, while the average cost per lawsuit has dropped from more than $400,000 to around $228,000, and the time to resolution has decreased from 20 to eight months. Physicians are very satisfied with the program, with 98% of 419 surveyed indicating their approval. Approximately 86% of plaintiffs' lawyers also approve, saying the transparency allows them to make better decisions about which claims to pursue.

In conclusion, Boothman said, "The long-term benefits are clear to us. We've seen some remarkable things happen." He added that in July 2001, the number of pending claims involving the system totaled 262. Now, that number is down to 64, with only 10 claims ending up in court last year, despite the fact that clinical activity has doubled since then, and twice as many patients are receiving care. He cautioned, however, that many people are invested in the status quo, including judges and defense attorneys.

Robin Moody, of the Oregon Association of Hospitals and Health Systems, told the workgroup that most Oregon hospitals currently offer early disclosure. However, Moody also said she was "disappointed" that the section of the group's draft bill dealing with litigation was so short. Even in a "model" system like Michigan's, she said, several cases still end up in litigation.

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Physician's Claim of Breach of Staffing Contract and of EMTALA Violation Dismissed

On July 11, 2012, the U.S. District Court for the District of Colorado granted a hospital's motion for summary judgment on a physician's allegations of breach of contract, tortious interference of contract, and violation of EMTALA (Genova v. Banner Health, D. Colo., No. 1:11-cv-1139, 7/11/12).

The Facts

Ron Genova, MD, an emergency medicine specialist, was part of an emergency department practice group known as the North Colorado Emergency Physicians, P.C. (NCEP). NCEP contracted with Banner Health, an Arizona non-profit corporation doing business as North Colorado Medical Center (Banner), to serve as the sole emergency medicine group in the hospital's ED. At 10:30pm on January 21, 2010, Genova, an on-duty ED physician at the hospital, was informed that the hospital was facing a potentially serious crowding situation. An administrative representative indicated "all in-patient hospital beds and emergency department beds were full," and a nurse indicated "there were four ambulances out on calls, and that the hospital and emergency department had no physical capacity to take another patient."

Genova recommended that the administrative representative implement the hospital's plan named "Code Purple," designed to "maintain patient safety when the hospital population is at a critical level," and "[t]o provide a mechanism that will decompress patient volume." The administrative representative believed that Banner's Chief Executive Officer, Rick Sutton, would not divert ambulances, so Genova called Sutton to recommend that the plan be implemented.

While there was no dispute that the hospital was busy that night, a difference existed as to whether "Code Purple" was necessary. Following Genova's call, Sutton contacted the NCEP medical director, Dr. Campain, to assess the situation that night. Campain phoned another ED physician at Banner, Dr. Hutchison. Hutchison stated, "[y]ou know, we're busy, but we're getting through it." Campain told Sutton that "neither ambulance divert nor ambulance advisory was necessary." Genova alleged, however, that Sutton "was concerned about losing patients to competing hospitals, and as a result, he refused to implement the Code Purple plan and divert ambulances to other hospitals."

Genova purported that as a result of his expressions of concern and recommendations to Sutton, Banner forced NCEP to forbid him from taking any further ED shifts in the hospital, effectively depriving him of his sole source of income. Genova filed the lawsuit, asserting three claims: 1) breach by Banner of its contract with NCEP; 2) tortious interference with Genova's contract with NCEP by both Banner and CEO Sutton; and 3) violation by both defendants of EMTALA. Subsequently, Banner filed a motion for summary judgment.

The Ruling

First Claim: Breach of Contract

In responding to Banner's argument that it had no contract with Plaintiff, Genova stated that he can assert breach of the contract because "1) NCEP acted as his agent; 2) his contract with NCEP makes him a party to the contract; and 3) he is a third party beneficiary of the Banner-NCEP contract." The Court determined that it need not address Genova's first or second claim, but agreed, "the NCEP group practitioners, including the group physicians, were the known and intended beneficiaries of Banner's obligations under the contract … [thus] a group physician such as Dr. Genova has the right to sue for an alleged breach of the contract. However, one must take the bad with the good."

Section 3.2(m) of the contract specifies, "[e]ach Group Practitioner shall conduct himself/herself in a manner that is not contrary to the interests, reputation or good will of Banner or to the efficient and appropriate operation of the Hospital." On February 4, 2010, CEO Sutton delivered a letter to NCEP invoking section 3.2(m) of the contract. The letter concluded that Genova's conduct on three occasions, including the January 2010 night in question, was "unprofessional and inconsistent with the interests, reputation and goodwill of the hospital," and thus requested that NCEP immediately remove Genova from all duties at the hospital. The Court stated "[w]hether Dr. Genova's alleged conduct was unprofessional, and specifically, whether the three incidents or any of them were fairly and accurately portrayed, certainly would be matters of genuine factual dispute. However, such disputes are not material. Paragraph 3.2(m) of the contract effectively gives Banner carte blanche to request the removal of a physician whenever Banner determines that the physician has conducted himself in a manner that is contrary to Banner's interests."

Plaintiff then argued that provision 3.2(m) "should be declared void as unconscionable and contrary to public policy." However, in finding that the contract was a valid agreement between and among NCEP and Banner, who each mutually contributed to its drafting, the Court concluded, "Plaintiff provides no authorities suggesting that a court could void a contractual provision as unconscionable or contrary to public policy in such circumstances."

The Court called attention to the Banner-NCEP contract requiring that each group physician execute a "Joinder Agreement." The joinder agreement was a very broad waiver of Genova's right to sue Banner for breach of the contract, which in part reads, *"I hereby release Banner, the Hospital, the Medical Staff, the CEO, and their agents, employees and attorneys from any liability, claim, cause of action or demand connected with the termination of my Medical Staff membership and clinical privileges as herein provided. I further agree to indemnify and hold harmless Banner from and against all obligations, claims, costs, debts, demands, controversies, expenses, attorneys' fees, damages, losses and causes of action, of any kind whatsoever, whether known or unknown, arising from termination or non-renewal of the Agreement or the termination of my relationship with the Group."*

Plaintiff contended that the waiver should not preclude his claim because the "Joinder Agreement is void as a matter of public policy." To the public policy point, the Court determined that "Dr. Genova argues that his services were discontinued for 'making recommendations he was required to make.' He analogizes this situation to cases holding that it is a violation of public policy to terminate an at will employee for refusing to perform an illegal act or for performing a public duty or exercising an important job-related right or privilege ... I accept the fact that

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Dr. Genova believes that he had an obligation to patients to recommend that the hospital invoke the Code Purple plan on January 22, 2010. I will presume that he had reasonable grounds for making that recommendation ... However, to void a contract, including the waiver provision in the Joinder Agreement ... on public policy grounds, the jury would have to find, based upon direct or circumstantial evidence, that Banner effectively discharged Dr. Genova because he exercised his right as a physician to request that the Code Purple policy be invoked. I conclude that even construing the evidence in plaintiff's favor for summary judgment purposes, he has not shown that there is a genuine dispute of fact requiring a trial."

Therefore, the Court granted the motion and dismissed the claim based upon breach of the Banner-NECP contract, but added "[t]his is not necessarily a result that the Court likes. I recognize that he is a fine physician, that he was arguably poorly treated, and that he and his lawyer have put a great deal of time and effort into this lawsuit. I have at least tried to write this order in a way that explains to him why I have come to the conclusions I have. Essentially, a contract is a contract."

Second Claim: Tortious Interference with Contract

Claiming the tort of intentional interference with contractual obligations under Colorado law, Genova purported that Defendants "intentionally interfered with Plaintiff's agreement with his practice group by forcing Plaintiff's practice group to prohibit Plaintiff from providing any further emergency room services at NCMC (the hospital) or face termination of the group's entire agreement to provide services to NCMC." Finding that there was "no evidence that NCEP did not comply with that obligation or other obligations under this contract or under the Joinder Agreement between Dr. Genova and NCEP ... [and that] by executing the Joinder Agreement Dr. Genova waived and released Banner and CEO Sutton from any claim connected with the termination of his medical staff membership," the Court granted the motion for summary judgment and dismissed the Second Claim for Relief.

Third Claim: EMTALA

The Court also rejected Genova's EMTALA claim. EMTALA contains a whistleblower provision for hospital employees who report violations of the statute. The Court suggested that Genova's claim "appears to be pursuant to this whistleblower provision, as he alleges that defendants retaliated against him for 'disclosing, objecting to and/or refusing to participate in an activity, policy or practice which Plaintiff reasonably believed was in violation of the [EMTALA].'"

The Court seemed sympathetic to Plaintiff's situation, stating that "[t]hese allegations, if true, describe conduct that is concerning. If true, there surely must be a means to report and remedy the problems. There may be a legal claim. Certainly the factual support offered in support of the allegations are sufficient to create a genuine dispute of fact that would preclude summary judgment if they were material to the resolution of the claim asserted." However, the Court concluded that Genova's allegations are not material to a claim under EMTALA. In failing to allege or show that a patient had not been properly screened and stabilized, i.e., the conduct that would violate EMTALA and would support a cause of action, no legal basis for the claim was asserted in this case.

Therefore, the federal district court entered its final judgment in favor of Defendants, dismissed Plaintiff's claims, and the civil action with prejudice, and awarded Defendants their reasonable costs.

The full text of the case is at: http://docs.justia.com/cases/federal/district-courts/colorado/codce/1:2011cv01139/125790/79/. ■

EMTALA case synopsis prepared by Terri L. Nally, Principal, KAR Associates, Inc.

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