



Reexamining and Supplementing Your Compliance Tools

**SCCE's 8th Conference for Effective Compliance
Systems in Higher Education**

April 23, Dallas, TX

Charles L. Howard

Shipman & Goodwin LLP

HARTFORD | STAMFORD | GREENWICH | LAKEVILLE

The Prosecution of Anne Mitchell February, 2010



The New York Times

Texas Nurse Faces Trial and Possibly 10 Years in Prison for Reporting a Doctor

By NEVIN SACH

HERMIST, Tex. — It occurred to Anne Mitchell as she was writing the letter that she might lose her job, which is why she chose not to sign it. But it was beyond her conception that she would be indicted and threatened with 10 years in prison for doing what she knew a nurse must: inform state regulators that a doctor at her rural hospital was practicing bad medicine.

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"I have detailed our services, and we're probably not going to be able to open them back to such a level," said Mrs. Clark, 56, a registered nurse at the hospital. "I'm not sure if we can do that."

She said she had been told that the hospital was going to be sold to a private equity firm. She said she had been told that the hospital was going to be sold to a private equity firm.

“Both sides acknowledge that the case has polarized the community, and the judge has moved the trial to a neighboring county.”

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The nurses, who are highly regarded even by the administrator who dismissed them, said the case had raised their spirits and showed their savings, with many charges pending, in-



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“The nurses, who are highly regarded even by the administrator who dismissed them, said the case had stained their reputations and drained their savings. With felony charges pending, neither has been able to find work.”

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“It has derailed our careers, and we’re probably not going to be able to get them back on track again,” said Mrs. Galle, 54, a grandmother who is depicted around town as the soft-spoken Thelma to Mrs. Mitchell’s straight-shooting Louise.”

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"They sounded internal alarms but felt they were not being heeded by administrators."

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The prosecutor said he would allow that Mrs. Mitchell had a history of making "inappropriate" comments about Dr. Arafiles, 47, and intended to damage his reputation when she reported him last April to the Texas Medical Board, which is the state's medical regulator.

Mrs. Mitchell counters that as an administrative nurse, she had

when the medical board notified Dr. Arafiles of the emergency complaint, he protested to his friends, the Winkler County sheriff, that he was being harassed. The sheriff, in advising patients who credit the clinic will have less than a local doctor, advised a search warrant to make the two nurses work computers and hand the nurse's case acknowledgment that the nurse has protected the community, and the judge has moved

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The letter also mentioned that Dr. Arafiles was smoking, eating improperly, or perhaps using alcohol supplements he sold on the site.

Mrs. Mitchell signed the letter and mailed it with a separate envelope signed by a third nurse, who wrote that she had no signed letters of similar concern about Dr. Arafiles. That nurse was not charged.

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Dr. Arafiles, 54, a general surgeon, worked at the hospital for 15 years before Mitchell and Gale reported his actions to regulators.

"Dr. Arafiles had been reprimanded on several occasions for improprieties in writing prescriptions and performing surgery."

The prosecution said he would allow that Mrs. Mitchell had a history of making "inflammatory" comments about Dr. Arafiles and intended to damage his reputation when she published his name and age in the local medical journal, where he remained an obituary doctor's.

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The Good News:

- Acquittal by jury after only 1 hour of deliberation



The Bad News:

- Nationwide publicity
- Chilling ripple effect
- Civil litigation
- Damage hard to undo



The Problem in West Texas

- Internal reporting channeled
- Even though report was confidential, prosecutor obtained access to it
- Search warrant for computer
- The Human Factor – the Doctor had treated the Sheriff
- How else could compliance officer raise the issue?



The Larger Problem: *Are Current Best Practices Enough?*

- Limitations of “Best Practices”
- Uncertainty over where to go
- Uncertainty over whether belief is correct
- FEAR OF RETALIATION
- Importance of checks and balances



Objectives:

- What is an Organizational Ombudsman?
- Why create an Organizational Ombudsman Program?
- How can an Organizational Ombudsman supplement and complement the Compliance Officer?



Types of Ombudsman Programs

- Classical
- Advocate
- Organizational



What is an Organizational Ombudsman?

- Independent
- Neutral
- Informal
- Confidential

Staff vs. Third Party Models



Organizational Ombudsman: DO

- Listen and help sort/frame issues
- Provide information confidentially
- Identify options and explain process
- Evaluate strategies to:
 - Report misconduct
 - Address workplace conflict
- Coach how to articulate concerns
- Mediation and facilitated discussions
- Trend reports for systemic change



Organizational Ombudsman: DO NOT

- Conduct investigations
- Accept notice of claims
- Make management decisions or policy
- Advocate or take sides
- Substitute for formal channels
- Testify in formal legal proceedings about confidential communications



Why Create an Organizational Ombudsman Program?



Why Create: Part I

- Societal and Demographic Changes
 - Immigration
 - Racial and cultural diversity
 - Role of women
 - Generational differences



Why Create: Part I

- Technological Changes
 - High demand for knowledge workers
 - Virtual work space
 - Global work force
 - New employment relationship



Why Create: Part II

- Legal and Regulatory Pressures on Organizations
 - Criminal law
 - Corporate governance
 - Regulatory (federal and state)
 - Employment law



Why Create: Part II

- Convergence to require organizations to:
 - Develop standards
 - Investigate misconduct
 - Take remedial action



Why Create: Part III

- Limitations of Current Best Practices
 - “Silo” thinking implicit in current tools
 - Compliance vs. Joint Commission Standard LD.02.04.01
 - Top down vs. bottom up
 - Data on effectiveness



Why Create: Part III

- Limitations of Current Best Practices – **Compliance Officers**
 - Management responsibilities
 - Notice channel
 - Duty to investigate
 - Risk of strict enforcement



Why Create: Part III

- Limitations of Current Best Practices – **Hotlines**
 - Notice channel
 - Low usage
 - Ill suited to employment and workplace conflict issues
 - Third parties and inquiry protocols



Why Create: Part III

- Limitations of Current Best Practices – **Whistleblower Laws and Policies**
 - Anne Mitchell
 - Human nature and social conditioning
 - Fact and perception of retaliation
 - Organization vs. boss
 - Peer retaliation
 - Cultural aversion
 - Procedural bias



Why Create: Part III

Fear

- 42% of employees do not report observed misconduct
- 40% of employees who did not report misconduct said they would have had to report it to the person involved
- 25% of employees were not aware of anonymous mechanisms

Source: 2007 National Business Ethics Survey®



Why Create: Part III

Belt Tightening

- Layoffs, adjusted work schedules, reduced compensation and benefits, etc.
- *“All of these tactics are related to **significant increases** in the number of employees observing misconduct.”*

Source: 2009 National Business Ethics Survey® Supplemental Research Brief



Why Create: Part III

Fear in the Hospital Setting

- Intimidation takes many forms
- Physicians intimidate but others do too
- Intimidation impacts patient safety
 - 49% of respondents said past experiences altered the way they dealt with order questions

Findings from survey by Institute for Safe Medication Practices (2004)



Why Create: Part III

Fear in the Hospital Setting

- Both genders affected
- Intimidation less acute for beginning nurses, **BUT...**
- Only 39% of respondents felt that their organization dealt effectively with intimidating behavior.



In Sum:

- Fear of retaliation
- Uncertainty over where to go
- Desire to ask questions confidentially
- Cultural, age, status inhibitors



The Key is Confidentiality



Structure Is Important to Protecting Confidentiality

Independent

+ Neutral

+ Informal

CONFIDENTIAL



Ways to Protect Confidentiality

- Privilege
- Program terms/Implied contract
- Mediation/ADR
- Arbitration



Organizational Ombudsman Well Suited to Hospital Setting

- Highly hierarchical
- Diverse at every level
- Pressured work environment
- History of difficult work environment



Organizational Ombudsman Well Suited to Hospital Setting

- Potential criminal and civil liability
- Technically trained workers and managers
- Importance of organizational culture



Organizational Ombudsman Fills the Gap

- Can deal with both compliance and HR issues
- Confidential and off-the-record guidance
- Extended conversations/coaching
- Mediation



Organizational Ombudsman Fills the Gap

- Particularly helpful where there is fear of retaliation or uncertainty
- Where someone wants to resolve issue but NOT be the whistleblower
- Explain larger context
- Supplement to bureaucratic inflexibility



Actual Examples

- Drug testing policy
- Probationary employee
- Extended interaction (outreach)
 - Test issue vs. real issue
- Direct assistance to compliance
- Disclosure of issue but not identity of person
- Ann Mitchell - *options*



Thank You

