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# Considering the Effect of Internal Policies on Medical Malpractice Liability

***Part Two of a Two-Part Article***

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In last month's newsletter, we discussed a case in which a South Carolina plaintiff avoided dismissal of a medical malpractice case on motion for summary judgment by relying solely on the defendant medical care facility's violation of its own polices and procedures as evidence of negligence.

If courts are going to look at a medical facility's policies rather than at the general standard of care when determining the adequacy of evidence of negligence, those in charge of formulating and implementing these policies must take notice. But is the danger for medical providers with high standards pervasive? The answer may depend on your client's jurisdiction.

## A Less Generous View

A survey of cases from other jurisdictions reveals that some states are not as relaxed as the South Carolina courts in the requisite proof to show a violation of the standard of care. In many of these jurisdictions, the court will allow evidence of a provider's internal polices and procedures, but only as a supplement to other evidence to establish the applicable standard of care. Internal policies and procedures alone are not sufficient to get a medical negligence case past the summary judgment stage in most jurisdictions.

### *Pennsylvania*

For example, in Pennsylvania Federal District Court, a medical malpractice plaintiff, representing a deceased patient who suffered a stroke shortly after being injected with the swine flu vaccine, called witnesses to testify as to the habit and routine practice of the clinic where the vaccine was administered. *Titchnell v. United States*, 681 F.2d 165 (C.A. Pa., 1982). Although it upheld a verdict for the plaintiff on other grounds, the Third Circuit Court of Appeals stated that "it is proper and desirable that health care facilities promulgate guidelines and define responsibilities for their own personnel." *Id.* at 173. The court further reasoned that "it may be reasonably expected that such procedures will, at a minimum, conform to the recognized standard of care at the time the guidelines are promulgated." *Id.* The court went on to explain, however, that the "mere failure to act in accordance with one's own internal procedures … will not automatically thereby render a health care facility negligent." *Id.* The court recognized the possibility that facilities could promulgate guidelines that were above the national standard of care and, further, that the care administered could fall somewhere below the guidelines and above the national standard. In that situation, "a facility's efforts to provide the best care possible should not result in liability because the care provided to a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time." *Id.* Respecting the strong public policy behind that conclusion, the court noted that such a result would "unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or

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similar localities at the time." *Id*.

### *Arizona*

The Arizona Court of Appeals echoed this decree in a medical malpractice case dealing with violation of hospital policies in *Bell v. Maricopa Medical Center*, 755 P.2d 1180 (Ariz. App. 1988). In *Bell*, the plaintiff introduced violations of hospital protocols, hoping the court would consider those violations as evidence of negligence. Although the Bell court allowed the internal polices as evidence of the standard of care, the plaintiff was forced to present expert testimony that the policies were indicative of the recognized standard of care.

### *Texas*

Similarly, the Texas Court of Appeals has refused to find that hospital policies alone determine the standard of care. In *Fence v. Hospice in the Pines*, 4 S.W.3d 476 (Tex. App.-Beaumont 1999), the plaintiff brought a medical negligence action against a doctor who misdiagnosed a patient's condition as terminal. The plaintiff claimed the patient was negligently accepted into the hospice program, and that the hospice's drug treatments killed him. The court held that, while internal hospice policies are admissible as evidence of the standard of care, those policies alone do not determine the governing standard of care.

Five years after *Fence*, the Supreme Court of Texas also held in favor of a defendant when the plaintiff did not offer any probative expert testimony, only evidence of the defendant's internal policies, which did not alone establish the standard of care. *FFE Transportation Services, Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004).

### *Other States*

Likewise, the Maryland Court of Appeals, while admitting expert testimony as to the facility's policies exceeding the standard of care, held the policies did not conclusively establish that standard. *State Board of Physicians v. Bernstein*, 894 A.2d 621 (Md. App. 2006). In addition, the Tennessee Court of Appeals has declined to equate internal protocols with the applicable standard of care. *Barkes v. River Park Hospital, Inc.*, 2008 WL 5423981 (Tenn Ct. App. 2008). Other states have also held that internal hospital policies, although possibly relevant when accompanying competent expert testimony, do not alone conclusively establish the standard of care for a medical procedure. *See Moyer v. Reynolds*, 780 So.2d 205 (Fla.Dist. Ct.App. 2001); *Pogge v. Hale*, 625 N.E.2d 792 (Ill.App.Ct. 1993); *Wuest v. McKennan Hosp.*, 619 N.W.2d 682 (S.D. 2000); *Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404 (Tex. App. 2003); *Riverside Hosp., Inc. v. Johnson*, 636 S.E.2d 416 (Va. 2006); *Happersett v. Bird*, 587 N.W. 2d 457 (Wis.Ct.App. 1998).

Several state courts have addressed the relationship between internal policies and the standard of care in non-medical cases, and have reached similar conclusions as the above courts. These courts ordinarily find that evidence of internal policies and procedures can be admissible to show the applicable standard of care, but may not be the sole evidence showing the negligence of a defendant. *See, e.g., National Telephone Cooperative Association v. Exxon Corporation*, 38 F.Supp.2d 1 (D.D.C. 1998); *Briggs v. Washington Metropolitan Area Transit Authority*, 481 F.3d 839 (C.A.D.C. 2007). Often, courts will exclude internal policies and procedures if they unquestionably rise above the minimal requirements of the standard of care. *See, e.g., Branham v. Loews Orpheum Cinemas*, 31 A.D.3d 319 (N.Y. 2006).

## Conclusion

The lesson to be learned by this trip around the various courts of the United States is that, while polices and procedures can be very helpful when running a health care organization, they can be detrimental in litigation. And while some courts may take a more restrictive view of the liability that should attach when internal policies are breached, it is probably better to be safe than sorry. When crafting polices and procedures, it is best to consider all of the liability implications if an employee complies with the recognized standard of care, but violates an arbitrarily drafted internal policy or procedure. If the policies and procedures mandate treatment that rises above the recognized standard of care, it is best to add flexibility to the language to allow for some variance in activity while still providing care within the recognized standard. Counsel for heath care organizations would be wise to consult with their clients to review these polices in depth. This may help the facility to prevent lawsuits based on policy and procedure violations.