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Formulating Internal Policies and Procedures

Their Effect on Medical Malpractice Liability Should Be Considered

Part One of a Two-Part Article

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Administrators at hospitals, nursing homes, outpatient surgical centers and small medical practices often feel that it is in their best interests to draft a comprehensive set of written policies and procedures. A written set of policies can make a provider appear to be less vulnerable to litigation, and more organized. Frequently, written policies and procedures are used to instruct nurses or other non-physician employees on the protocols for a variety of activities. This practice can make training and employment performance issues easier for the provider. However, it can also expose the organization to criticism when these seemingly arbitrary policies are not precisely followed.

It is rare that a medical provider will draft a policy or procedure on the medical "standard of care" and how medical personnel should apply it to patients. However, occasionally a plaintiff is able to argue that a policy that a provider intended to be procedural creates a self-imposed standard of care. In these cases, depending on the jurisdiction, the health care provider may have to defend the violation of its own policy or procedure, even if the policy goes above and beyond the national standard of care. This is why great care must be taken when drafting and implementing written policies and procedures for medical care organizations.

Policies Come Back to Haunt

A recent medical malpractice case litigated in South Carolina provides an example of a situation in which internal policies affected a litigation's progress. The case involved an outpatient surgery center and post-operative courtesy telephone calls. This particular out-patient surgery center had written policies and procedures on the specific date and time that a staff nurse should make post-surgical telephone calls to check on recently discharged patients.

Unfortunately, the surgery center was closed on the weekend after the plaintiff's surgery and the telephone call outlined in the center's policies and procedures was not completed prior to the written deadline for such calls. Although it was universally recognized that no follow-up telephone call was required under the national or local standard of care, the plaintiff argued that the late telephone call was outside the standard of care simply because it violated the center's own policies and procedures. Even though the late telephone call did not fall below the recognized standard of care, as explained by expert witnesses, the violations of the center's own policies and procedures allowed the case to survive a motion for summary judgment.

The standard of care against

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which a provider's actions are ordinarily measured is a nationwide standard established according to what providers in similar fields typically do. Generally, expert testimony is required to establish the appropriate standard of care and whether there has been a deviation from that standard, proximately causing the claimed damages. Expert testimony is typically required because the standard of care expected from a healthcare provider requires skills not ordinarily possessed by lay persons. However, in the South Carolina case described above, the trial court allowed the plaintiff to rely solely on the violation of internal polices and procedures as evidence of negligence to survive a motion for summary judgment.

The Ruling

In its ruling, the court relied on *Madison ex rel. Bryant v. Babcock Center, Inc.*, 638 S.E.2d 650 (S.C. 2006). *Madison* was a case involving a mentally challenged female resident of a private residential treatment center. Through her court-appointed guardian, the resident brought a negligence action against the center and the Department of Disabilities and Special Needs. The plaintiff alleged that the center and the Department breached their duty of care to her by failing to exercise sufficient control over the patient, which led to her having inappropriate sexual contacts with current and former male residents of the facility.

In *Madison*, the Supreme Court of South Carolina ruled that the fact-finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. *Id.* at 659.

The court relied on several other non-medical cases to establish this theory of liability. *See, e.g., Peterson v. Natl. R.R. Passenger Corp,* 618 S.E.2d 903 (S.C. 2005) (although federal regulations provided standard of care, the internal policies of company that owned the line of track and the railroad that owned the train were not preempted by federal law, and the company's and railroad's deviation from their own internal policies was admissible as evidence they deviated from the standard of care, thus breaching duty owed to plaintiff, in lawsuit brought by plaintiff injured in train derailment); *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 95 S.E. 109 (S.C. 1918) (relevant rules of a the defendant's are admissible in evidence in a personal injury action regardless of whether the rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury); *Caldwell v. K-Mart Corp.*, 410 S.E.2d 21 (S.C. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, the jury may consider such violations as evidence of negligence if the violations proximately caused a plaintiff's damages); *Steeves v. U.S.*, 294 F.Supp. 446 (D.S.C. 1968) (violation of a rule or regulation designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury).

Conclusion

In next month's issue, we will discuss the fact that not all states' courts are as quick to hold medical care facilities to the higher standards they have set for themselves through their internal policies.