



TO BLOW THE WHISTLE... OR NOT

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Cynthia Cooper. Colleen Rowley. Sherron Watkins. Only the most serious news junkies will remember these accomplished but otherwise ordinary women who graced the cover of Time Magazine when 2002 was declared “The Year of the Whistleblower.” These women made hard choices when they went public with wrongdoing at Worldcom, the FBI, and Enron respectively. Their actions were the right thing to do, resulted in justice, and changed their lives forever.

From elementary school on, we are taught by our peers that tattling is one of the worst sins that can be committed. Yet, during this century, whistleblowing has become an admired quality. What has made the difference? Perhaps there is a sense that organizations, particularly big businesses, have so much power that they are able to take advantage of ordinary Americans and literally ruin their lives. No longer do employees work for the same corporation their entire lives – the corporations do not seem to have the same loyalty to their employees, and the employees do not seem to have the same loyalties to their employers. Of course, there are exceptions to this, but they are the exception rather than the rule.

Or, perhaps it is that as young children, we are unable to recognize that our primary loyalties can and should be overridden by compelling moral reasons. This is a distinction that, even as adults, we have trouble making.

What is Whistleblowing?

While some define whistleblowing broadly, most make a distinction between “reporting” and “whistleblowing.” Reporting recognizes that most health care organizations have an internal process for sharing employee concerns in an environment that allows them to be addressed within the organization. Whistleblowing, on the other hand, is construed as an external action to an organization that has not responded appropriately to a concern expressed by an interested party. Many whistleblower laws require that internal reporting mechanisms be utilized first. Even if the law does not, this is a good and ethical standard to follow.



Whistleblower Laws

Whistleblower laws have been passed at the state and federal level to allow employees to stop, report or testify about employer actions which are illegal, unhealthy, or violate specific public policies by prohibiting retaliation against that employee.

There are more than fifty federal whistleblower laws. Some of them relate directly to health care organizations. Others are more broad and include employees in many industries. Many are administered by the Federal Department of Labor; others are administered by other federal agencies. Some have statutes of limitations of as little as ten days; others are much longer. Some have administrative remedies; some allow for civil remedies; and still others provide no remedy at all to an employee who alleges retaliation as a result of his whistleblowing activity.

Entire books have been written and published on federal whistleblower statutory laws and case law. It is not within the scope of this article to review these laws. Instead, it will focus on Virginia laws that prohibit retaliation against whistleblowers in certain health care settings and some things you might want to consider before you make a decision to blow the whistle.

Virginia's Health Care Whistleblower Protections

Virginia has three laws that protect complainants against retaliation or discrimination in hospitals (Va. Code § 32.1-125.4), nursing facilities (Va. Code § 32.1-138.4) and assisted living facilities (Va. Code § 63.2-1730). By utilizing the term "complainant," these laws apply not only to employees, but also to volunteers, patients, residents, families, and others who have an interest in the rights of patients or residents of hospitals, nursing facilities, or assisted living facilities.

While this sounds clear and easy, in practice, it often is not. First, there are no standards embodied in these laws. Therefore, what one person may see as a violation of patient rights may not be seen by others in a similar fashion. Furthermore, there is no specified remedy for a health care organization that retaliates under these circumstances, so any remedy by an employee will be in civil court, often a protracted and costly proceeding.

Thus, it may be helpful to look at what others say about the protection of patient rights before relying on these laws exclusively.

What JCAHO Says

While the Joint Commission on the Accreditation of Health Care Organizations does not specifically require due process and other protections for staff members who intervene on behalf of patients, they are required to have "structures to support patient rights...in a collaborative



manner that involves the hospital's leaders and others." JCAHO also requires health care organizations to have mission statements and a patient bill of rights that reflect the organization's basic beliefs. So, while JCAHO does not require structures to encourage internal reporting or prohibit retaliation against an employee who goes public with an unresolved concern, in some cases, these may be extrapolated from JCAHO-required statements.

You will want to note that many assisted living facilities are not subject to JCAHO requirements.

What the ANA Code for Nurses Says

While the Code for Nurses also does not specifically state what values should be upheld and what responsibility RNs have for reporting internally or externally specific situations, Provision 6 of the ANA *Code for Nurses* reads:

The nurse participates in establishing, maintaining, and improving health care environments and conditions of employment conducive to the provision of quality health care and consistent with the values of the profession through individual and collective action.

This and other provisions of the *Code* when read as a whole, should give nurses some guidance as to their role as a health care professional in reporting and helping to correct unsafe, inappropriate, or negligent practices. You can read the entire *Code* at http://nursingworld.org/ethics/code/protected_nwcoe813.htm.

Other Considerations

Since external whistleblowing (as well as internal reporting) can have serious consequences for the nurse and the organization, it is not an action that you will want to take lightly. At the same time, failure to report or blow the whistle can be life-threatening for patients as well as staff. Here are some additional considerations you will want to weigh as you decide how to proceed:

- Do your concerns represent a substantial risk to patient or staff safety, health care outcomes, or morbidity or mortality?
- Are your concerns the result of a single event, or a pattern of practice?
- Have you fully investigated the situation, collected appropriate facts and other data, and thoroughly understand the situation as well as potential reasons behind it?
- Have you exhausted established internal processes before you think about making your concerns public?
- Do you have a positive tenure and reputation within your organization or profession?
- Have you thought about the need for a legal consultation or legal representation?



Note of Caution

Reporting inadequate conditions in health care organizations, and ultimately deciding to blow the whistle on those that are not corrected, is a complex area of state and federal law. Making a decision in this area also requires scrutiny of the ANA Code for Nurses and JCAHO require. And neither this article nor your personal judgment should be a substitute for good legal counsel or representation with experience in this area. So let your conscience be your guide as to whether you need to investigate your options more fully.