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The Legal Ramifications of Best Practices in Health Care

*Introduction by Kevin Rasp**

I. INTRODUCTION

The innovations that come from within the nation's health care system and their legal ramifications are often overshadowed by reform plans and legal "crises" that come from without. Addressing the Fifth Annual Health Law and Policy Colloquium at Loyola University Chicago School of Law, Jane Reister Conard spoke from this inside perspective, describing the legal issues of representing a large integrated system that bases its health care provision on the novel "best practices" philosophy. As Senior Counsel for Intermountain Health Care, Inc. (IHC), she is charged with the legal oversight and representation of this large system. Since 1982, Ms. Conard and her staff have represented and advised not only the IHC's hospitals, but also its Physician Division, Office of Research, IHC Home Care, IHC Hospice, surgical centers, central laboratory, and occupational health clinics. Her specific expertise spans a similar breadth: Ms. Conard focuses on Medicare and Medicaid regulatory compliance issues, risk management questions, facility and professional licensing matters, tax exemption issues, physician contracting, behavioral health matters, and questions of billing and reimbursement. Her work in health law predates IHC and continues outside of it. Ms. Conard worked first with health law and regulation in 1976 as legal counsel for the California Department of Health. Since joining IHC, Ms. Conard served on the Salt Lake Valley Board of Health for ten years. She is currently vice-chair of both the Board of Trustees of the Utah Disability Law Center and the Health Advisory Council of the Utah Department of Health. For the American Health Lawyers Association and the Utah State Bar she has presented several legal education seminars. Ms. Conard often provides clinical supervision for health law students at the University of Utah S.J. Quinney College of Law.

Intermountain Health Care, Inc., is a non-profit integrated system that

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provides care throughout Utah and Idaho. Headquartered in Salt Lake City, IHC consists of 21 hospitals, 150 total service sites, 580 employed physicians, 2800 affiliated physicians, and approximately 2450 hospital beds.¹ IHC began in 1975 when the Church of Jesus Christ of Latter-day Saints donated its fifteen-hospital system to the communities it served.² IHC continues out of this community-first impetus, pledging in its mission to provide excellence to the large and small communities of the region.³ Towards this end, IHC has largely succeeded. In 2004, IHC hospitals and clinics provided charity care in some 147,000 cases.⁴ Today, IHC provides more charity care than all other Utah health care organizations combined.⁵

What makes Ms. Conard's job at IHC particularly unique is the challenge she faces as in-house legal counsel for the IHC Institute for Health Care Delivery. This Institute is what distinguishes IHC from similarly large integrated health care systems. Founded in 1990 and directed by Brent James, M.D., M. Stat., the Institute collects and analyzes data from services provided throughout the IHC system. With this information the Institute recommends strategies for improving quality while reducing cost. Most transformative of these recommendations has been the identification of best practices protocols to standardize the provision of care across hospitals and clinics, as well as among physicians. What the Institute has devised in its determination of best practices re-imagined the provision of medical care and reshaped the legal issues confronted by Jane Reister Conard and IHC's legal division.

II. THE IDEA OF BEST PRACTICES

Best practices reinterpret the classic understanding of medicine. Instead of the kindly doctor rendering care customized to the individual patient, best practices standardizes the treatment of all similarly situated patients. The evidence-based best practices for a certain medical situation serves as a baseline for the clinician. From that baseline, care can be customized beyond the mandates of the best practices, but the baseline itself must be shared and followed across IHC's clinics and hospitals.⁶ Though undermining the popular conception of health care, the Institute's idea of best practices promises improved quality and reduced cost by drawing on

1. INTERMOUNTAIN HEALTH CARE, ANNUAL REPORT 2004 7 (2004), available at <http://intermountainhealthcare.org/xp/public/documents/corp/annualreport.pdf>.

2. *Id.* at 3.

3. *Id.* at 3-6.

4. *Id.* at 28.

5. *Id.*

6. Jane Reister Conard, *Cost and Quality in Health Care: Does Anyone Get What They Pay for?* 3 (Nov. 2005) (unpublished provider response, on file with the author).

the knowledge of the entire IHC medical community to target the precise ailment and streamline its treatment.⁷

The Institute develops its best practices by three methods: Quality Utilization Evaluation ("QUE") studies, research studies, and computerized decision programs.⁸ All of these focus on the collection and analysis of evidence, but each alone is sufficient to generate a best practice.⁹ Once generated, a best practice is far from static. Instead, IHC and the Institute use data from these methods to continually reevaluate and redesign these care models.¹⁰ IHC's computerized medical records are especially comprehensive.¹¹ IHC developed its first health record software, *Help*, approximately thirty years ago.¹² Data from these detailed computerized medical records prove particularly useful in these reviews, allowing teams of doctors to track the response of every IHC patient to the diabetes best practice, for instance.¹³

Using computers as tools to structure care protocols attracted the attention of General Electric. In July of 2005, IHC inked a deal with GE Healthcare to co-develop the latter's Centricity clinical software, which integrates medical records with a bedside medication-administration system.¹⁴ The pair structured a \$100 million, ten-year agreement to produce the new software that GE Healthcare will ultimately distribute to other medical providers, giving them the tools to develop similar best practices through IHC's methods and their own clinical experience.¹⁵

The Institute describes its redesign of health care provision as a movement from craft-based medicine towards profession-based medicine.¹⁶ Generally speaking, while the craft-based approach customizes care to the individual patient, profession-based medicine draws from the experience of treating individual patients, research studies, and computerization to devise the best treatment for all similarly situated patients. The latter approach

7. Timothy J. Mullaney, *Doctors Wielding Data: Standard Treatments Don't Please Everyone, but They're Effective*, BUS. WK., Nov. 21, 2005, at 94, 94

8. Conard, *supra* note 6, at 3.

9. *Id.*

10. Mullaney, *supra* note 7, at 94

11. See generally, John R. Griffith et al., *The Revolution in Hospital Management*, 50 J. HEALTHCARE MGMT. 170 (2005) (reviewing the characteristics of five health care systems that have either won the Malcolm Baldrige National Quality Award in Health Care or have been extensively studied).

12. *GE Partners with Health-Care Provider to Develop Next-Generation Clinical Software*, TECHWEB NEWS, July 6, 2005, available at 2005 WLNR 10629732 [hereinafter *GE Partners with Health-Care Provider*].

13. Mullaney, *supra* note 7, at 94.

14. *GE Partners with Health-Care Provider*, *supra* note 12.

15. *Id.*

16. Conard, *supra* note 6, at 3.

exemplifies the idea of best practices.

III. THE IMPACT OF BEST PRACTICES

According to the Institute, the standardization of treatment through best practices yields fewer mistakes, more consistent application of current research, and lower costs.¹⁷ Dr. James believes that redesigning health care through this use of information could eliminate hundreds of billions of dollars of waste in this country's health care system.¹⁸ IHC's experience supports this hope: its inpatient hospital costs run 27% below the national average, its operating margins of 4% rank near the top of the hospital industry, and *Modern Healthcare* has named IHC five times as the best run health system of this nation's 582 integrated health systems.¹⁹ Much of these savings—both in dollars and lives—reflects the greater partnership between hospital administrators and physicians to streamline purchasing and standardize care pursued by IHC and the Institute.

Unaccounted for are savings attributable to reductions in medical malpractice actions and the costs associated with lengthy litigation. Although notoriously difficult to isolate a single causative factor for failures to prosecute malpractice actions, IHC has anecdotal evidence that best practice protocols provide effective defenses. In around 75% of malpractice actions against IHC, the plaintiff requests the best practice protocol relevant to the claim.²⁰ By producing a document so thoroughly infused with the research, knowledge, and experience of IHC's physicians, the defense can often successfully argue the best practices protocol as establishing the standard of care.²¹ Absent a breach of this standard of care, the plaintiff must then argue the best practice as inadequate in order to prove the requisite breach—a difficult task.²² To accommodate unique situations, all best practices protocols include a disclaimer that yields to the judgment of the physician.²³ The strength of these disclaimers is not absolute. Where the defendant physician acts at variance with the best practice protocol in the interest of the plaintiff patient, the defense might find itself outside of the disclaimer's protection and arguing against the best practices as establishing the standard of care. Therefore, best practices has both the authority to demonstrate the standard of care and the flexibility to

17. *Id.*

18. Mullaney, *supra* note 7, at 94.

19. *Id.*

20. Conard, *supra* note 6, at 4.

21. *Id.* at 5.

22. *Id.*

23. *Id.*

allow for some deviations guided by the physician's best judgment. But its force may prove either a shield for or a sword against physicians.

Given this authority to set the standard of care, the best practices protocol requires constant updating to truly reflect the current practice of medicine in a system's facilities. In cases involving treatments with best practices, IHC has lost only one verdict.²⁴ An old best practices protocol contributed to that outcome.²⁵ While the course of treatment had changed among physicians, the best practices for that treatment had not been updated.²⁶ This protocol suggested a different standard of care and supported the plaintiff's claim.²⁷

IV. CONCLUSION

IHC's experience with its innovative best practices framework proves the treatment philosophy economical, efficient, and effective at improving patient care. In medical malpractice claims, best practices protocols often establish the standard of care which either protects or exposes the physician. From within this innovative system of delivery, practitioners like Ms. Conard will continue working to understand fully the legal ramifications of best practices.

24. *Id.*

25. *Id.*

26. Conard, *supra* note 6, at 5-6.

27. *Id.* at 6.