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## New Texas Laws Fix Loopholes After Retaliation Against Two Nurses

**Reprinted from [REPORT ON MEDICARE COMPLIANCE](#), the nation's leading source of news and strategic information on Medicare compliance, Stark and other big-dollar issues of concern to health care compliance officers.**

By [Nina Youngstrom](#), Managing Editor

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Texas enacted two statutes that took effect in September in the wake of unprecedented events involving two nurses who reported a physician to the state's medical board.

One of the laws (SB 192) aims to protect nurses from retaliation and was needed to close certain loopholes, a source tells *RMC*. The other statute (SB 680) prevents the medical board from accepting anonymous complaints against physicians. It almost included a provision that required the medical board to disclose to physicians the identity of the complainant, which currently remains confidential. The Texas Nurses Association was successful in lobbying against that provision because the organization believes it could discourage complainants from coming forward, says Jim Willmann, TNA's director of governmental affairs.

The nurse-protection statute originated from a case involving registered nurses Anne Mitchell and Vicki Galle, who worked at Winkler County Memorial Hospital. They complained about Rolando Arafiles, M.D., to the medical board in April 2009, citing deficiencies in his standards of practice. After the medical board contacted Arafiles about the complaint, he allegedly asked his friend, Sheriff Robert Roberts, to find out who filed the complaint, according to the Texas Attorney General's office. Roberts allegedly used "law enforcement channels" to obtain a copy of the complaint — which is supposed to remain confidential — from the medical board, the state says.

### Nurses Were Pursued Aggressively

Based on information contained in the complaint, Arafiles and Winkler Hospital administrator Stan Wiley were

able to deduce who the likely complainants were, according to the state. The sheriff's office then obtained a search warrant for information stored on the nurses' computers to confirm that they were the ones who submitted the complaint, the state says.

Galle and Mitchell were arrested and charged with misuse of official information in June 2009. They were also fired from their jobs at Winkler Hospital. County Attorney Scott Tidwell alleged that the nurses had improperly disclosed non-public information (i.e., patient medical record numbers, but not names), and that they intended to harm a physician's reputation.

The charges against Galle were dropped just before the trial started on Feb. 8, 2010. The case proceeded against Mitchell, but the jury took less than an hour to return a verdict in her favor (*RMC 2/22/10, p. 8*). The nurses filed a federal civil suit against Arafles, the hospital and the county officials, alleging that their termination and indictment were retaliation in violation of state laws such as the Nursing Practice Act and the Public Employee Whistleblower Law, which prohibit retaliation for reporting patient care concerns. They settled the suit in August 2010, court documents show.

Then the state turned the tables on the physician, the hospital administrator, the sheriff and the county attorney:

- Former hospital administrator Wiley was charged with abuse of official conduct and pleaded guilty in an agreement to help the state with its case against the other three defendants. He was sentenced to 30 days in county jail.
- Former sheriff Roberts was charged with misuse of official information, retaliation and official oppression. He was found guilty in June 2011 and was sentenced to serve 100 days in jail, plus four years of probation and was ordered to pay a \$6,000 fine.
- Former county attorney Tidwell was charged with misuse of official information, retaliation and official oppression. He was found guilty on Oct. 3 and was sentenced to serve 120 days in county jail, a 10-year "probated prison sentence" and was ordered to pay \$6,000 in fines.
- Arafles has also been charged with misuse of official information and retaliation, according to the state. His case is still pending. According to the medical board's website, he still has his medical license, but was reprimanded for his involvement in this case.

SB 192 "was specifically designed to address some of the lessons learned from the Winkler County case," says Willmann. "Texas already had some significant anti-retaliation protections for nurses, but after the case we saw that some things could be better," he says. For one thing, nurses needed to be shielded from criminal charges. Next, the law increased administrative fines imposed on a facility or practitioner to \$25,000 for violating the state's rules on termination. Winkler Hospital had been fined only about \$1,300 for the improper termination of the two nurses, he explains.

The law also spells out that "a report is considered to be made in good faith if the person reporting believed that the report was required or authorized, and there was a reasonable factual or legal basis for that belief." This was needed so the subjects of the complaints couldn't argue that the nurses were just acting out of malice, says Willmann. "If you are raising a concern, usually you've already had some discussions and tried to get it resolved internally," which often leads to conflicts, he explains. And the physician would often allege that the complainant "just didn't like you."

## Board Need Not Disclose Identities

SB 680 states that the board can no longer accept anonymous complaints. This change wasn't directly inspired by the Winkler County case, Willmann says, but TNA helped take out a proposed amendment that would have required the board to disclose to the physician the identity of the person who filed the complaint. "Because of Winkler, we were successful in defeating that." The argument for the amendment was due process: You have the right to know who your accuser is. "But we [argued] that people aren't going to complain if the board is going to turn around and tell the physician who made the complaint."

Willmann explains that the complaint filed by Galle and Mitchell was not submitted anonymously because they had already been in communication with the board about the conduct, and the board encouraged them to submit an unsigned letter.

Anonymous complaints are very difficult to investigate and other boards in the state don't accept them, Willmann explains. Even with the change, the confidentiality of sources will still be maintained, he says.

Both laws were signed by Gov. Rick Perry (R) on June 17.

Before the False Claims Act was amended in 1986, Congress held hearings to find out why more citizens weren't stepping forward with claims, says Jeb White, of Nolan and Auerbach, who represents whistleblowers. Lawmakers learned two important things, he says:

- (1) There weren't any retaliation protections for whistleblowers at that time, and
- (2) Whistleblowers' names were made public when the suits were filed.

"Once they fixed those two things, people started stepping forward and shining the light" to expose fraudulent conduct, he says. "It seems that Texas is taking a page from the False Claims Act."

TNA has a complete history of the case at [www.texasnurses.org](http://www.texasnurses.org).

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