Reporting professional incompetence

A nurse anesthetist may face a dilemma when observing a colleague who is performing in less than a competent or professional manner. There has been historical resistance on the part of all health care professionals in making formal complaints regarding such conduct—either due to a fear of being needlessly exposed to legal liability or out of humanitarian considerations of not impeding an individual from earning a livelihood. In recent years, both of these historic motivations have been declining, largely because of an increased recognition of the professional responsibility to protect consumers from receiving inadequate care.

However, many problems arise when such conduct is discovered. The first decision is who should be notified, that is, the supervisor, the hospital administrator, local professional association, state licensing authority, or national professional association. It is not the purpose of this article to consider the social pressures involved, but rather the possible legal consequences which a nurse anesthetist may encounter.

The most obvious consequence which may arise from reporting professional misconduct is the risk of being named in a defamation suit. Defamation, consisting of libel and slander which concern the written and spoken word respectively, involves an allegation that the nurse anesthetist communicated something to a third person which was untrue and which tended to disparage one's professional character. The mere fact that the information was communicated through no intent to harm (called malice) serves as no defense. On the other hand, a showing of truth (for example, that one is professionally incompetent), is, in most states, a complete defense to a defamation action. As might be expected, however, proving professional incompetence before a court is a rather difficult task.

To further encourage such activities, the law has created special exceptions for the individual reporting such conduct which afford significant protection against the possibility of civil liability. This has been called a "qualified privilege." A qualified privilege to report allegedly questionable conduct may exist where the defendant (nurse anesthetist) can show (1) that there was some truth to the statement, (2) that it was communicated to only the authorities who have reason to know of the questionable conduct, and (3) that the statement was made without malice. For example, such
a privilege may arise for reporting to the state licensing board or hospital administrator or supervisor.

Most states have enacted statutes providing protection, known as immunity, from civil or criminal liability for those who participate in various in-hospital committee activities whose purpose is to improve patient care. Some statutes specifically enumerate various committees which receive the protection from suit or liability. For example, one statute may list peer review, medical audit, tissue review, incident reporting, and nursing care committees as receiving immunity from prosecution.

What this means is that persons acting in their capacities as committee members are protected in their deliberations, minutes, reports and disciplinary proceedings. These statutes are designed to permit the hospital to carry on various review activities in order to maintain the competency of the professional staff. Generally, reports made to the respective hospital committees will be covered by the immunity grant to the committee, so as to allow a free flow of information throughout the institution.

Many states also have provided immunity for those who report alleged incompetence to local licensing authorities. It is believed that the person complained of will have a full opportunity to clear his or her professional name during an investigation of the complaint. Usually, an investigation into one's professional competence is not initiated unless the complaint involves gross misconduct or is symptomatic of several prior complaints. Again, these statutes protect the person reporting the incompetence from a possible lawsuit for defamation or otherwise.

It must be noted that these statutes vary to a major degree. Therefore, it is important to review the law existing within your state prior to assuming that protection exists. For example, one eastern state has a bill pending in its legislature where the reporting of professional incompetence will be mandatory for certain specific individuals. This, however, represents the extreme exception. Of those states providing immunity, the majority indicate that reporting is wholly discretionary on the part of the individual or hospital.

In other words, in virtually all states, there is no legal obligation for a licensed professional to report alleged unethical or incompetent practice to appropriate hospital authorities or to a state licensing body. On the other hand, many have concluded that there exists a professional responsibility to telling such action. Although there is no legal duty to report, there clearly exists a legal right to report; and in such instances, immunity or protection is generally provided.

Certain problems arise when a nurse anesthetist decides to report incompetence to a professional association. No statute to date has provided immunity for one reporting to a national organization such as the American Medical Association or the American Association of Nurse Anesthetists. On the other hand, a few statutes provide protection for those who notify local professional societies. This is based on the fact that often, the state licensing authorities assist, and are assisted by, the local professional organizations and societies.

In considering whether to report incompetence and unethical behavior, one should remember an additional fact. The above mentioned statutes were enacted in order to permit hospitals and professional societies to maintain high quality professional staffs and memberships, respectively. Further, they permit the identification of persons who may be acting in a less than desirable manner which can result in patient injury. However, no statute will protect a nurse anesthetist who makes an unfounded complaint. In other words, where bad faith underlies the action, liability on the part of the one making the report may be found. Therefore, it is incumbent upon the nurse anesthetist to ground her complaints of unethical and questionable conduct on facts which she or he specifically observed.
When a nurse anesthetist is attempting to determine with whom a complaint should be lodged, at least two factors should be considered. Not only is the statutory immunity which protects the complaining party typically applicable solely to complaints rendered to state or local societies or organizations, but these entities are also in a substantially better position to promptly and fairly investigate the alleged wrong, as well as reach and enforce a conclusion. Therefore, it is suggested that the forum of choice with which a complaint should be filed is the state licensing agency, or the state or local professional society. This does not mean that a national association should not be informed about these proceedings; but in most instances, it is more desirable for the national association to defer action until the matter is resolved at the local level.

In all instances, however, any such communication should be made in a confidential manner and only to those persons who have authority to act upon the report. Likewise, any and all notification of allegedly incompetent or unethical behavior should be supported by facts which demonstrate the questionable conduct. In other words, such a complaint should be made in an atmosphere of good faith, should demonstrate objectivity, and indicate that it is being made in an effort to assure high quality patient care and not out of any personal animosity toward the individual addressed in the complaint.