A special messaging system can alert hospital staff to violent incidents quickly, says **Terri Mock**, chief strategy and marketing officer at Rave Mobile Safety in Framingham, MA. Systems are available that can notify staff using multiple communication channels so they are immediately aware and know how to respond.

Hospitals must create emergency preparedness plans, use communication tools so staff can act quickly, and provide a channel to report violent incidents and anonymous tips.

"By deploying a personal safety app that can easily be downloaded onto phones, healthcare organizations can put emergency plans, contacts, and safety tools right into the hands of their staff," Mock says. "Adopting these more agile communication technologies give employees multiple ways to report violence, and help hospital administrators improve conditions for those on the frontline. Likewise, ensuring hospitals work with police, fire, emergency managers, and others in the community will be crucial to ensuring a swift and collaborative response." ■

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Protect Peer Review Privileges, or Risk Serious Consequences

A hospital's peer review protection often prevents attorneys from potentially using damaging information in court, but that protection can be forfeited.

Peer review is an important tool healthcare organizations use to prevent future patient harm by identifying issues, conducting investigations to determine the root causes, and fixing those root causes before they can cause further harm, says **Callan G. Stein**, JD, partner with Troutman Pepper in Boston.

The peer review privilege is critical because it allows physicians and medical professionals, whose medical expertise make them uniquely qualified to know best how colleagues should act, to conduct the investigations themselves while maintaining confidence. Absent the peer review privilege, hospitals and medical centers would have to rely on another privilege to maintain confidence. For example, they would have to engage legal counsel in every instance to take advantage of the attorney-client privilege, Stein says.

All 50 states and the District of Columbia currently have peer review privilege statutes on the books, Stein says. The application of, and limitations for, the peer review privilege will vary by state.

State peer review statutes and some federal statutes, such as the Healthcare Quality Improvement Act of 1986, generally provide levels of immunity to those who participate in the peer review process, Stein says. That means they cannot be sued or otherwise held liable for their statements or actions that were part of the peer review process.

"State peer review statutes also typically protect the confidentiality of peer review processes," he explains. "This encourages the open exchange of ideas and open communication during peer review without the participants fearing that their statements will later be used against them, for example, in litigation."

This protection goes both ways. In a malpractice suit, peer review materials cannot be used by either the plaintiff patient or the defendant physician or facility.

Follow the Statute

To protect patient safety investigations, the most important thing is to follow the applicable federal or state peer review statute as strictly as possible.

Most statutes explain the circumstances in which the peer review protections will apply, including defining what does and

does not constitute a "peer review committee," Stein says. For an investigation to enjoy peer review protection, it must, at a minimum, be conducted by one of these committees or another body to whom the statutory protections apply.

"In addition, often times peer review statutes will make clear that the peer review privilege only applies to actions taken for specific purposes; for example, the evaluation or improvement of the quality of healthcare being provided," Stein explains. "It should be well documented that any patient safety investigation is being conducted for one or more of these purposes, and the findings of the investigation should, in fact, be used for those purposes. Put another way, a hospital or facility claiming the peer review privilege over a patient safety investigation should be prepared to demonstrate how the investigation helped improve patient care, for example."

If the hospital or facility uses a specific, documented process by which a patient safety investigation must be conducted, it should first ensure the stated process complies with the applicable peer review statutes, Stein says. If the process is compliant, Stein advises following that process as strictly as possible.

"Plaintiffs and other parties seeking to vitiate the peer review privilege frequently seek to exploit even minor deviations from documented procedures," he explains.

Peer review protection can be forfeited through errors on the part of the healthcare entity, Stein cautions.

Avoid Bad Faith Charge

One common way parties seek to sever the peer review privilege is by claiming the party seeking to enforce it engaged in bad faith during the peer review process, Stein says. The term often applied in this context is that of a "sham peer review," in which the participants are alleged to have acted out of bias, personal animus, or some other non-medical reason. If such bad faith is proven, it will defeat a claim of peer review privilege.

"Another somewhat common argument to overcome the peer review privilege is a claim that certain comments or actions were taken outside the peer review setting," Stein says. "The privilege only applies to the peer review setting, the boundaries of which are often defined as the duration of a meeting of a peer review committee."

Peer review records also typically do not enjoy privileged protection in federal lawsuits alleging discrimination or other civil rights violations, Stein notes.

The most important thing to remember about confidentiality protections afforded to patient safety investigations by state law is they represent an exception to the strong policy in favor of allowing patients to access information about their own treatment, says **Mark R. Ustin**, JD, partner with Farrell Fritz in Albany, NY.

"They tend to be limited. You want to make sure that any disclosures occur only in the context of formal proceedings eligible for protection, and you have to pay close attention to any exceptions to those protections," Ustin explains. "For instance, sometimes the statements of a malpractice defendant will not be afforded the same protection as statements of other individuals investigating the alleged malpractice. Once the privilege is forfeited in one place, that can lead a court to determine that it was forfeited elsewhere, forcing the disclosure of statements or documents that you never thought would be subject to disclosure."

Hospital Acted Too Quickly?

Acting in haste can threaten peer review privilege, says **Christopher J. Kutner,** JD, partner with Rivkin Radler in Uniondale, NY.

The privilege, created by statute in most states, is rationalized by the need for confidentiality in promoting a complete and candid peer review, Kutner says. But one court in Pennsylvania decided the privilege was not available because the formality required by statute to afford the protection was not followed.[1]

"The lesson to be learned is that statutes affording privilege must be followed to the letter if the hospital will intend to use privilege as a shield," he says.

In a case involving infant deaths following an outbreak of adenovirus, the lower court in Pennsylvania ordered the release of information because a formal meeting to commence the peer review did not occur as required, Kutner explains. Balancing the need to follow the applicable peer review statute to the letter against the urgency of commencing an immediate investigation to avoid further patient harm may be the key issue on an appeal.

"It is certainly understandable, especially when involving the deaths of infants, to want to investigate immediately to avoid further loss of life," Kutner says. "In present day, with extensive technology available to gather individuals for a meeting on short notice, there is no excuse for not commencing the investigation as required, especially understanding

that infants died and there would most surely be lawsuits."

Investigators may have concluded the hospital was liable for failure to adequately sanitize ophthalmic equipment used in the neonatal unit or the hospital did everything reasonable to sanitize the equipment, or something in between, Kutner explains.

Privilege is afforded based on broad principles. Privilege will be afforded if peer review action is taken in the reasonable belief the action was in furtherance of quality of care, after a reasonable effort to obtain the facts of the matter, after reasonable notice and hearing procedures are afforded to the physician involved or after such other procedures are fair to the physician under the circumstances, and in the reasonable belief the action was warranted by the facts known after such reasonable efforts to obtain the facts.

"In the Pennsylvania case, there was certainly urgency to determine if a quality-of-care issue existed and to immediately remediate, but that could have been done after the formalities required to kick off the review were performed," Kutner says.

When a statute affords protections such as a privilege from discovery, and the statute is not followed to the letter of the law, courts are constrained in their ability to extend the privilege. Had the judge granted the privilege and that issue appealed, the appellate court would likely have reversed the lower court and ordered the release of information.

"The lesson in these peer review cases is to follow the applicable statute, bylaw, or otherwise to the letter, or courts will be constrained for upholding the privilege," Kutner says. ■

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Stay Vigilant About Malpractice Risks with Telemedicine

The dramatic increase in the use of telemedicine is raising concerns about the potential for malpractice issues related to this form of caregiving, with some experts cautioning a wave of lawsuits could be on the way.

Adherence to key principles of patient safety and risk management can reduce the risk.

Few lawsuits focused specifically on care delivered by telemedicine have been filed, and some attorneys are surprised, says **Tom Davis**, MD, FAAFP, a practicing physician, consultant, and expert witness in St. Louis. There always is a delay after new technology is widely adopted, but some legal experts expected more lawsuits by now, he says. It may only be the lull before the storm.

The consensus in the legal community is the delay is simply because the liability attorneys do not know how to value these claims, Davis says. Plaintiff's attorneys appear to be holding on to complaints until they can determine valuations, but that is not an indicator that telemedicine has been unusually free of medical malpractice allegations.

"When one or two brave souls file claims, their peers can look at that and see how to value these cases, and then it will be a flood of cases coming. Attorneys hear people say it appears there has not been much actionable related to telemedicine, and they chuckle at that because they think it is going to be the alpha and omega of tsunamis once the claims start," Davis says. "Don't take the lack of filings as being reassuring in any sense. It's a new thing, and once they come, boy, are they going to come."

Failure to Diagnose

Failure to diagnose will be one of the most likely allegations, Davis predicts. Healthcare organizations should be extremely conservative in how they use telemedicine and resist encouragement from the business office to maximize patient volume through the technology.

By its nature, telemedicine allows for much less meaningful interaction with and assessment of the patient, Davis says. What might be immediately obvious in a traditional office visit might go overlooked or