VALLEY PERSPECTIVE

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Balance Consumer Protection, Health Care Worker Rights

[**April 01, 2001**](http://articles.latimes.com/2001/apr/01)|GARY N. STERN | Gary N. Stern, an attorney specializing in elder abuse / nursing home litigation, is a public member of the state Department of Consumer Affairs' Respiratory Care Board. He lives in Granada Hills.

It is every patient's nightmare. You are admitted to the hospital with a serious illness. You place your life in the hands of what seems like an endless parade of health care workers. You recognize your doctor but these other white-coated men and women, some appearing to be barely out of high school, are strangers to you.

One of them administers a drug to make you sleep. You are not aware that this young man has had a rough week. He is out on bail after battering his wife. He is looking at substantial jail time. He has recently been diagnosed with a severe psychological disorder that he has been successful in hiding from peers at the hospital. He has his mind on other things and does not notice that the drug he pulled from the shelf is not the one listed on the doctor's order sheet. The result? Another hospital-based tragedy. Will others face the same fate?

Another case, this one not merely hypothetical but all too real, made headlines in 1998. Efren Saldivar, a trusted health care worker, was alleged to have killed patients using the very tools he was trained to use. Saldivar has been charged with murder, and his chosen profession, respiratory care, is again in the limelight.

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News coverage of the California Respiratory Care Board has been mostly positive, and for good reason. Those of us on this little-known consumer protection board followed the law and swiftly applied the Respiratory Care Practice Act to revoke Saldivar's license, incidentally, without opposition from Saldivar.

Later we supported a bill, now law, that established a comprehensive mandatory reporting requirement governing hospitals and hospital-based health care workers. Hospitals now must report known instances of negligence and incompetence to our board.

Since the law was passed, reporting has been slow, not in keeping with what many believe are the actual instances of hospital-based misconduct. This is not surprising to people such as myself, critics of a health care delivery system that often seems more concerned about protecting its own than serving the public. For years, the Medical Board of California has had the reputation of disciplining few doctors, certainly not at levels consistent with the reported instances of negligence and misconduct. That reputation has only recently begun to slowly improve.

The failure of the health care industry to police its own is a mystery. Wherever there is a duty to report misconduct under the law, there is an accompanying immunity from civil lawsuits. Those named as "mandatory reporters" concerning child abuse and elder abuse have such immunity. Hospitals likewise have legal protections with regard to doctors. Hospitals can freely investigate staff physicians without fear that their records can later be used against them in court. Thus there is no excuse for the failure to vigorously apply mandatory reporting laws as part of daily oversight by our health care facilities.

On the other hand, health care workers have raised a legitimate issue with regard to what they perceive as heavy-handed disciplinary practices by California's consumer protection boards. The trade association representative for respiratory care practitioners essentially has said that if a wrong is committed while not on the job, it is not the Respiratory Care Board's business to investigate and discipline. Although this position is extreme, it does point out a problem. The Respiratory Care Board is permitted to evaluate the actions of a practitioner, at any time or under any circumstances. It may discipline the individual (with revocation or suspension of license or with probation) if the actions are "substantially related" to the qualifications, functions or duties of his or her profession and show present or potential unfitness to perform the job in a competent manner.

That might be a reasonable test, but the law actually defines the actions that meet that test. They include any conviction of any crime involving fiscal dishonesty, theft or larceny, and conviction of any crime involving driving under the influence or reckless driving while under the influence.

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The law mandates discipline without looking at the circumstances involved in the offense. It treats the practitioner not as an individual but rather as a statistic. This is wrong and should be corrected. The "substantial relationship" test should be applied with no preconceived notions about what conduct constitutes grounds for discipline.

For example, under current law, a respiratory care practitioner with a spotless record would be subject to discipline if he were found to have a 0.08 blood alcohol level after having just left his sister's wedding. Certainly no one condones driving while intoxicated. But do we really want to invoke discipline for an isolated error in judgment, and while off duty?

Our system of weeding out incompetent, dangerous health care practitioners must attempt to strike a balance between the need for consumer protection and the rights of health care workers. I am proud to be a part of a consumer protection board that believes that mandatory reporting by hospitals is proper public policy. I am also confident that the same board will be responsive to the claims of the 15,000 respiratory care practitioners of this state when they ask that our disciplinary powers be reasonably applied to those who are truly a danger to the public.

The allegations of the Saldivar case are the stuff of every patient's nightmare. All of us involved in the health care world must see to it that such events can never happen again.