

# REMEMBERING A NEVER EVENT

## WINKLER CO.—TEN YEARS LATER

By Cindy Zolnierek, PhD, RN, CAE

THIS YEAR MARKS THE 10TH ANNIVERSARY of a “never event”—an event of such grave significance it should never occur. In 2009, two nurses faced felony charges for reporting a physician to the Texas Medical Board (TMB). In a saga meant for the big screen, not real life, the Winkler County sheriff, prosecuting attorney, and hospital administrator conspired with physician Rolando Arafiles to shut down concerns about the doctor’s practice—at any cost.

Winkler County Memorial Hospital is a 25-bed rural, critical access hospital located in Kermit, TX. Anne Mitchell, RN, served as compliance officer and Vicki Galle, RN, was over quality improvement and utilization review. Both nurses became alarmed by Arafiles’ irregular medical practices and exhausted internal mechanisms to have their concerns addressed. Honoring their professional duty to patient safety, the nurses determined they had an obligation to report their concerns externally to the Texas Medical Board. What followed was a convoluted saga of a small Texas town with a thick good-ol’-boy culture more concerned with protecting the status quo than serving its citizens.

Notified by the TMB of a complaint against his practice, Arafiles complained to his golfing buddy and business partner (distributors of a nutritional supplement) Sheriff Robert Roberts that he was being harassed. Roberts obtained confidential information from TMB through fraudulent means, traced the report to Mitchell and Galle, and got county attorney Scott Tidwell to issue arrest warrants.

The charge: misuse of official information, a third-degree felony. The nurses turned themselves in and hospital administrator Stan Wiley promptly fired them.

Ultimately, the case went to trial. Charges against Galle were dropped one week before the trial date, and

**In a saga meant for the big screen, not real life, the Winkler County sheriff, prosecuting attorney, and hospital administrator conspired with physician Rolando Arafiles to shut down concerns about the doctor’s practice—at any cost.**



### PART 1: UNPACKING A LANDMARK CASE

Winkler County Courthouse in Kermit, TX

Mitchell turned down a plea agreement the morning of the trial. After four days of testimony, the jury reached a not guilty verdict in less than an hour. Galle and Mitchell relied on whistleblower protections to successfully sue the good-ol’-boys: Arafiles, Wiley, Roberts, and Tidwell. The Texas Attorney General later filed felony charges against the good-ol’-boys, and all paid fines and served time. Arafiles lost his license to practice medicine and Tidwell, his license to practice law.

However, nurses Mitchell and Galle are not celebrating a victory.

The experience was traumatic, personally and professionally. Unable to return to their long-term employer Winkler County

Hospital, Galle retired and Mitchell had to look outside her community for employment opportunities. TNA successfully pursued legislation to strengthen existing nurse advocacy protections with Galle’s and Mitchell’s support and testimony.

There are no winners when organizational culture squelches expressions of concern about patient safety. Only when organizations intentionally adopt a culture of safety and welcome the expression of concerns can we expect improvement in patient safety goals.

In the next three 2019 issues of *Texas Nursing*, we will look at the full trial and experience of the Winkler County nurses, and what impact the event continues to have on nursing practice ten years later. ✘

# SMALL TOWN; BIG CONSEQUENCES

## Two Nurses Arrested for Doing the Right Thing

By Cindy Zolnierek, PhD, RN, CAE

THIS ARTICLE CONTINUES our Winkler Co. 10-year retrospective. Read the introductory article in the Winter 2019 issue of *Texas Nursing*.

It was a June afternoon in 2009 when Clair Jordan, Texas Nurses Association (TNA) executive director, called Jim Willmann—then TNA director of governmental affairs—and me, Cindy Zolnier-ek—then director of practice—into her office and shared with us a letter the Texas Medical Board (TMB) had sent to the Winkler County District Attorney. The letter admonished DA's office for issuing an arrest warrant for two nurses accused of sending an anonymous complaint to the Texas Medical Board regarding a physician, Rolando Arafiles, MD.

We were incredulous—there had to be more to the story. But there wasn't.

That afternoon, Willmann and I spoke with nurse practitioner Naomi Warren, who worked with Arafiles in the Winkler County Rural Health Clinic and had also complained to the TMB regarding his practice. She outlined the efforts she, Anne Mitchell, RN, (hospital compliance officer and medical staff coordinator) and Vickilyn Galle, RN, (hospital quality improvement and utilization review coordinator) had taken to raise their concerns with the medical director, hospital administrator, and the board of directors to no avail.

Out of a sense of duty to their patients they felt they had no choice but to report Arafiles to the TMB.

When we then spoke with Galle, we heard a very calm yet relieved voice on the phone line, filled with hope. Willmann and I listened to an eerie tale of small-town politics gone bad. This rural community with a 15-bed critical access hospital was desperate for physicians and apparently willing to "look the other way" to keep providers, namely Arafiles, in the community. After all, he had community ties.

Arafiles reportedly was good friends and golfing buddies with Sheriff Robert Roberts and county attorney Scott

Tidwell. As a distributor of nutritional supplements, Arafiles had also partnered with the Sheriff for his business. Arafiles was affable and loved by the community. Yet, he was also under a TMB order for questionable practices in Victoria in 2007.

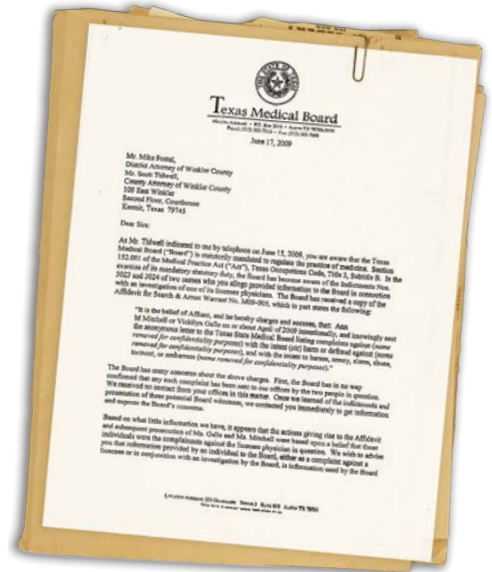
To us, the unthinkable had occurred: Two nurses were charged with felony offenses for making a good faith report to the TMB.

Discovering warrants had been issued for their arrest, Galle and Mitchell turned themselves in on felony charges of "misuse of official information" for reporting a physician to the TMB. The complaint had been made anonymously as Mitchell and Galle correctly believed that their jobs were at risk if their identities were known.

When Arafiles received notification of the complaint, which identified patient record numbers related to practice concerns, he alerted Roberts that he was being harassed. Roberts used the case numbers to obtain patient names implicated in the complaint and sent deputies to interview patients to discover who had filed the complaint. This was a dead end.

### TNA and nurses across the country were outraged. How could nurses, fulfilling their duty to patient safety, face felony charges?

Roberts then underhandedly obtained a copy of the anonymous complaint made by Galle and Mitchell to the TMB in which the nurses stated that they were "over 50, female, and employed by this facility since the 1980's." In the small town, these details were enough for him to narrow the potential complainants to two nurses. He obtained a search warrant to seize Galle's and Mitchell's computers and found their copy of the letter to the TMB.



Tidwell issued arrest warrants for Galle and Mitchell under Texas Penal Code §39.06 for misuse of official information—a third degree felony which carries potential penalties of up to 10 years imprisonment and a \$10,000 fine. The nurses turned themselves in and posted a \$5,000 bond. Both were fired by the hospital.

TNA and nurses across the country were outraged. How could nurses, fulfilling their duty to patient safety, face felony charges?

TNA established a legal defense fund, raising over \$50,000 from nurses, physicians, and attorneys across the country. Willmann started to work closely with Galle's and Mitchell's defense attorneys, ensuring they were well informed on Texas nurse advocacy protections and assisting with expert witnesses for hearings. And TNA members provided support to Galle and Mitchell throughout the ordeal.

Ultimately, charges against Galle were dropped. In February 2010, Mitchell went to trial. But she didn't go alone. The courtroom was filled with nurses wearing apricot ribbons in support of Mitchell—a nurse advocate for patient safety.

In the next two 2019 issues of *Texas Nursing*, we will look at the full trial and experience of the Winkler County nurses, and what impact the event continues to have on nursing practice ten years later. ✘



# NURSES ON TRIAL

## The Impact of the Verdict

By Cindy Zolnierok, PhD, RN, CAE



THIS ARTICLE CONTINUES our Winkler Co. 10-year retrospective. Read the introductory article in the Winter 2019 issue of *Texas Nursing* and how the nurses were accused in the Spring 2019 issue.

Nurses Vickilyn Galle, RN, and Anne Mitchell, RN, stood accused of sending patient information to the Texas Medical Board, allegedly to harass popular Kermit physician Roland Arafiles, MD. The tight-knit community in Kermit was deeply divided, and animosity towards the nurses would make it difficult to have a fair trial. A change of venue was granted in October 2009, moving the trial from Kermit to Andrews County.

The official charge by prosecutor Scott Tidwell was misuse of official information, a third-degree felony with potential penalties of up to 10 years imprisonment and a \$10,000 fine. The week before the trial, Mitchell learned she would face prosecution alone, as charges against Galle had been dropped.

### THE TRIAL

The State of Texas vs. Anne Marie Mitchell began February 8, 2010, in the 109th Judicial District Court with Honorable Judge James Rex presiding and John H. Cook IV and Brian Carney representing Mitchell.

**I would say to every nurse: If you witness bad care, you have a duty to your patient to report it, no matter the personal ramifications. This whole ordeal was really about patient care.**

Moments before the trial began, Tidwell offered a plea agreement to Mitchell. Defense attorney Cook advised, "I support whatever you want to do. It's your decision." Arms crossed in front of her, Mitchell paced for a minute, looked him straight in the eye, and said without hesitation: "I'm fighting this. Let's do it."

The courtroom brimmed with Mitchell supporters, including nurses from across the state. Texas Nurses Association (TNA) supplied apricot ribbons (the academic color of the nursing discipline) to wear. The deep respect nurses held for Mitchell's and Galle's advocacy was clear.

To make its case, the state had to prove that Mitchell misused information with the intention of harming Arafiles and that the information was used for a nongovernmental purpose. Prosecution witnesses testified that there was friction between Arafiles and Mitchell, the basis for the "intent to harm" allegation.

Arafiles took the stand and responded to questions about his medical decisions in specific situations, at one point

stating that patients with diabetes were at "no more risk of infection than anybody else." Nurses and nursing students throughout the courtroom collectively gasped, and the judge admonished the spectators to be quiet or risk being banned from the courtroom.

Once Tidwell rested the state's case two days later, Cook immediately filed a motion for a directed verdict—a request that the judge to direct the jury to acquit Mitchell as the evidence presented was inadequate. The judge denied the motion, and Cook began his defense.

TNA member Lolly Lockhart, PhD, RN, testified as a defense expert witness regarding the nurse's professional and legal duty to the patient. A medical expert testified that the five cases cited in the nurses' complaint demonstrated substandard care.

### THE VERDICT

In the end, the jury returned a verdict of not guilty in less than an hour, with a juror later stating that there was no ques-

tion the nurse was acting in the best interest of patients.

"I was just doing my job," relayed a jubilant Mitchell in a phone conversation with TNA immediately following the not guilty verdict, "but no one should have to go through this. I would say to every nurse: If you witness bad care, you have a duty to your patient to report it, no matter the personal ramifications. This whole ordeal was really about patient care."

"We didn't have any support—emotional or financial—until TNA and (the American Nurses Association) stepped in," said Galle, who attended the trial as a spectator. "We could never have gotten through this without nursing's support."

The civil lawsuit filed by the nurses in August 2009—alleging retaliation, civil rights and due process violations—was settled a few months after the trial for \$750,000, or \$375,000 each. Much of the settlement went to pay for legal defense costs.

## NURSES FIGHT BACK

In July 2009, TNA lodged a formal complaint with the Texas Department of State Health Services (DSHS) against Winkler County Hospital for establishing a policy prohibiting employees from reporting patient concerns to outside agencies without the hospital's permission and for retaliation. Such a policy violates nurses' rights under the Nurs-

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ing Practice Act and Hospital Licensing Rules. DSHS substantiated the complaint and fined the hospital.

After Mitchell's trial and the civil case, the "good ol' boys" faced their own day in court. The four men—hospital administrator, physician, district attorney and sheriff—were investigated and prosecuted by the Texas Attorney General's office, resulting in sentences of jail time and fines for all of them.

Hospital administrator Stan Wiley, who resigned in October 2009, was indicted on two felony counts of retaliation.

Sherriff Robert Roberts was convicted on two counts each of misuse of official information and retaliation and official oppression.

Tidwell was convicted on similar charges, removed from office, and his license to practice law was suspended and later relinquished to avoid disbarment.

Arafiles was charged with two counts of misuse of official information and retaliation. Surrender of his medical license was a condition of his plea bargain.

In May 2012, TNA president Margie Dorman-O'Donnell recognized three Attorney General staff members with the Texas Nurses Association's highest award, the President's Award. David Glickler, Shane Attaway and Randy Muenzler (whose wife is a nurse) were honored to have played a role in addressing the violations, noting that suppression of nurses' advocacy for patients directly conflicts with public interest in safety. ✕

*In the final 2019 issue of Texas Nursing, we will look at how the event continues to impact nursing practice ten years later.*

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# THE IMPACT OF WINKLER COUNTY

## A Decisive Response To a Never Event

By Cindy Zolnierek, PhD, RN, CAE

*This article continues our Winkler Co. 10-year retrospective. Read the previous articles online at [texasnurses.org/TNmagazine](http://texasnurses.org/TNmagazine).*

In health care, the most serious occurrences threatening safety are called sentinel events. The National Quality Forum refers to devastating sentinel events, including criminal activity, as never events, which require immediate responses and corrective actions to prevent recurrence. The retaliation against Vickilyn Galle, RN, and Anne Mitchell, RN, who reported a physician to the Texas Medical Board (TMB), was a never event.

After the nurses' criminal charges and civil suit were resolved, Winkler County Hospital was cited and fined. Despite being vindicated in court, the damage was done to the two nurses. Galle and Mitchell had spent most of their careers at Winkler Memorial Hospital in the community of Kermit—a place to which they could not return. Mitchell ultimately found a nursing job in New Mexico and Galle took early retirement.

We knew a policy solution was needed.

In 2011, the Texas Nurses Association (TNA) worked with Senator Jane Nelson and Representative Donna Howard to sponsor and pass the Patient Advocacy Protection Law (PAPL; SB 192, HB 575) to strengthen legal protections for nurses who speak out for patient safety. The PAPL:

1. Established "good faith" rather than "without malice" as the standard for making protected reports. During the criminal trial, the prosecution suggested Mitchell made the report to the TMB because she didn't like the physician (with malice), rather than due to patient safety concerns. A "good faith" standard establishes the basis for the complaint on the safety issues, rather than regard for the physician.
2. Provided immunity from criminal liability for patient advocacy activities. No one ever imagined that the act of patient advocacy could



3. Provided additional protection for nurses, including nurses who advise others of their rights and the nurse advocate role. The PAPL covers all retaliation, not just from the employer. (In the civil suit, the physician argued he couldn't have retaliated against the nurses because he wasn't their employer. Yet, power differentials can create a means for retaliation).
4. Enhanced penalties for retaliation so agencies could impose fines significant enough to act as a deterrent, up to \$25,000. Ten years ago, the Texas Department of State Health Services could fine the hospital only \$1,300: \$650 for each nurse. Likewise, validating several patient safety concerns and concluding the physician had illegally retaliated against the nurses, TMB issued the maximum allowable fine of \$5,000.

Another provision which extended protections to public employees passed in 2013, after being introduced in the previous two sessions (2009 and 2011). All public employees are protected from retaliation for reporting violations of law to the appropriate authority and have access to certain remedies through the Texas Whistleblower Law. However, these protections are more limited and more difficult to access than those in the Nurse Practice Act because of sovereign immunity.

Sovereign immunity protects public entities from civil lawsuits, including state and county hospitals, public universities, and correctional facilities. Because Winkler

County Hospital is a public facility, the nurses at the time could only sue the hospital under the Whistleblower Act and not the additional patient protection activities included in the NPA such as:

- Reporting patient care concerns within the facility.
- Refusing to engage in conduct that violates the NPA or rules of the Board of Nursing.
- Requesting safe harbor nursing peer review.
- Reporting licensed practitioners and facilities to their respective licensing boards or accreditation bodies because of a failure to meet accepted practice standards.

A 2013 limitation on sovereign immunity now allows publicly employed nurses participating in patient advocacy activities the ability to file civil lawsuits under the NPA.

TNA also fought legislation introduced in 2011, 2013, and 2015 that would have removed the confidentiality of reports to TMB. Winkler County nurses Mitchell and Galle testified to the harsh repercussions that can occur without confidentiality.

Since its inception in 1907, and first successful legislative policy effort in 1909 when the original Nursing Practice Act was established, TNA has worked to support patient safety by advancing nursing practice through policy initiatives. Because of that work, Texas nurses enjoy strong advocacy protections. As the Winkler County case and its aftermath shows, patients are better served when nurses can speak up for safety without fear of retaliation. ✕