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'Complete regulatory collapse': Why complaints about abortion doctor went nowhere

by Chelsea Conaboy, Inquirer Staff Writer, Posted: March 21, 2011



AP



Cassandra Barger knew something was wrong almost immediately. Kermit Gosnell, the abortion doctor charged in January with eight counts of murder, had begun giving her anesthetic to end a pregnancy. Barger ripped the IV from her arm.

Racked by convulsions, she crashed from the exam table to the floor. She would stay there nearly an hour while Gosnell and his staff refused to call 911 or allow her companion to leave the locked clinic for help, according to a lawsuit her lawyer filed.

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Barger, 34, a recovering drug addict, had warned Gosnell that she was on methadone when she went to his West Philadelphia clinic April 2, 2005, her filing said. She knew the drug could interact dangerously with certain sedatives.

What she could not have known was that Gosnell had a long history of injuring his patients and had let his malpractice insurance lapse nearly a year earlier in violation of state law.

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Lawyers at Pennsylvania's Department of State, charged with weeding out bad doctors, were told about the lapse and Barger's lawsuit - along with many others - but took no action. Barger's lawyer said he suspected that Gosnell had paid his client privately to walk away.

Barger's case provides a window into the state's system to discipline doctors, one that relies heavily on physician self-reporting and state investigators whose effectiveness has been questioned. It's a system that patient-safety advocates and a leading ethicist say is broken.

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Gosnell "was able to go on despite complaints for a long time," said Arthur Caplan, director of the University of Pennsylvania's Center for Bioethics. "That is not acceptable."

Gosnell was arrested Jan. 19 with his wife and eight employees. He is charged in the death of Karnamaya Mongar, 41, who went into cardiac arrest after an overdose of anesthesia, and in the deaths of seven babies prosecutors say he delivered live and then killed.

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Gosnell, who may face the death penalty, has maintained he is innocent. His lawyer Jack McMahon, who is still evaluating the case, said it appeared much weaker than prosecutors had portrayed. It may be years before Gosnell's case is heard in court.

The grand jury that indicted Gosnell denounced the Department of State for its role in the "complete regulatory collapse" that kept him in business for nearly four decades. The agency has been silent since, referring reporters to Gov. Corbett's office. Spokeswoman Janet Kelley declined to make anyone available for this article but answered a few questions by e-mail.

Complaints about doctors are made to the department's Bureau of Professional and Occupational Affairs by patients, by doctors, or as notices from insurers. State law requires doctors to notify the bureau when named in a malpractice suit. Lawyers there decide which cases to take before the Board of Medicine.

Filings against Gosnell - five were made from 2002 to 2009 - were handled by various lawyers there, some of whom told the grand jury that they had been unaware of Gosnell's full complaint history. Each case was closed without action.

Department of State chief counsel Steven Turner told the state Senate's Consumer Protection and Professional Licensure Committee on March 1 that he had taken up the mantra "Never another Gosnell."

Turner said he was working to improve communication and streamline reviews so that the same lawyers see all cases against a single doctor. He acknowledged that the lawyers he oversaw had not properly investigated malpractice cases filed against Gosnell - at least 13 since 1981.

The lack of action was not the result of a shortage in resources, Turner said. It was "a failure to perform" by certain individuals. Between the Department of State and the Department of Health, which oversees abortion clinics, 11 employees have been fired, resigned, or retired. Corbett's office declined to provide a list of the Department of State lawyers affected.

Critics say the bureau is understaffed and weak.

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The office is full of "people of goodwill who have absolutely no power," said Cliff Rieders, a malpractice lawyer who sits on the board of the state Patient Safety Authority. "It is completely and totally ineffective."

Barger filed her case, alleging negligence and battery, in September 2005.

Gosnell responded, denying the allegations, without a lawyer. That was a red flag for Barger's Philadelphia attorney, Derek Laysner. A malpractice-insurance carrier typically provides counsel, he said.

As in most states, physicians and surgeons in Pennsylvania must carry liability insurance. The requirement is aimed at deterring negligent care and giving wronged patients some recourse.

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Laysner wrote to the Department of State on Sept. 13, 2005, requesting an investigation into Gosnell's self-representation. Soon afterward, Laysner said, Barger stopped returning his phone calls.

"As far as I know," Laysner said, Gosnell "contacted her directly and paid her some amount, and then I couldn't get a hold of her."

Barger could not be reached for comment. The grand jury said Gosnell might have paid others off. McMahon, his lawyer, said he knew nothing of such payments.

Eight months after receiving Laysner's letter, Department of State prosecutor David Grubb recommended closing the file without checking Gosnell's insurance coverage, the grand jury found, and supervisor Andrew Kramer agreed.

After federal drug authorities raided Gosnell's clinic years later, an investigator at the department discovered that Gosnell had no malpractice insurance from July 2004 to mid-April 2005.

Turner, in his Senate testimony, disputed that. There was "divergent information" showing Gosnell might have been covered all along, he said. He didn't explain, and Kelley, the governor's spokeswoman, declined to clarify.

Mariana Sorensen, a lawyer with the Philadelphia District Attorney's Office, said she stood by the grand jury's report and its account taken from the Department of State's own investigator.

Gosnell should have been on the department's radar before Layser sent his letter. A year earlier, in 2004, lawyers there reviewed two cases against Gosnell: a complaint filed by a former employee listing violations, including that untrained staff administered anesthesia, and a notice of a \$900,000 settlement with the family of patient Semika Shaw, who died after an abortion in 2000.

Lawyer Mark Greenwald reviewed the cases and, on the same day in 2004, closed both without further action, a decision the grand jury called "incomprehensible." Senior prosecutor Charles Hartwell approved the decision.

In 2009, another complaint was closed without action. Lawyer Juan Ruiz reviewed the case of a patient who said Gosnell had perforated her uterus during an abortion. Ruiz found no "pattern of conduct," even though five other women had sued for similar injuries, the grand jury found.

Ruiz and Grubb remain on the department staff. Kramer is retired and could not be reached for comment. Hartwell and Greenwald were among those who the governor's office said had resigned or been fired.

Hartwell said in an interview that he had served the state well during his 12 years there. Files moved through the bureau quickly, he said. About 30 lawyers handled up to 12,000 cases each year for 29 professional licensing boards, he said. That would require each lawyer to resolve more than one case every day.

Hartwell said there had been "nothing extraordinary" about the Gosnell cases. One complaint came from a former employee who did not want to be called as a witness, which put its merit in question, he said. Shaw suffered a perforated uterus, a known risk in certain abortions, he said.

The insurer said that Gosnell had failed to notice he injured Shaw and that she had died of sepsis as a result, the grand jury found.

The department received a poor review in a study released last week from Public Citizen, a national consumer advocacy group. It found the state had taken no licensure action against 70 percent of doctors disciplined by Pennsylvania hospitals for poor performance between 1990 and 2009. That compared with 57 percent in New Jersey and 55 percent nationally.

Gosnell had been disciplined by at least one hospital. Penn Presbyterian Medical Center revoked his privileges before federal authorities raided his clinic in February 2010.

Nationally, medical boards are ill-equipped to act quickly. And, Penn's Caplan said, the culture "is oriented toward keeping doctors in practice, respecting their ability to earn a living, more than patient safety or weeding out inept practitioners."

"We really need to decide whether a system that lets a guy like this slip by doesn't really need a serious overhaul," he said.

Rieders, the malpractice lawyer on the Patient Safety Authority board, has lobbied for a state database that would allow patients to see whether their doctor had insurance, something they now have no way of knowing. And he would like judges to be able to issue injunctions when necessary to keep bad doctors from seeing patients. Fixing the existing system, he said, requires resources.

In his proposed budget, Corbett recommended cutting 13 people from the Bureau of Professional and Occupational Affairs. Funding would shrink 8.6 percent to \$35.6 million.

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