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THE DUTY TO DISCLOSE

The Cost of Silence in Medical Staff Credentialing

The rule "silence is golden" should no longer apply when responding to a request from another provider for credentialing information regarding a previously affiliated practitioner. This conclusion was brought home in the federal case of *Kadlec Medical Center v. Lakeview Anesthesia Associates et al.*, in which the jury awarded Kadlec an astounding $8.2 million based on fraud and negligent misrepresentation by the Lakeview anesthesia group, some of its individual members and Lakeview Regional Medical Center ("Lakeview"), concerning a physician's credentialing history. The court was not swayed by arguments that providing basic information about the physician (dates of service, general references) is an acceptable, industrywide practice. What mattered to the court, and resulted in this blockbuster judgment, is a provider's duty not to disclose misleading, incomplete or inaccurate information as a matter of patient safety.

Hospitals should take note that the *Kadlec* scenario could happen at almost any institution. The physician was terminated by the anesthesia group and his privileges at Lakeview expired and were not renewed based on an underlying allegation that he abused Demerol. Through a staffing agency, the physician secured employment at Kadlec to provide anesthesia services on a *locum tenens* basis. When requested by Kadlec to provide credentialing information, Lakeview provided dates of service only, with a notation that other information was not available "due to the large volume of inquiries received in this office." Further, Lakeview did not answer any of the questions on the questionnaire that Kadlec sent to Lakeview, and later represented to the court that this type of response was part of its standard business practice in responding to such inquiries. However, Lakeview's response for this physician was different from other responses to credentialing requests Lakeview had provided for other physicians. Based on the limited information provided by Lakeview and letters of recommendation from the physician's former colleagues at the anesthesia group, Kadlec granted medical staff privileges to the physician.

About a year after the physician began practicing at Kadlec, he was the anesthesiologist for a tubal ligation surgery performed at Kadlec. The surgery resulted in a horrific outcome, allegedly due to the physician's gross negligence and drug impairment during surgery. The family of the injured patient sued the physician and Kadlec as his employer, and Kadlec settled for $7.5 million. Seeking to recover on this payout, Kadlec and its insurance company sued Lakeview, Lakeview Anesthesia Associates and the doctors who had written the letters of reference for the physician. This litigation resulted in the $8.2 million jury verdict, for which the provider defendants are liable for $4 million.

The court was not sympathetic to claims that Lakeview had no legal obligation to respond to Kadlec's inquiries. It found that Lakeview's response was "entirely gratuitous" and may have been motivated by fear of a defamation action. Addressing Lakeview's duty to Kadlec, the court said, "if and when a hospital chooses to respond to an employment referral questionnaire, public policy should encourage a hospital to disclose the sort of information at issue. Kadlec and Lakeview have a unique 'special relationship' which existed in part to further communication between healthcare providers so that future patients could be protected."

So what does this case mean for hospitals, physician groups and other healthcare entities? First, even though this case is expected to be appealed and it is not binding on courts outside of Louisiana, it may be a bellwether of a new, nationwide credentialing disclosure standard. Indeed other cases involving nurses and others who killed patients at a number institutions – the so-called Angels of Death cases – also raised the issue of how much information a hospital should disclose about an affiliated practitioner to another hospital where the practitioner seeks to provide services. Second, although it is understandable that a provider may want to avoid divulging too much information about a previously affiliated practitioner, which carries the risk of defamation or other litigation, a hospital should keep in mind that truth is always an absolute defense. Additionally, many state and federal statutes provide immunity to providers in the peer review process and in sharing credentialing information with other entities. Although a defamation action can be expensive, obviously a verdict based on the *Kadlec* duty to disclose could be much more costly. Third, providers should review their insurance policies to determine the limits of coverages for a claim from a subsequent employer that credentialing information was omitted or misleading. Carriers are also learning about the *Kadlec* case, and may be considering new limitations on coverage to minimize possible exposure.

If you have a question on this material, or would like to discuss legal services, please contact us at healthcare@duanemorris.com.

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