DuaneMorris®
Attorneys at Law

THE DEBATE OVER REFERENCE CHECKS:
What to share about former employees

Last month, an appellate court ruling fueled an ongoing debate in healthcare: What is a hospital's responsibility when responding to a reference check? In essence, the court validated a widespread practice: Providing merely "name, rank and serial number" does not subject the former employer to a lawsuit by the new employer if the employee turns out to be a "bad apple." Despite the ruling, questions remain regarding the extent of a hospital's duty to disclose negative information about former staff physicians and other healthcare employees.

In 2001, Kadlec Medical Center (Kadlec), a hospital in Washington State, hired anesthesiologist Dr. Robert Berry, who formerly had staff privileges at Lakeview Medical Center in Louisiana. After his hire by Kadlec, Dr. Berry was involved in a botched routine surgery in which a patient was seriously injured. The patient sued, and her claim ultimately settled for $7.5 million.

After the settlement, Kadlec brought suit against Lakeview Medical and Lakeview Anesthesia Associates (LAA). Lakeview Medical and LAA had previously terminated Dr. Berry for using narcotics while on duty and placing patients at risk. However, neither LAA nor Lakeview had disclosed these facts to Kadlec when it was considering hiring Dr. Berry. In fact, two of Dr. Berry's colleagues at LAA wrote positive referral letters. Lakeview Medical's letter confirmed the dates that Berry was on the active medical staff but did not reveal any negative information about his performance.

The basis of Kadlec's suit was that both Lakeview Medical and LAA should have disclosed these pertinent facts about Dr. Berry, and if they had, Kadlec would have refrained from hiring him. A federal jury accepted this argument and awarded Kadlec approximately $5.5 million in damages.

The federal trial court upheld the jury's verdict. The trial judge poignantly asked in open court after the reading of the verdict: "Has society become so afraid of lawsuits that we are willing to hide from the truth in matters affecting life and death?"

On May 8, 2008, the U.S. Court of Appeals for the Fifth Circuit answered the rhetorical question posed by the trial judge. The Fifth Circuit held in *Kadlec Medical Center v. Lakeview Anesthesia Associates* that hospitals and physician practice groups do not have an affirmative duty to disclose negative information in a reference check. The duty is to avoid misrepresenting the qualifications of former employees if they choose to provide substantive information.

For this reason, the court reversed the verdict against Lakeview Medical. Lakeview Medical's letter provided only Dr. Berry's employment dates. It did not recommend him or comment on his qualifications as an anesthesiologist. Accordingly, it did not "mislead." The court also found that Lakeview Medical was not liable for failing to disclose negative information about Dr. Berry. It held that because Lakeview Medical did not have a pecuniary interest or other special relationship with Kadlec, it provided the reference information gratuitously.

In other words, the Fifth Circuit validated a widespread practice: to provide only "name, rank and serial number" in response to a reference check. As the court made clear, responding in this manner does not subject the former employer to a lawsuit by the new employer for the harm subsequently done by the "bad apple" and does not subject the former employer to defamation or similar claims from the "bad apple" himself.

Kadlec will not end the debate on how much information should be reported. While such a practice may be the least risky one for the former employer, others argue that it imposes serious consequences on society, for instance allowing so-called "Angel of Death" practitioners to move from one healthcare provider to another with less fear of discovery. And those employees who work hard and do well, and who deserve a positive reference, are deprived of this benefit by the "name, rank and serial number" practice.

Notwithstanding this decision, hospitals and other providers should seriously consider the implications of a decision to refrain from disclosing negative information about a prior medical staff member's or employee's ability to offer high-quality healthcare. While the fear of a defamation lawsuit arising from the release of information is not an irrational one, it is likely overstated. Furthermore, many, although not all, states have enacted some form of reference immunity statute designed to provide a qualified immunity to employers who carefully respond to reference checks in good faith. Finally, the issue in *Kadlec* was decided under the law of one state, and in the inevitable "next case" decided under the law of a different state, a different result might occur.

But ultimately, the trial judge said it best: Are we so afraid of lawsuits that we are willing to hide from the truth in matters affecting life and death?

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

Paul D. Snitzer, *a partner at Duane Morris LLP, practices in the area of labor and employment law.*

Erin M. Duffy, *an associate at the firm, focuses her practice on corporate healthcare matters.*