

FEDERAL APPEALS COURT REVERSES KADLEC AND EASES HOSPITAL DISCLOSURE OBLIGATIONS

Hospitals no longer face limitless liability exposures arising from credentialing responses, but sound credentialing policies and practices are still advised.

On May 8, 2008 a federal appeals court, in *Kadlec Medical Center v. Lakeview Anesthesia Associates*, reversed the multi-million dollar verdict against Lakeview Regional Medical Center arising out of its failure to disclose to Kadlec Medical Center, in response to a routine credentialing inquiry, that a former staff anesthesiologist was suspected of drug dependence and abuse.

The \$8.24 million verdict shocked the hospital industry in 2006 by appearing to create a new legal duty and huge exposure based on the relatively common hospital practice of providing accurate but non-responsive letters about staff physicians suspected of having significant quality issues that had never been confirmed through a formal corrective action.

The Fifth Circuit, in reversing the verdict as to the hospital but **not** as to the independent anesthesiology group, made an important distinction between affirmative misrepresentation and mere failure to disclose. The hospital had issued an arguable "white lie" to the inquiring hospital by asserting that it could not respond more fully because of the "large volume of inquiries received." Two anesthesiologists, however, had affirmatively characterized the physician as "an excellent clinician" and "an asset to any anesthesia service," without revealing that the group had fired him because of suspected substance abuse and conduct that posed a patient-safety risk. Whereas liability could not be imposed on the hospital for mere failure to disclose, the physicians, in contrast, had provided "misleading" information and thereby had assumed an affirmative "duty to cure."

Although the new *Kadlec* decision may ease hospitals' fears of credentialing liability exposures, the process is still fraught with legal risk. Disclosure obligations are variable and fact-specific. The challenge is to provide information that is accurate and responsive without being unduly prejudicial or defamatory. The most sensitive problem area is when, as in *Kadlec*, negative information is known or suspected but the physician has never been the subject of formal peer review or corrective action. Hospitals may therefore wish to consider the following:

- Working with counsel to develop standard policies for responding to credentialing inquiries that clearly delineate what categories of information may be disclosed and under what circumstances;
- Implementing compliance procedures to make sure that the standard policies are followed; and
- Working closely with counsel in high risk cases to develop an accurate, appropriate response to credentialing inquiries that minimize liability exposures.

If you have any questions about the recent *Kadlec* decision, or credentialing inquiries in general, please contact Robin Locke Nagele, 215-587-1114 or rnagele@postschell.com, Kathleen Chancler, 215-587-1007 or kchancler@postschell.com, Mark L. Mattioli, 215-587-1087 or mmattioli@postschell.com, or any member of our Health Law Group.

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