

May 2008

## Kadlec Decision Reversed

On May 8, 2008, the 5th Circuit Court of Appeals reversed the District Court's opinion which included a holding that Lakeview Medical Center ("Lakeview") and Lakeview Anesthesia Associates ("LAA") had a duty to disclose to Kadlec Medical Center that Dr. Berry, a former partner with LAA, had a drug problem when it made inquiry after Berry applied to Kadlec for medical staff membership. This finding and resulting multimillion-dollar jury verdict against Lakeview and LAA caused something of an uproar throughout the industry because no court had previously held that such a duty to disclose existed. The result was also unsettling for many hospitals because most have been faced with the ethical and legal question of how to respond to third-party inquiries about current and former medical staff physicians who have had documented quality of care or impairment problems.

The holding of the 5th Circuit can be summarized as follows:

1. Although there is no duty to disclose, a party has an obligation to avoid affirmative misrepresentations in referral letters to another hospital. Here, Lakeview provided a neutral letter regarding Dr. Berry which contained only factual information and did not attempt to recommend Berry for appointment. LAA, on the other hand, stated that Dr. Berry was "excellent" and a very good clinician even though they had previously fired him two months earlier because of his addiction to Demerol and his threat to patients.
2. Once a party does disclose information about a physician which creates a "misapprehension" about qualifications, or if disclosures are misleading, it has an obligation to clarify the information provided. Here, given LAA's representations that Dr. Berry was excellent and "will be an asset to [his future employer's] anesthesia service," the Court held that it had a "duty to cure these misleading statements by disclosing to Kadlec that Dr. Berry had been fired for on-the-job drug use."
3. In Louisiana, there is no duty to disclose unless some special circumstance exists between the parties such as a fiduciary or confidential relationship. The 5th Circuit believed that the relationship between Lakeview and Kadlec was more "gratuitous" and that no particular special relationship existed. It recognized some of the important policy issues raised by the case in terms of disclosing information about impaired physicians to third parties, but this did not give rise to an affirmative duty to disclose. The court pointed out that this question also must be evaluated in the context of a physician's privacy rights and possible defamation claims against the hospital.
4. Regarding the question of legal causation, the Court held that LAA's purposeful misrepresentations caused, in part, the injury to Dr. Berry's patient who is now in a permanent vegetative state as a result of his negligence.

### **Impact of Kadlec Reversal**

- Although hospitals may be relieved that the 5th Circuit held that Lakeview had no duty to disclose Dr. Berry's impairment to Kadlec, liability was affirmed against LAA.
- The case law interpretation of intentional and negligent misrepresentation and whether a duty to disclose exists varies from state to state. Remember—bad facts make bad law.
- MS.4.25, EP4 requires that: "The decision to grant, deny, revise or revoke privilege(s) is disseminated to all appropriate internal and/or external persons or entities as defined by the organization and applicable law." A hospital needs to review its policies and state reporting obligations to determine whether it is required to make disclosures to other hospitals regarding physicians seeking appointment or reappointment.

- Responses should be truthful, objective and based on documented actions.
- Responses that are misleading or create misapprehensions may give rise to liability claims either from the inquiring hospital or the physician.
- If a response may be likely to result in an adverse decision regarding a physician's membership or privileges, consider requiring the physician to sign an absolute waiver form before providing the information.
- Even if there is no recognized duty to disclose in your state, a hospital that withholds information regarding documented and substantiated impairment, quality of care, behavioral or other problems that are clearly relevant to a hospital's appointment decision and/or could adversely affect patient care, does so at its own risk.
- Disclosure of adverse information should be reviewed and carefully coordinated through appropriate management personnel and, when necessary, legal counsel.

If you have any questions regarding Kadlec or its impact on your facility, please feel free to contact Katten attorney Michael Callahan directly at [michael.callahan@kattenlaw.com](mailto:michael.callahan@kattenlaw.com) or 312-902-5634.

To view a copy of the decision, [click here](#).

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

**CIRCULAR 230 DISCLOSURE:** Pursuant to Regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

©2008 Katten Muchin Rosenman LLP. All rights reserved.

# Katten

Katten Muchin Rosenman LLP

[www.kattenlaw.com](http://www.kattenlaw.com)

401 S. Tryon Street  
Suite 2600  
Charlotte, NC 28202-1935  
704.444.2000 tel  
704.444.2050 fax

525 W. Monroe Street  
Chicago, IL 60661-3693  
312.902.5200 tel  
312.902.1061 fax

5215 N. O'Connor Boulevard  
Suite 200  
Irving, TX 75039-3732  
972.868.9058 tel  
972.868.9068 fax

1-3 Frederick's Place  
Old Jewry  
London EC2R 8AE  
+44.20.7776.7620 tel  
+44.20.7776.7621 fax

2029 Century Park East  
Suite 2600  
Los Angeles, CA 90067-3012  
310.788.4400 tel  
310.788.4471 fax

575 Madison Avenue  
New York, NY 10022-2585  
212.940.8800 tel  
212.940.8776 fax

260 Sheridan Avenue  
Suite 450  
Palo Alto, CA 94306-2047  
650.330.3652 tel  
650.321.4746 fax

1025 Thomas Jefferson Street, NW  
East Lobby, Suite 700  
Washington, DC 20007-5201  
202.625.3500 tel  
202.298.7570 fax