# KADLEC REVERSED:

*How To Collect and Share Credentialing Data While Avoiding Legal Risk*

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*How To Collect and Share Credentialing Data While Avoiding Legal Risk*

## LIVE WEBCAST PRESENTED ON:

## WEDNESDAY, JUNE 4, 2008

# Presented by:

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# Kadlec: An Overview of the Case

- Key Facts
  - Dr. Robert Lee Berry ("Berry") was an anesthesiologist who became a partner with Louisiana Anesthesia Associates ("LAA") which, in turn, had an exclusive services contract with Lakeview Regional Medical Center ("Lakeview").
  - It is alleged that upon conducting an audit of Berry's narcotic medication records in November, 2000, Lakeview determined that he had failed to properly document his withdrawal of Demerol.
  - In March, 2001, Berry failed to respond to a hospital page during a 24 hour shift. It is alleged that Lakeview found him sleeping in a chair and that he "appeared to be sedated."

# Kadlec: An Overview of the Case (continued)

- Based on this incident, Lakeview's CEO determined that in the interests of patient safety, Dr. Berry could no longer practice of the hospital. Shortly thereafter, he was terminated immediately by LAA. His Medical Staff membership and clinical privileges expired.
  - It was later revealed that in the LAA termination letter to Berry, it stated that he was being fired because he reported to work in an impaired physical, mental and emotional state which prevented him from performing his duties and which put his patients at significant risk.

# Kadlec: An Overview of the Case (continued)

- Neither the CEO nor LAA reported Dr. Berry's drug use or the reason for termination to the MEC, the Lakeview Board of Trustees, the Louisiana Board of Medical Examiners or the Data Bank.
- Six months later, Berry was placed as an employee at Kadlec Medical Center in Richland, Washington, through a temporary employment agency.
- As part of its application process, Kadlec submitted a letter to Lakeview requesting:

# Kadlec: An Overview of the Case (continued)

  - a candid evaluation of Berry's training, continuing clinical performance, skill, and judgment, interpersonal skills and ability to perform the privileges requested.
  - Evidence of current competence to perform the requested privileges
  - Response to an "Appointment Reference Questionnaire"
- Lakeview did not answer any questions on the questionnaire even though it was established at trial that its common practice was to answer all questions posed, including whether a physician has even been disciplined or had "shown any signs of behavioral/personality problems or impairments".

# Kadlec: An Overview of the Case (continued)

- Lakeview only sent a letter which stated that Berry was a member of the Active Staff from March 4, 1997 to September 4, 2001. No other disclosures were made.
  - Lakeview stated that the limited response was “due to the large volume of inquiries received in the office.”
  - Lakeview also claimed, during the subsequent litigation, that this limited response is standard for the industry.

# Kadlec: An Overview of the Case (continued)

- LAA sent two letters of recommendation to the staffing agency for purposes of distribution to potential employers. The letters described Berry as an "excellent" physician and clinician and that he would be an asset to any anesthesia service. There was no disclosure about his termination or drug use.
- Based on these representations from Lakeview and LAA, Kadlec hired Berry as an employed anesthesiologist.

# Kadlec: An Overview of the Case (continued)

- One year later, Berry was the anesthesiologist for a straight forward tubal ligation procedure. This was his fifth operation of the day and, according to a nurse, he was acting strangely and had been “screwing up all day”.  Patient suffered extensive brain damage which left her in a permanent vegetative state after he failed to revive her when she stopped breathing.
- Berry admitted that he had been addicted to Demerol for the previous months.

# Kadlec: An Overview of the Case (continued)

- Malpractice complaint alleged that Kadlec, as Berry's employer, was responsible for Berry's gross negligence. Plaintiff further alleged that Berry was impaired by drugs during the surgery.
- Kadlec settled the malpractice suit for $7.5 million.

- Overview of Litigation and Trial Court Rulings
  - After settlement, Kadlec and its liability insurer sued Lakeview, LAA and its four physician shareholders.

# Kadlec: An Overview of the Case (continued)

- Kadlec filed suit alleging intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation and negligence against the defendants.
- The Court's ruling in this case was in the context of a motion for summary judgment filed by Lakeview. The standard of review in ruling on this motion is whether there is a genuine issue of material fact. If so, the issue goes to the jury for a decision. If not, the Court can then make a decision on whether, as a matter of law, Lakeview was entitled to judgment in favor of its request to dismiss the lawsuit.

# Kadlec: An Overview of the Case (continued)

- The principal question posed in this case was whether Lakeview had a legal duty to disclose information to Kadlec regarding Berry's suspected or actual impairment in response to Kadlec's inquiries, whether Lakeview breached this duty and if so, did the breach cause the damages sustained by patient on which the malpractice settlement was based.
- Court held that there is a duty to disclose requested information in misrepresentation claims which duty is further supported by public policy considerations relating to "a doctor's adverse employment history that risks death or bodily injury to future patients."

# Kadlec: An Overview of the Case (continued)

- "Kadlec and [Lakeview] have a unique 'special relationship' which existed in part to further communication between health care providers so that future patients could be protected."

- "The Court finds that if and when a hospital chooses to respond to an employment referral questionnaire, public policy should encourage a hospital to disclose this sort of information at issue."

# Kadlec: An Overview of the Case (continued)

- Lakeview's response omitted relevant and material information "which may have been exceedingly useful in preventing the harm caused …."

- Kadlec introduced sufficient evidence to support its argument that Lakeview attempted to deceive Kadlec because it typically provided more than a generic response to requesting hospitals regarding physicians who had no adverse employment or other information.

# Kadlec: An Overview of the Case (continued)

- During discovery, Lakeview acknowledged that it omitted the information requested because it feared a defamation action and other possible claims by Berry.
- Case went to the jury which ruled in favor of Kadlec and awarded $8.2 million.  Because Kadlec and Berry were found 50% negligent, award was reduced to $4.1 million.

# Kadlec Reversed

- On May 8, 2008, the Fifth Circuit Court of Appeals reversed in part, and affirmed in part, the trial court's decision. Lakeview was found not liable but the judgment against LAA was upheld.

- Summary of Circuit Court's Decision:
  - There is no affirmative duty to disclose negative or positive information about a physician. Such a duty only exists if there are "special circumstances" between the parties such as a fiduciary or confidential relationship. There also must be some type of pecuniary relationship.

# Kadlec Reversed (continued)

- Here, there was no special relationship between Kadlec and Lakeview and the neutral disclosure to Kadlec was not based on any monetary interest but was "purely gratuitous".

- A party does have a duty to avoid affirmative misrepresentations in referral letters.
  - In Louisiana "although a party may keep absolute silence and violate no rule of law or equity . . . If he volunteers to speak and to convey information which may influence the conduct of another party, he is bound to [disclose] the whole truth".

# Kadlec Reversed (continued)

- Once information is disclosed, a party assumes a duty to make sure that the volunteered information is correct.
- Casually made incorrect statements will not lead to liability. Must look to facts and circumstances of the case.
- LAA's representations that Dr. Berry was "excellent" and would be "an asset" to any future employer were "false on their face and materially misleading", especially after just firing him sixty days earlier.
- When LAA made these misleading statements, it had a duty to cure by also disclosing that Berry had been fired for on-the-job drug use.

# Kadlec Reversed (continued)

- Lakeview’s letter did not comment on Berry’s skills, did not recommend him to Kadlec, did not respond to the questions submitted and did not affirmatively mislead. Information provided was factual and neutral. Therefore, Lakeview was not liable for alleged affirmative misrepresentations.
- Court also cited as factors that: Although there may be an ethical obligation to disclose, hospitals are “rightly concerned” about possible defamation claims and other lawsuits and should not have to worry about whether they can successfully defend against these actions; that a physician has certain rights to privacy; and how is an employer to know how much negative information to provide to a third party if it actually possesses such information.

# Kadlec Reversed (continued)

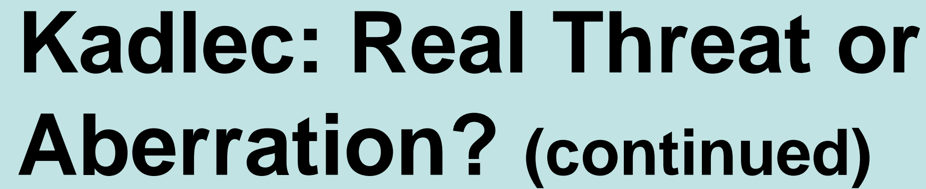
- Although there was evidence to show that Kadlec did or may have had sufficient concerns about Berry that might arguably have required them to take action against him prior to the date the patient was injured, the threat to patient's clearly was foreseeable given Berry's addiction and their purposeful misrepresentations on which Kadlec relied. Therefore, LAA's actions caused, at least in part, the patient's injuries.

# Kadlec: Real Threat or Aberration?

- Kadlec as Real Threat
  - Fact pattern not dissimilar from experiences at many hospitals.
  - Hospitals and physicians extremely reluctant to disclose all relevant information to third parties thereby raising risk of adverse consequences such as Kadlec.
  - Most hospitals try to avoid Data Bank reports and sometimes cut deals to provide no responses or to limit disclosure in order to avoid hearings and litigation.

# Kadlec: Real Threat or Aberration? (continued)

- Reluctance to disclose sometimes driven by nature of qualified, versus absolute, waiver of liability forms signed by the physician.
- Kadlec decision could trigger a statutory response –
  - See Joint Commission Medical Standard 4.25
- Ever increasing focus on practice patterns, outcomes and physician profiling: more information is better.



# Kadlec: Real Threat or Aberration? (continued)

- Kadlec as aberration
  - Bad facts make bad law
  - No other court has held that there is a duty to disclose
  - Case is still on appeal
  - Duty difficult to monitor and enforce: Kadlec involved a physician who was part of an exclusive group
  - How much has to be disclosed?

# Best Practices for Requesting and Gathering Information: Credentialing and Privileging Principles

- #1 Credentialing exists to protect patients
- #3 Beware of the two types of credentialing errors: Information errors and decision errors
- #7 Place the burden on the applicant
- #8 Before granting privileges, solve the competency equation

# Credentialing Principle #1:

- Credentialing exists to protect patients

Credentialed by
XYZ Hospital

# Corollary:

- Credentialing done poorly puts patients, doctors, and hospitals at risk!

# What is the problem? The facts:

- Approximately 800,000 physicians in the USA
- 466,000 board certified
- 100,000 awaiting board certification
- Approximately 50% sued for malpractice
- Thousands sued greater than 10 times
- Tens of thousands with license restrictions

# The Facts

- Thousands sanctioned by Medicare/Medicaid
- Tens of thousands have received hospital disciplinary action
- Thousands convicted of felonies (fraud, homicide, drug possession/sales)
- Thousands unable to obtain positive references
- Approximately 40,000 potentially impaired providers

# Credentialing Principle #3:

- Beware of the two types of credentialing errors: Information errors and decision errors

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# Credentialing Errors to Avoid

- Information error: Information existed that could have been known but wasn't, and the information would have impacted a credentialing decision
- Decision error: The necessary information was known, but leaders failed to make the wise decision

# Corollary

- Resolve all concerns to your satisfaction before making any recommendations for membership or privileges

# Avoiding Information Errors

- Peer Reference Forms (Exhibit A)
  - Compare forms to best practice
  - Review state mandated information
  - Make sure all forms of corrective and remedial actions are captured by the questions

# Avoiding Information Errors
## (continued)

- Reprimand
- Probation
- Voluntary relinquishment of privileges
- Withdrawal of applications
- Monitoring
- Proctoring
- Mandatory consultations with and without prior approval
- Reductions in privileges

# Avoiding Information Errors
## (continued)

- Concurrent review of cases
- Administrative suspensions
- Adverse licensure decisions
- Adverse employment decisions
- Transfers
- Resignations
- Full explanation of time gaps and moves

# Best Practices for Professional References

- Do not allow partners/relatives to provide sole references
- Multiplicity of professional references: Program directors, department chairs, section chiefs, officers, etc.
- Not a sufficient response that hospital will not provide requested information. Burden is to produce.

# Best Practices for Professional References (continued)

- Applicant obligated to provide any and all information updates responsive to the application questions during the pendancy of the application

- Application should include an absolute waiver of liability and release form which must be signed by the physician as a condition of processing the application (Exhibit C)

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# Best Practices for Professional References (continued)

- Application should make clear and require that physician signs and attests to the accuracy of the information
  - Avoids the “my assistant filled it out” excuse
- If physician does not sign, then do not process the application
- Low threshold to pick up phone

# Best Practices for Professional References (continued)

- For impairment, consider specific questions
  - Formal accusations
  - Disruptive behavior
  - Unprofessional conduct
  - Asked to seek evaluation or counseling
  - Need to comply with ADA for employment
  - Form of questions important to avoid discrimination
  - Authorization to review rehab records

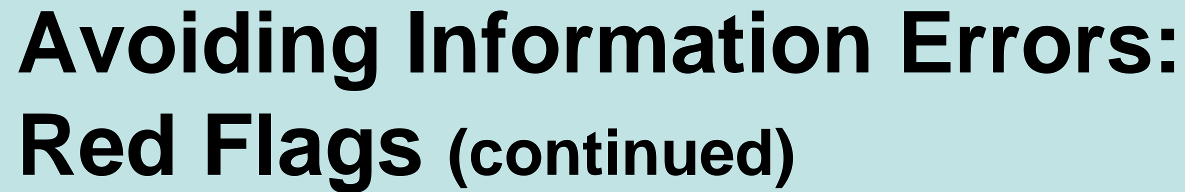
# Best Practices for Professional References (continued)

- If hospital or other professional references do not respond, application is not processed unless information can be obtained from reliable and independent source

- If physician provides false, misleading or incomplete information, application deemed withdrawn!

# Avoiding Information Errors: Red Flags

- Red flags
  - Resignation as partner from group
  - Gaps in CV particularly with employment or medical staff membership
  - Moved significant distances or has moved a lot over professional career
  - Change of specialties
  - Requesting fewer privileges than normally granted under a core privileging system



# Avoiding Information Errors: Red Flags (continued)

- Continued
  - Gaps in insurance coverage, change in carriers, reduction in coverage
  - Professional liability history
  - Reference letters are neutral
  - Category ratings are “poor”, “fair” or “average”
  - Response from hospital simply gives dates of service or very limited information

# Credentialing Principle #7:

- Place the burden on the applicant



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# Placing the Burden on the Applicant

- Burden of proof policy (Exhibit B)
- Failure to meet burden will result in
  - Withdrawal of application
  - Decision not to process
  - Declaration of incomplete application
- Physician not entitled to fair hearing under these circumstances

# Best Practices for Responding and Disclosing

- Third party inquiries
  - Hospitals, surgicenters, managed care organizations professional associates and physician groups
  - Inquiries usually are submitted in the form of questionnaires and fill in the blank
    - Forms typically request an explanation if any adverse response to a question is provided
  - Forms usually do not request documents
  - Some questionnaires ask that the physicians be rated in various categories
  - Some disclose privilege list and ask if physician had problems exercising any of them

# Best Practices for Responding and Disclosing (continued)

- Questions will seek to identify whether physician has been disruptive; has received any form of disciplinary action; has been impaired; has been unprofessional, etc.

- Questions to Ask Before Responding
  - Are there any limitations on what can be disclosed?
    - State confidentiality/immunity statute
    - Bylaws/Policies which may limit the response
    - Hospital cut a deal and has a pre-determined response

# Best Practices for Responding and Disclosing (continued)

- Pending litigation or internal proceedings
- Are there any reporting obligations and, if so, what is scope of required or permissible disclosure?
- What business implications, if any?
- Physician has or is likely to sue depending on response

- How detailed is hospital's documentation in order to support the response?
  - If not documented, if no paper trail, it did not happen.

# Best Practices for Responding and Disclosing (continued)

- Have you pulled together all relevant documentation?
- Reliance on rumor, innuendo, distant memories or anecdotal information will only cause problems.
- If you don't know, you don't know.

- What form of waiver of liability did the physician sign?
  - Absolute or qualified? Need to read closely.
  - No waiver, no response.

# Best Practices for Responding and Disclosing (continued)

- Is an accurate, objection response likely to lead to an adverse appointment/reappointment decision by inquiring third party?
  - Is a factor, but should not be the deciding factor on how to respond.
- Is the physician on Staff?
  - Need to be consistent and fair in how you treat this physician.
- What do your Medical Staff Bylaws provide regarding protection and immunities relating to disclosures?
  - Presents an opportunity to amend bylaws.

# Best Practices for Responding and Disclosing (continued)

- What is the immunity standard for your state and inquiring states?
- Do you have a separate waiver form that physician is required to sign?
- What are your insurance coverages?
  - Always a good idea to reaffirm to Medical Staff the coverage and state protections afforded to physician participating the peer review process.

# Best Practices for Responding and Disclosing (continued)

- Check Board policies and procedures.
- Need to decide whether qualified or absolute waiver should be used.

- Responses and Disclosures
  - Need to determine if state statutes, caselaw or regs dictate or affect nature of scope of response.
    - i.e. – Louisiana hospitals bound by Kadlec decision.



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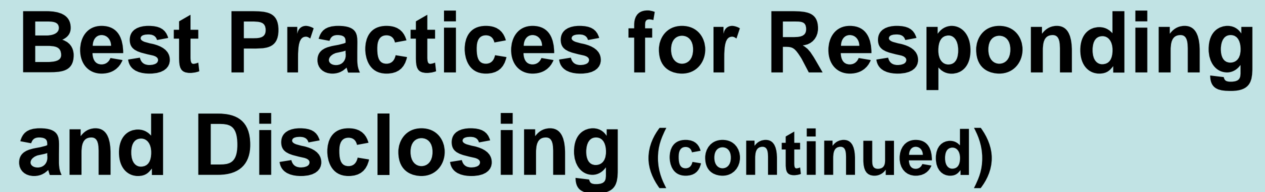


# Best Practices for Responding and Disclosing (continued)

- Form Responses
  - Responses which simply provide dates during which physician was on the Medical Staff and is in good standing should only be used for physicians who have not had any quality of care, professional conduct or similar issues which have resulted in any kind of investigations or reviews that had led to the imposition of any form of corrective or remedial action.
  - Examples where use of form is appropriate

# Best Practices for Responding and Disclosing (continued)

- The perfect physician - no problem, no complaints in file, no investigations, no remedial actions.
- Physician has had some cases reviewed and some medical record suspensions but no remedial action imposed.
- Physician is difficult to deal with and may even have been counseled but no remedial action ever taken against him.

- Examples where use of form is inappropriate

# Best Practices for Responding and Disclosing (continued)

- Form letter should not be used if any remedial action has been imposed within the previous two years for quality of care or professional conduct which did or may have had an adverse impact on patients. Actions would include monitoring, proctoring, mandatory consultations, privilege restrictions on reductions, resignations in lieu of correction action and any time hospital has been required to report the physician to federal or state agency or authority.
- Under these circumstances, answer the questionnaire.

# Best Practices for Responding and Disclosing (continued)

- Responding to questionnaires
  - Respond to all questions
  - Be truthful, accurate, objective and base response on clear documentation
  - If a question asks for an explanation because of a response provided, be brief and to the point.
    - Response, at a minimum, should provide enough information to give the answer proper context. You need not go overboard but you also want to avoid follow up questions from the hospital.

# Best Practices for Responding and Disclosing (continued)

- Example
  - Did physician regularly comply with hospital and medical staff policies?

    Yes No

    - If “no”, please provide an explanation.
    - Physician did not always follow department policies – Insufficient
    - Physician, on occasion, did not abide by scheduling policy and protocols for treatment of his patients – Okay.
    - Physician, on occasion, would claim his patients had an emergency condition as a way of avoiding compliance with scheduling policies and protocols. His actions were disruptive and he was placed on a compliance plan. Physician has followed the plan and we have not had any subsequent problems - Better response

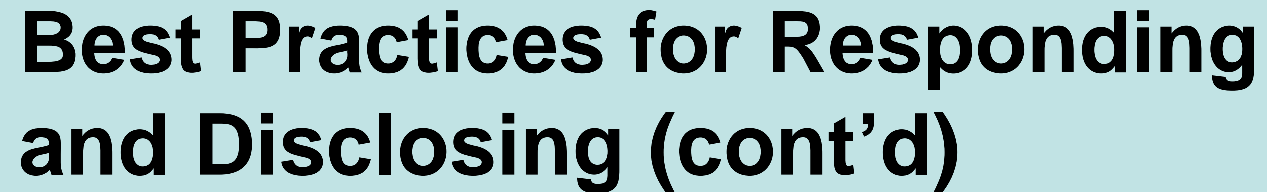
# Best Practices for Responding and Disclosing (continued)

- If questionnaires completed by more than one person, i.e., Department Chair and Division Head, attempt to coordinate and strive for consistency, if possible.
- Make sure that Medical Staff Coordinator or other administrative personnel reviews response before it is sent out.

- Responding to ratings questions
  - If you don't know because of little or low activity levels, simply say so and do not provide rating responses.

# Best Practices for Responding and Disclosing (continued)

- Try to come up with an agreed to approach on the profile of a physician who should get highest, middle and lowest ratings and strive for consistency.
- Any rating of average or less will be viewed as evidence of a potential problem physician and may require an explanation.
- Always make sure you have facts and documentation to support any response.
- Keep in mind that MS.4.25 requires that:
  - "The decision to grant, deny, revise, or revoke privilege(s) is disseminated and made available to all appropriate internal and/or external persons or entities, as defined by the organization and applicable law."



# Best Practices for Responding and Disclosing (cont'd)

- Other questions and issues
  - Must you disclose response to physician?
    - No, although if requesting an absolute waiver, physician may not sign until you disclose the proposed response
  - If physician refuses to sign an absolute waiver, can you refuse to provide a response
    - Yes, although you should inform physician that response will not be provided to requesting hospital which likely will delay processing or result in involuntary withdrawal of application or even denial.

# Best Practices for Responding and Disclosing (continued)

  - You could also advise physician that if contacted, you will tell hospital that you are withholding response pending signature on absolute waiver.

- Should I provide a copy of any portion of peer review record?
  - Never! Never! Never! Once document is released, you should assume that everyone and their uncle will see it, including one or more plaintiff's attorneys.

# Best Practices for Responding and Disclosing (continued)

- Am I obligated to respond to subsequent requests for additional information?
  - If first response was specific enough so as to provide a context or background to questionnaire answers, there is no need or requirement to provide additional information unless otherwise mandated by law.
  - Use your judgment.
- Should I ever provide verbal responses: What if the hospital wants to know the “real story?”

# Best Practices for Responding and Disclosing (continued)

- You should limit your responses to written answers.
- Verbal disclosures will, I repeat, will be misconstrued, misinterpreted and possible misrepresented to suit ones purposes. It will come back to haunt you.
- You should have told the real story in your written response.
- Verbal responses might not be protected under waiver or state immunity structure.

# Managing Settlement Negotiations and National Practitioner Data Bank (NPDB) Reports

- Settlement Environment
  - Most hospitals and medical staffs are reluctant to impose corrective action generally but specifically, are loathe to make decisions which trigger hearings and state and/or Data Bank reports
    - Are concerned about time, expense, litigation, impact on careers as well as the “there but for the grace of God go I” concern

# Roadmap for Investigations

- Should be found in medical staff bylaws and clearly define
  - When an investigation begins (the “bright line”)
  - By whom it can be initiated
  - What are the grounds for the investigation
  - By whom will investigation be carried out
  - How the investigation will be documented
  - The obligation to report voluntary withdrawal or plea bargain

# Impact of Kadlec on Settlements and NPDB Reports

- Hospitals likely will feel compelled to be more forthcoming and responsive to third party inquiries at time of appointment and reappointment
- Consequently, hospitals may be less willing to agree to vague or ambiguous disclosures as part of settlement agreement
- Data Bank reports will likely contain more detail recognizing that the “facts” may not have been fully investigated

# Example

- Dr. Callahan resigned at time of reappointment based on questions raised about compliance with record keeping requirements.

# Example

- Dr. Callahan resigned at time of reappointment based on a medical record audit which revealed a continuous pattern of not seeing patients within 24 hours of their admission and not completing histories and physicals within 48 hours of discharge [which failures led to adverse patient consequences] [including one patient death].

# Impact of Kadlec on Settlements and NPDB Reports

- "Deal cutting," which results in resignation and no report when one actually is required probably will diminish
- Points to Remember
  - Settlement should include
    - Absolute waiver of liability/covenant not to sue
    - Agreed to language in Data Bank report, if required, which is truthful and specific enough to put third parties on notice about the physician's issues

# Impact of Kadlec on Settlements and NPDB Reports

  - Try to avoid any required script, verbal or written, with respect to third party inquiries, including responses to questionnaires
  - If third party inquiry received, physician should be required to sign absolute waiver relating to future disclosures
- If physician does not sign the waiver, then do not respond to inquiries
  - Advise physician that you will advise hospital of his/her refusal to sign
  - Advise hospital that physician has relevant information but be careful about release of confidential peer review documents

# Challenges

- What if an investigation, corrective action or medical staff due process is never triggered
  - Employment agreements
  - Exclusive contracts
  - Other arrangements
- Will these issues even see the light of day?

# Question???

- Will some issues ever see the light of day?

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# Question & Answer

**Please type your questions into text chat at this time.**

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# Thank You!

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**This concludes today's program.**

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