

Client Advisory

Duty to Disclose in Illinois After Kadlec?

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In the wake of the Fifth Circuit Court of Appeals' recent reversal of the *Kadlec* decision, many hospitals are left questioning whether laws in their state create a duty to disclose information when responding to third-party inquiries about current and former medical staff physicians who have documented quality of care or impairment problems. As you may recall, because the Fifth Circuit's interpretation of this issue turned on state law in Louisiana, the analysis of whether a duty to disclose exists will vary from state to state. In light of this state-specific analysis, if a situation like *Kadlec* occurred in Illinois, what obligations would Illinois hospitals have in terms of disclosing information to other hospitals and medical centers about former medical staff physicians?

Summary of *Kadlec II*

In the *Kadlec I* decision, the District Court for the Eastern District of Louisiana held that Lakeview Medical Center ("Lakeview") and Lakeview Anesthesia Associates ("LAA") both had a duty to disclose to Kadlec Medical Center that Dr. Berry, a former partner with LAA, had a drug problem when Kadlec inquired after Berry applied there for medical staff membership. In *Kadlec II*, the Fifth Circuit reversed part of this decision, holding that under Louisiana law, there is no affirmative duty to disclose this information absent a fiduciary or confidential relationship between the hospitals. However, the court emphasized that parties have an obligation to avoid affirmative misrepresentations in referral letters or responses of any kind to another hospital. Accordingly, the court upheld liability against LAA because it stated that Dr. Berry was "excellent" and a very good clinician even though they had fired him two months earlier because of his Demerol addiction and his potential threat to patients. Further, the Fifth Circuit held that once a hospital does disclose information about a physician which creates a "misapprehension" about qualifications, or if the disclosures are misleading, it has an obligation to clarify the information provided.

No Legal Duty to Disclose in Illinois

Illinois law appears to track Louisiana law in the sense that there is no affirmative duty to disclose information between unaffiliated hospitals unless some special circumstances exist, such as fiduciary or confidential relationships. Some examples of situations where these relationships may exist include hospital members within a multi-hospital PHO or between sister hospitals in a health care system. However, even in the absence of fiduciary or confidential relationships, parties will still face potential liability for fraudulent and negligent misrepresentation claims in certain situations, just as LAA was held liable for intentional misrepresentation as a consequence of its misleading statements about Dr. Berry.

Similar to Louisiana law, the relevant causes of action under Illinois law are negligent misrepresentation and fraudulent misrepresentation. The major difference between the two claims is the state of mind of the person making the statement. A hospital could be liable for negligent misrepresentation if it makes a representation it believes to be true, but is, in fact, false and the hospital reasonably should have known it was false.

For example, if a hospital states that a physician with a contracted group was not impaired but it had suspicions that the physician had a drinking problem, it could be alleged that the hospital was negligent in not further investigating this concern given its contractual relationship with the group. Fraudulent misrepresentation can be established in two scenarios. First, a hospital could face liability if it makes an affirmative representation which it knows to be false, or the representation is made with reckless disregard as to whether the statement is true or false. Second, the omission of certain information can

constitute a fraudulent misrepresentation if the parties have a fiduciary or confidential relationship, as discussed earlier, and a hospital makes the statement with an intent to deceive the other party.

Recommendations:

- Remember—bad facts make bad law. Although there is no affirmative duty to disclose in Illinois, 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. If there is a fiduciary or confidential relationship between the hospitals, i.e., they are sister hospitals in a health care system, there is an affirmative duty to disclose.
- Responses to third-party inquiries should be truthful, objective and based on documented events. Responses which simply provide dates during which a 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. These response letters should not be used if any remedial action has been imposed within the previous two years.
- 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 of liability form before providing the information.
- 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 or 312-902-5634.

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