



Doctor's docket

To tell the truth: potential liability for concealing physician impairment

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1. Facts

Dr B was an anesthesiologist who practiced medicine at Medical Center through Anesthesia Associates (AA). Anesthesia Associates was the anesthesia practice group in which Dr B was employed and the exclusive provider of anesthesiology services to Medical Center. From January 1997 to March 2001, Dr B was an employee of AA and, ultimately, a shareholder with Drs D, PR, B, and PA.

During his employment with AA, Dr B became involved in a prescription drug diversion scheme where he would personally use narcotic drugs, that is, Demerol, that he had purportedly withdrawn for patient use. Drs D, PR, B, and PA became aware of Dr B's drug abuse and knew that B was practicing medicine while impaired. On March 27, 2001, AA terminated Dr B's employment "with cause." In his termination letter, AA indicated to Dr B that:

As we have discussed on several occasions, you have reported to work in an impaired physical, mental, and

emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk.

After Dr B was fired, he sought employment through SC, a locum tenens company. Drs D and PR provided letters of reference for Dr B to SC, which stated that Dr B was an "excellent" physician. However, these letters failed to mention Dr B's drug diversion, his impairment while practicing medicine, or that he was terminated from AA for cause.

In late 2001, through SC, Dr B was assigned to work as an anesthesiologist at K Medical Center in another state as a locum tenens physician. K Medical Center received three "primary" letters of recommendation by other physicians, but also noted the presence of and comments in letters from Drs D and PR, although inscribing "can't use" on them because of their datedness. However, these letters were part of Dr B's file and were read by reviewing medical staff.

On November 12, 2002, during a routine tubal ligation surgery, Dr B caused extensive brain damage to patient KJ when he committed anesthesia malpractice while impaired by narcotics during the procedure. Dr B prematurely extubated KJ while she was still under the influence of anesthesia and refused to call a code when nursing staff noted no breathing or pulse. KJ has remained in a nonresponsive, vegetative state since the surgery. KJ and her family brought a medical malpractice

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lawsuit against Dr B and K Medical Center as Dr B's employer, which K Medical Center settled for 7.5 million dollars.

K Medical Center subsequently discovered Dr B's history of narcotics abuse and AA's knowledge and actions against him. K Medical Center then sued AA and its anesthesiologists, alleging that when they sent professional letters of reference on Dr B's behalf, they intentionally and/or negligently misrepresented Dr B's qualifications and competency as an anesthesiologist by failing to disclose information with respect to his adverse employment history.

Anesthesia Associates and its physicians moved for summary judgment against K Medical Center. They argued that the record in evidence established that K Medical Center did not and could not rely on the letters submitted by Drs D and PR. Specifically, AA and its physicians indicated that K Medical Center had labeled the letters written by Dr. PR and Dr. D as "can't use" because the letters were either undated or too remote in time for their evaluation, and therefore, AA and its physicians could not be held liable for anything in them.

2. Legal analysis

The court found against AA and its physicians and granted K Medical Center's motion denying them summary judgment and ordered the case for trial (*Kadlec Medical Center v Lakeview Anesthesia Associates*, 2005 WL 1155768 [E.D. La. May 6, 2005]).

The court first noted that under the legal standard, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Furthermore, the court noted that in the state in which the case was heard, the elements of an intentional misrepresentation claim are the following:

1. a misrepresentation of material fact;
2. made with intent to deceive; and
3. causing justifiable reliance with resultant injury.

Similarly, the elements of a claim for negligent misrepresentation are the following:

1. a duty on the part of the defendant to supply correct information to the plaintiff;
2. a breach of said duty; and
3. justifiable reliance upon the misrepresentation with resulting damage.

The court focused on reliance. It indicated that reliance is a necessary element of K Medical Center's claims for intentional and negligent misrepresentation, and its failure to establish reasonable grounds for such reliance would entitle AA and its physicians to summary judgment.

However, although some of defendants' evidence supported a finding that the letters could not be used as "primary-source" letters, the court found that K Medical Center submitted evidence that suggested that K Medical Center actually relied on AA letters from Drs D and PR, notwithstanding the fact that K Medical Center had labeled the letter "can't use." For example, as noted by the court, a K Medical Center employee testified that the letters written by Drs D and PR were in fact taken into consideration by reviewing staff, although they were not counted toward the required three "primary source" letters.

The court also concluded that AA and its physicians did not carry their burden of demonstrating that they were entitled to a judgment as a matter of law with respect to K Medical Center's intentional and negligent misrepresentation claims. The court acknowledged that AA and its physicians did highlight evidence that suggested that Dr B might have been employed by K Medical Center (i.e., the "can't use" notations) despite their alleged misrepresentations. However, the court noted that it must resolve any factual controversy in favor of the nonmoving party, here, K Medical Center, if it has brought forth evidence sufficient to enable a rational trier of fact to find for it. By showing that it did include and review Drs D and PR's letters recommending Dr B, K Medical Center made an adequate showing of evidence that met this burden.

Upon review of the motion, the undisputed facts, K Medical Center's opposition to the summary judgment motion, and the exhibits submitted by both parties and the law, the court found that K Medical Center submitted evidence that raised genuine issues of material fact with respect to K Medical Center's reliance on the representations in the letters by Drs D and PR written on behalf of Dr B. The court then ordered that AA and its physicians' motion for summary judgment to be denied and allowed the trial by K Medical Center against AA and its physicians for both negligent and intentional misrepresentation to proceed.

Commentary

"Primum non nocere" et "Cura te ipsum." Among the many directives given to medical students, "First, do no harm" and "Physician, heal thyself" remain important precepts. These writs urge all physicians to consider the possible harm that any intervention might do and also exhort us to care for ourselves before we deal with patients. To these dictums, we add "Do not, through inaction, allow harm to occur." All of these axioms were violated in the case presented in this "Doctor's docket". This unfortunate case has received national attention in the lay press as well as in professional newsletters [1-3].

To summarize, Dr Robert Lee Berry, an anesthesiologist and partner at Lakeview Anesthesia Associates was fired "with cause" after he reported to work in an impaired state. This physician was subsequently hired by Kadlec Medical Center, where his negligence, while

impaired by narcotics during a routine tubal ligation procedure, caused the patient to suffer extensive brain damage. Kadlec's requests for information and references from his former employer failed to uncover Dr Berry's history of narcotic diversion and personal use. Kadlec Medical Center (and its insurer) filed suit at the US District Court for the Eastern District of Louisiana against Lakeview Anesthesia Associates and Lakeview Regional Medical Center. According to the complaint, alleging intentional and negligent misrepresentation, two former colleagues of the impaired anesthesiologist and Lakeview Regional together failed in their duty to disclose relevant material information. The former partners had provided positive letters of recommendation and the hospital responded incompletely to credentialing information requests. Unfortunately, this lack of truthful communication may have led to Dr Berry's credentialing and employment at Kadlec Medical Center. Ultimately, the jury in this tort suit found that intentional and negligent misrepresentations were made and that these misrepresentations were the proximate cause of the injuries. The jury found that Lakeview Anesthesia Associates and Lakeview Regional Medical Center were responsible for 50% of the approximate \$8.2 million malpractice claim [4].

This case has several implications for hospitals and providers from a legal and societal perspective. The duty to disclose complete and accurate material information is a matter of patient safety and healthcare quality [5]. We have an obligation to share information as is necessary to protect all current and future patients. Ideally, communication around the credentialing process must be factual, formal, written, made in good faith, and should be as limited as possible, while still being complete [6]. The future career of the physician, as well as patient safety, may be affected by the information provided. In its ruling, the Louisiana court said that "if and when a hospital chooses to respond to an employment referral questionnaire, public policy should encourage a hospital to disclose the sort of information at issue. Kadlec and Lakeview have a unique "special relationship," which existed in part to further communication between healthcare providers so that future patients could be protected" [5].

The partners/anesthesiologists, who wrote positive letters of recommendation, failed in their duty to disclose. They did not report Dr Berry to the National Practitioner Data Bank (NPDB) when they terminated his employment "with cause." The NPDB was created to protect patients by assuring that concerns regarding clinical competence and conduct serious enough to cause one institution to restrict or terminate privileges are broadly disseminated to other institutions. While we all assume responsibility for the individual patients under our care, this case emphasizes that society expects us to assume broader, more complex responsibilities [1]. Concerns about hurting a colleague's reputation/career or about being sued for defamation are unfounded. As difficult as it may be, we must protect all patients by responding to requests for information factually and completely. Specifi-

cally, under the Health Care Quality Improvement Act [7], those who provide information are immune from liability unless knowingly providing false information. By terminating Dr Berry's employment, the partners showed that they were unwilling to expose themselves and their patients to further risk/liability. They were concerned and confident enough about the impairment that they chose to terminate him "with cause". Is it justifiable to pass such risk along to other patients and providers? If the answer is no, then writing a positive letter of reference was unconscionable.

Allowing a culture of collegiality to trump patient protection is not just an ethical issue—it is a medical-legal risk. Conceptually, liability in writing references could result from errors of commission or omission. Errors of commission are actively made, false assertions such as "blackballing" a good candidate or endorsing a poor one. Errors of omission, on the other hand, involve not being forthcoming with all the facts or relevant information. These partners could have refused to write a letter telling others that they could not, in good faith, give him a positive endorsement having recently fired him "with cause". Alternatively, they could have written a letter disclosing all the facts. Stating just the "name, rank, and serial number," like the hospital did, is incomplete and dangerous. Such a letter does not serve the referring hospital, the hospital seeking information, future patients, or even good practitioners. In effect, this only aids the incompetent/impaired practitioner [8]. At the very least, such a letter should state that privileges were suspended or restricted with further directions to contact the person or facility for further information.

These anesthesiologists also failed their impaired colleague. We must support an addicted colleague as he/she is guided through evaluation and treatment [9]. Institutional support, in the form of an Employee Assistance Program, is built on the principle of confidentiality. Participation should have no adverse effects on job security or promotional opportunities. Early assessment, focused counseling and support, and identification of and referral to additional resources would have been beneficial in dealing with the stress and depression that often underlie substance abuse. For example, our institution has a Committee on Practitioner Health, which is charged, among other duties, with the handling of alcohol and substance abuse issues among members of the professional staff. Written policies and procedures compliant with state and federal reporting requirements facilitate assistance and rehabilitation of impaired employees while ensuring quality patient care and a safe working environment. Centralized multidisciplinary peer review committees are required to build a nonpunitive culture of excellence that supports physicians, but never at the expense of patients [10].

We are not sure that well-planned intervention was offered to Dr Berry and, if refused, whether all available measures were used toward getting him to enter a substance abuse treatment program. These could have included the threat of being reported to the state medical board. A

powerful motivation for recovery is also the possibility of returning to full medical practice after treatment. The details of this case do not provide insight into the presence or absence of these interventions, but the fact that these issues and alternatives did not get publicized lends one to assume that intervention and referrals were not aggressively undertaken. If reasonable care is taken to see that an impaired physician is identified and treated in accordance with accepted medical practice, liability is generally reduced or eliminated [6,11]. Unfortunately, Dr Berry and his former partners will now have to live with the guilt of multiple preventable tragedies.

In a landmark report by the Institute of Medicine [12] it was noted that “few professional societies or groups have demonstrated a visible commitment to reducing errors in health care and improving patient safety.” It identified one exception: anesthesiologists. Pulse oximetry, capnography, training with advanced patient simulators and analyses of the American Society of Anesthesiologists Closed Claims Database have all helped us make anesthesia safer than ever before. The Agency for Health Care Research and Quality has enlisted the Anesthesia Patient Safety Foundation’s assistance in developing a National Center for Patient Safety. Front-page stories lauding our efforts in promoting patient safety have deservedly improved public perceptions of our profession [10]. Despite the rising cost of medical malpractice insurance, anesthesiologists pay less in constant dollars today than 20 years ago. The foundation for all of these advances is the “vigilant” anesthesiologist. An impaired colleague performs a disservice not only to the individual patient under his/her care, but also to him/herself and to our community as a whole. It behooves us all to protect the trust that patients place in their anesthesiologists everywhere by individually “doing no harm”, including through inaction: or qui non agit numnumquam nocere.

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