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FEDERAL COURT OF APPEALS ABSOLVES LOUISIANA HOSPITAL OF LIABILITY IN FAILURE TO REPORT PHYSICIAN IMPAIRMENT WHILE ON THE MEDICAL STAFF

In May of this year, the United States Court of Appeals for the Fifth Circuit absolved Lakeview Regional Medical Center (“Lakeview”) of any liability, and reversed a damage award against it, in a lawsuit that had been brought against Lakeview and a physician group practice by Kadlec Medical Center, a hospital located in the state of Washington. Kadlec sued Lakeview and a physician practice for over \$8 million in damages, on the grounds that Kadlec was forced to settle a malpractice lawsuit due to the negligence of an anesthesiologist who was impaired at the time of the malpractice. Kadlec’s claim was that Lakeview and the physician group practice knew of the physician’s impairment when he was on the medical staff of Lakeview, were asked about his performance before he was credentialed at Kadlec, and did not disclose the prior impairment and disciplinary action that had resulted.

The Fifth Circuit affirmed a lower court decision that the practice group, Lakeview Anesthesia Associates, APMC, and some of the individual physicians in the group practice, liable for their failure to provide full disclosure to Kadlec upon its request to receive a recommendation from the group regarding the physician’s placement on the Kadlec medical staff. Factually, the physician group, when asked to comment on the physician’s performance,

not only responded in writing, but also gave positive remarks about the physician, despite being aware of his impairment and its impact on his ability to practice. Lakeview, on the other hand, responded to Kadlec’s request by simply stating that the number of requests for information, such as Kadlec’s request, was voluminous and, due to inability to have time to respond, Lakeview simply gave the starting and ending dates of the physician’s tenure on the medical staff of Lakeview. Kadlec did not ask for anything further from Lakeview.

Although a federal jury had found Lakeview 25% at fault for its failure to disclose the physician’s problems while on the medical staff due to his impairment, the Fifth Circuit reversed this finding, on the grounds that under Louisiana law, the hospital did not have a duty to disclose information about the physician. This was because the hospital had no special relationship or pecuniary interest in the transaction. The court made clear, however, that had the hospital decided to voluntarily disclose information even absent a legal duty, then its voluntary disclosure would have created a duty to disclose completely and honestly. Because the hospital did not incur the duty, it had no obligation to provide further information regarding the physician.



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The import of this decision is that under Louisiana law there may be a duty to speak if one has a special relationship or a pecuniary interest in the transaction at issue. Even if there is no such special relationship or pecuniary interest, a party who voluntarily chooses to respond to an inquiry assumes a duty to respond accurately and completely.

The *Kadlec* decision should be read very carefully, as it does not appear to provide a “sword” to use against others under the theory that failure to voluntarily give negative information regarding a physician might result in liability. That is not the import of *Kadlec*. The import of *Kadlec* is that **when asked**, a party who has no duty to speak need not speak at all. If the party has a duty to speak, or if the

party voluntarily incurs a duty to speak, then the party must do so in such a way as to not mislead, misrepresent, or give less than all pertinent information. This is all that the *Kadlec* decision stands for.

The Fifth Circuit decision is *Kadlec v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008).



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DISPENSING PHYSICIANS PROHIBITED FROM DISPENSING CONTROLLED SUBSTANCES

In the September 20, 2008 issue of the Louisiana Register (34:9 La. Reg. 1905), the Louisiana State Board of Medical Examiners amended the rules governing dispensation of medications. The amended rules now forbid dispensing physicians from dispensing any controlled substance or drug of concern, unless the physician practices at a governmental facility or a licensed abuse or addiction treatment facility, or is engaged in a regulated clinical research project or investigational study. The current list of controlled substances under Louisiana’s Uniform Controlled Dangerous Substances Law is contained in section 40:964 of the Louisiana Revised Statutes. The additional “drugs of concern” are identified in the September 20 publication as the following: carisoprodol, dezocine, nalbuphine and tramadol and such other non-

controlled substances, as defined by rule, which demonstrate a potential for abuse.

The amended regulations do permit a dispensing physician to dispense up to a single 48-hour supply of a single controlled substance or drug of concern to a patient. Also, a physician is permitted to submit a written application to depart from the prohibition for an individually identified patient. The board will review such written waiver applications on an individual case basis.



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