

# How to Respond to Reference Requests Regarding Difficult Physicians

BY: MICHEL MARCOUX

Unfortunately, it happens routinely. A difficult physician is fired because he fails to appropriately perform his duties due to alcoholism, drug addiction or some other cause. Weeks later, the physician's former partner, employer, or the hospital where the physician had privileges receives a request for a reference letter from that physician or another healthcare entity interested in employing that physician or granting him medical staff privileges.

Should the reference letter disclose the reason that the physician was fired? Must it? On the one hand, the physician's former partner, employer, or the hospital where the physician had privileges needs to be concerned about a possible defamation claim by the physician if the reference letter communicates negative information about the physician. On the other hand, if the reference letter is too positive, then there may be liability for negligent misrepresentation. Any person tasked with responding to a reference request regarding a difficult physician undoubtedly feels stuck be-

tween a rock and a hard place.

## **The Kadlec Case Comes to the Rescue**

A recent ruling by the United States Court of Appeals for the Fifth Circuit provides some clarity on how to navigate this predicament with a decreased likelihood of incurring liability. In the case, which was brought by Richland, Washington-based Kadlec Medical Center against Lakeview Anesthesia Associates ("LAA"), LAA's shareholders, and Lakeview Regional Medical Center ("Lakeview Medical"), Kadlec sued the defendants for failing to disclose the on-duty use of narcotics by an anesthesiologist in response to Kadlec's reference requests.

The anesthesiologist, who was a former shareholder of LAA, had worked at Lakeview Medical until he was caught in a call-room, asleep, groggy and unfit to work after having used Demerol. He was fired soon thereafter. After being terminated by Lakeview Medical and LAA, the anesthesiologist sought work at Kadlec. During his credentialing process, Kadlec examined a variety

of materials, including referral letters from LAA shareholders and Lakeview Medical.

LAA shareholders submitted referral letters for the anesthesiologist a mere 68 days after firing him for his on-the-job drug use. These letters stated that he was "an excellent clinician", would be "an asset to any anesthesia service", and was recommended highly as an anesthesiologist. Separately, Lakeview Medical received a detailed confidential questionnaire and other documents from Kadlec as part of Kadlec's request for credentialing information about the anesthesiologist. Instead of filling out these documents, Lakeview Medical responded to the reference request with a short letter stating only the dates that the anesthesiologist served on its medical staff and providing a number that Kadlec might use to contact Lakeview Medical if it needed further assistance. None of the reference request responses disclosed the firing of the anesthesiologist, his on-duty drug use, or any other negative information.

Kadlec credentialed the anesthesiologist, and he began working there. Over

the next several months, nurses noticed that the anesthesiologist often appeared sick and exhibited mood swings. Then, on November 12, 2002, after "screwing up all day" in the eyes of one nurse and causing several of his patients to suffer adverse affects from not being properly anesthetized, the anesthesiologist failed to resuscitate a patient being treated for what should have been a routine, fifteen-minute tubal ligation. The patient is now in a permanent vegetative state.

The anesthesiologist confessed that he had been using and was addicted to Demerol. Both he and Kadlec were sued by the patient's family. Insurers settled both claims and then, with Kadlec, filed suit against LAA, its shareholders, and Lakeview Medical alleging, among other claims, intentional and negligent misrepresentation by the defendants arising out of their alleged misrepresentations in, and omissions from, their respective referral letters to Kadlec.

In the lower court, a jury found all of the defendants liable in an amount of \$8.24 million for breaching their duty to disclose the anesthesiologist's

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## How to Respond,

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impairment to Kadlec. However, on appeal, the Fifth Circuit Court of Appeals held that: (i) the defendants, after choosing to write referral letters, assumed a duty not to make affirmative misrepresentations in the letters; (ii) the defendants had no affirmative duty to disclose negative information about the anesthesiologist in their referral letters; (iii) the LAA shareholders' reference letters were misleading, while the letter from Lakeview Medical was not; and (iv) Lakeview Medical did not breach any duty owed to Kadlec and, thus, the judgment against it was reversed.

### Practical Advice to Completing Reference Requests

The Kadlec case provides some key points that anyone tasked with responding to a reference request for a difficult physician would be wise to remember. First, you do not have to fill out the reference or recommendation form that another healthcare entity sends you. For example, Lakeview Medical took the approach of returning a brief letter that stated the dates that the troubled anesthesiologist was employed at its facility, rather than filling out the documents that were sent by Kadlec. If you do complete such a form, however, it must be accurate and complete in order to avoid any whiff of negligent or fraudulent misrepresentation. Second, you do not have to write a referral letter, but, if you do decide to do so, consider that you are assuming a duty not to make affirmative misrepresentations like those made by the LAA shareholders. Third, if you write a reference letter and disclose negative information about a physician, such as the fact that a physician was abusing drugs while he or she was on-call, and the contents of your letter are made known to the physician, be prepared for a defamation suit, notwithstanding any immunities that federal or state law may provide to you.

Generally, a person should not submit a reference letter for a difficult physician without (i) confirming that every statement made in the letter matches with documentation in files and (ii) ensuring that the letter receives appropriate review by legal counsel. Remember that there is no rush to complete a reference request. Slow down and take your time. Do not allow yourself to get crushed between the rock and the hard place to the tune of millions of dollars like the LAA shareholders.



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## Breast Cancer SPORE, *continued from page 13*

and is given to patients with a family history of breast cancer to reduce their risk of developing the disease," LoBuglio says. "The compound has gone through all preclinical trials and is currently in Phase 1 preclinical studies with humans here at UAB and at the University of Wisconsin."

The UAB30 study is distinctive because the developing agent will be used to prevent cancer from occurring or recurring in women at high risk. Other studies will look at retinoids to prevent hormone-resistant breast tumors in animals, or to see if retinoids can prevent and treat other types of cancers.

### Cancer Gene Biomarkers

The SPORE project is building on previous research at UAB that identified Kruppel-like factor 4 (KLF4) as a new oncogene that is present in breast cancer and squamous cell carcinoma. UAB investigators have shown its level of expression correlates with patient survival.

"We discovered that this gene is present in 75 to 80 percent of breast cancer cases. It's an important gene in the majority of patients," LoBuglio says. "Initial work has been done to see if its presence would show which patients will do well and which will have a recurrence of the disease. Evidence shows characteristics of the gene present at diagnosis can determine how we should treat those who will do well versus those with expected recurrence."

KLF4 is a diagnostic tool, LoBuglio adds. "We're moving the project to look at new drugs that can interfere with

cancer behavior. We're currently in the preclinical stage with animal models and are hoping to progress to human trials soon," he says.

### Gamma/Delta T Cells

"Imagine an anticancer agent that can induce immune resistance to cancer via rare human yd-T Cells, one of the body's most basic defenses against cancer," LoBuglio says. "This is the basis for the fourth SPORE project and a truly novel approach to immunotherapy."

UAB investigators pioneered large-scale ex vivo expansion of human yd-T cells. It is important that these cells retain their innate anti-tumor activity in vitro against a variety of human tumor cell lines, including breast cancers. Researchers are now in the preclinical stage with animal testing on this project.

### Preparing for the Future

In addition to the research projects, the SPORE includes a pilot-project component that allows some of the grant money to be earmarked for early-phase innovative cancer research work. It also provides discretionary funds for career development and pilot projects. Being able to recruit promising clinical investigators to come to UAB early in their careers is vital to ongoing research.

"Faculty is the key to the funding and activity in research, and we recruit good people from all over the U.S.," LoBuglio says. "UAB is attractive for these scientists because the university is very good at interdisciplinary research and provides a productive atmosphere for research. The breast cancer SPORE has done well because of our very good Cancer Center. All of that makes it easy to do research here."




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