



# Damned if You Do – Damned if You Don't – How Much Can I say?

Insights

3.30.19

How often have you wished that you could candidly respond to reference requests or to attacks on your organization or questions about a catastrophe ... and been unable to do so because of “legal concerns?”

The legal concerns may have been genuine or they may have been overstated. Employers must work with counsel to reasonably evaluate the risks of defamation, employment or retaliation claims, or the communications being used in a civil matter. These legal risks must be weighed against longer term harm to the organization based on refusing to fully respond. There are no easy answers. Often an employer is in the dilemma of choosing the least bad option.

As in so many legal matters, the key is not to make a knee-jerk decision. Talk to your attorneys, but also talk to your PR advisors and consider the longer term harm if the organization refuses to comment or provides a truthful but incomplete or evasive response

A popular new Podcast, [Dr. Death](#), illustrates the challenges a group of employers faced in handling a dangerous surgeon as he went from place to place, and the subsequent harm to the hospital's hard-won reputation. Read the [Washington Post article on the Podcast series](#). This podcast is a good opportunity for you to consider “what would you have done?”

[As a related issue, consider how the surgeon's rambling expletive-ridden emails contributed to his criminal conviction.]

This Dallas area neurosurgeon [killed or maimed at least 33 patients](#) and was eventually sentenced to life imprisonment. While the podcast tries to determine why the surgeon did such horrible things, the series focuses even more on why the healthcare system did not stop this man after so many deaths and injuries. The Podcast brought out these damaging facts about various employers:

1. The surgeon's residency program had placed the surgeon in an addicted physician program for a year, and did not share that info with groups and hospitals considering the physician for hire or privileges.
2. Mentors during residency strictly interpreted questions from hospitals so as to avoid raising concerns, even after Dallas area physicians had contacted them about horribly botched cases on which they had consulted

when they had consulted.

3. Hospital systems did not share information about efforts by the surgeon to evade drug testing after complaints about drug possession and use.
4. Hospital administrators did not act even after approached by other highly respected surgeons.
5. A hospital which forced out the surgeon nonetheless provided a neutral reference letter and apparently felt that it was adequate to remove the surgeon from their group, even if he still could work elsewhere.

The employers' reputations suffered after the subsequent investigations by the Texas Medical Board, news outlets, and the DA illustrated their failings.

### **Legal Issues Faced by these Employers.**

The med school, residency program, and the hospital system involved were solid members of the medical community and faced with situations where any statements would be used against them. Certain legal issues obviously affected the organizations' decisions.

Employers were concerned about whether the surgeon would sue if they terminated his employment and/or privileges.

The surgeon did sue at least one of the hospital systems, so the concern was valid. However, the employer had a strong case and the subsequent public harm of this story may have been more damaging than any employment or contract claim.

The med school, training programs, and healthcare systems were concerned about suits if they shared more detailed performance information.

What employer has not considered this risk? In most states, few defamation cases based on references are successfully pursued. However, some claims do succeed, as well as allegations of retaliation after termination by providing poor references.

The *Dr. Death* situation is not the first time that healthcare systems have been embarrassed and accused of failing to share accurate references on a healthcare professional later determined to have killed patients. Consider the early 1990s lawsuits filed against Georgia and Alabama hospitals after a nurse, Joseph Dewey Akin, killed at least 16 patients. Some plaintiffs later sought a commitment by hospitals to honestly share factual not neutral references going forward.

How would you respond if your hospital was described as follows:

*In December, the Georgia Secretary of State's Office informed Roswell police that Mr. Akin might have been involved in the sudden heart failures of a number of patients at North Fulton Regional Hospital, including three who died, according to Roswell police files obtained by The Atlanta Journal-Constitution.*

*The Secretary of State's Office, which oversees Georgia's licensing board for nurses, sent an undercover nurse into the Roswell hospital to see whether Mr. Akin was drugging patients to induce heart failure, according to the file. Mr. Akin did not report for work while the undercover nurse was there and then was fired.*

*Two months later, Mr. Akin began work as a nurse at Cooper Green Hospital in Birmingham. Now, Birmingham police are investigating whether Mr. Akin was involved in the March 27 death of hospital patient Robert Price.*

*"Why did they wait so long? Why would they let something like that go so long?" said Elizabeth Price, Mr. Price's sister-in-law.*

*By the end of 1990, Mr. Akin, 34, had been fired by North Fulton, Grady Memorial Hospital and Georgia Baptist Medical Center for lying about his background and by a Birmingham hospital for unprofessional behavior. Shortly before North Fulton fired him in December, four nurses had come forward with their suspicions about a number of sudden heart failures among the hospital's intensive-care patients.*

*North Fulton chief administrator Frederick Bailey said Wednesday that authorities were investigating 18 sudden heart failures that resulted in five deaths. However, Fulton County Medical Examiner Saleh Zaki said his office has reviewed at least 11 deaths in North Fulton's intensive care unit that occurred while Mr. Akin was a nurse there. AJC, 8/5/91 DESPITE 4 FIRINGS AND INVESTIGATION, NURSE SWITCHED HOSPITALS WITH EASE POLICIES HINDER BACKGROUND CHECKS.*

Employers must objectively weigh all potential risks. They should realistically ask themselves whether they are being unduly risk averse or whether the proof of poor performance is too subjective or under-documented to prove. Employers must balance these concerns against whether their decisions to provide neutral information cause harm and how that harm may damage the organization's reputation if the employee later does great wrong. Similar analysis may be required in responding after an event becomes public. Statements regarding public catastrophes present even more legal issues.

The employers were no doubt concerned about whether they would be exposed to malpractice claims (or other civil claims) if they provided more detail.

This is a valid and important inquiry. Unprotected public comments can destroy a defense. This scenario may be one that presents no "good" choice; only bad and "less bad" options.

With these comments in mind, listen to [the podcast series](#) and consider how your organization would have handled these challenges and what you would or would not do differently.

Then consider how you would apply these lessons when your organization experiences an employee death or catastrophe, a claim against an executive, or allegations of widespread discrimination.

Howard

## ***Service Focus***

Workplace Safety and Catastrophe Management