Legal Briefs

GENE A. BLUMENREICH, JD
Nutter, McClennen & Fish, LLP
Boston, Massachusetts

The importance of being certified

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Such a high percentage of nurses giving anesthesia have been certified as CRNAs that some may overlook the distinction between a nurse anesthetist and a Certified Registered Nurse Anesthetist. In many ways certification and recertification have become second nature. Ninety-nine percent of nurses administering anesthesia are CRNAs. At that rate, very few hospitals would want to risk defending a lawsuit over anesthesia administered by a nurse anesthetist who was not certified. So closely identified are anesthesia and CRNAs that one sometimes has to pause to remember that there is a difference between a nurse anesthetist and a CRNA. This distinction played a prominent role in a recent case arising in New York state (*Chicago Insurance Company v Halcond*, 49 F.Supp. 2d, 312, S.D. (New York, 1999)). The case involves what should be any healthcare professional's worst nightmare, the refusal of an insurance company to provide coverage to a nurse anesthetist facing 3 lawsuits.

Litigation can be unpredictable and expensive, even for the innocent. Professional liability insurance can cover a significant portion of the risk and provide for the cost of an attorney. However, just as hospital administrators are reluctant to ignore a standard of practice followed by more than 99% of the industry, so too are professional liability insurance companies.

Chicago Insurance Company v Halcond

The defendant's recertification expired on July 31, 1988. Nonetheless, the defendant continued to practice as a nurse anesthetist. In March 1996, the defendant applied for an individual nurse anesthetist professional liability insurance policy from the Chicago Insurance Company. Question 4 on the application form provided 2 boxes, 1 for "CRNA" and the other for "student nurse anesthetist." The defendant, who was neither, checked the "CRNA" box. In addition, although his certification had expired, the defendant added the letters "CRNA" to his signature on the application.

Thereafter, the nurse anesthetist became involved in 3 anesthesia incidents. The first occurred on September 23, 1996. The patient went into an irreversible coma/persistent vegetative state. The defendant apparently did not notify the insurance company of the incident until he was sued a year later. A second incident occurred on March 20, 1997. While there are no details in the record to explain the incident, the court notes that the plaintiff was represented by her mother and court-appointed guardian, an indication of the plaintiff's mental incompetence. Again, according to the court, the nurse anesthetist failed to notify the insurance company of the incident until he was sued many months later.

On March 26, 1997, after these 2 incidents had occurred but before any litigation had been instituted, the nurse anesthetist applied for a renewal of the professional liability policy for the period of April 1, 1997 to April 1, 1998. In response to a question on the application form whether any facts or circumstances had occurred in the past year "that might give rise to a claim or suit," the nurse anesthetist checked "no." At the time, the nurse anesthetist may not yet have been sued, but knew that he had been involved in 2 matters in which the patient had been badly injured.

The nurse anesthetist was served with complaints in the 2 matters on December 22, 1997 and January 21, 1998. The nurse anesthetist claims to

have given telephonic notice to the broker of his insurance company and to have sent the pleadings to the insurance company by mail, but he conceded that the mailings were returned. Chicago Insurance found out about both of the actions in March 1998.

Chicago Insurance renewed the nurse anesthetist's malpractice policy for an additional 1-year term on April 3, 1998, but on May 8, 1998 it sent the nurse anesthetist a letter saying that it did not have any obligation to provide professional liability coverage with respect to the 2 existing lawsuits. The letter stated that the policy was "deemed void as of its inception" and stated that the broker was returning the full amount of the premium paid. The insurance company based its actions on its contention that the nurse anesthetist had breached his obligation to forward the pleadings to the insurance company "as soon as practicable," and therefore Chicago Insurance Company was not bound to defend or indemnify the nurse anesthetist or to otherwise provide insurance coverage.

Then, Chicago Insurance Company found out that the nurse anesthetist was not a *Certified Registered* Nurse Anesthetist at the time he applied for the policy. On June 23, 1998 it brought a declaratory action, asking the court to declare that the insurance company was not bound to provide insurance coverage to the nurse anesthetist. Its grounds were that the nurse anesthetist had made a false assertion that he was a CRNA and in addition had failed to provide timely notice of the malpractice actions.

As if this were not bad enough, on December 16, 1998, the nurse anesthetist was sued in a third incident that occurred during the 1998-1999 renewal term and resulted in the death of a patient. He promptly notified the insurance company of the action, but the insurance company disclaimed any obligation to defend or indemnify him. The basis for the disclaimer in the third liability action was the misrepresentation in the original policy application that the nurse anesthetist was a CRNA.

Usually, parties go to court to resolve a dispute in which 1 party has suffered damage and is asking the court to determine that the defendant is responsible and should pay for it. In the case of a contract, the plaintiff may claim that the damage resulted from the defendant's failure to live up to his or her agreement. However, in some cases, such as the insurance contract in this case, the parties may disagree over what the contract requires. The insurance company felt that the nurse anesthetist had failed to disclose a very important fact and that the insurance company was misled into agreeing to insure the nurse anesthetist. Moreover, the contract required the insured to give prompt notice of a lawsuit. The insurance company did not think the nurse anesthetist had done so.

Seeking declaratory judgment

But the insurance company had a dilemma. What if it was wrong? If it refused to provide an attorney to defend the nurse anesthetist, the patient could be granted a large recovery. The nurse anesthetist might sue over a breach of contract, and if he won, the insurance company could be in an even worse position. Fortunately, there is a procedure that allows parties with real disputes to get them resolved before even greater damage occurs. The parties can seek a declaratory judgment. The court will listen to evidence just as it would for any other case. Each party can argue for his or her interpretation of the contract, and the court will rule as to who is correct. The suits are so similar to a regular proceeding that a party can ask for a summary judgment, as did the insurance company in this case, arguing that no possible interpretation of the contract or the law entitled the nurse anesthetist to be defended by the insurance company.

The court begins its answer by stating the basic law: An insurance company can void its policy if the insured makes a material misrepresentation of a past or present fact. Even innocent misrepresentations, if they are material, will allow an insurer to void its policy. While the court does not spend much time on it, "material" means that the fact had to be important enough that the other party really relied on it and might have taken a different action if it had known it. For example, a typographical error in an area code in the insurance application would probably not have been "material" in the insurance context (though it may well have been in others) while the fact that the applicant had never attended nursing school or been licensed as a nurse *would* likely be material. As in many other areas of law, while the concept is easy, trying to figure out after the fact what is material often proves difficult.

Fact or opinion?

The question that the court asked first in the *Chicago Insurance* case was whether the statements called for were "facts" as opposed to "opinions." It is easy to decide if a fact is correct or incorrect. However, an applicant's opinion is misstated only if it was not the applicant's actual mental state. The court gives as an example of fact/opinion a

question on a life insurance policy asking if the applicant is in good health. "Good health" only looks like a fact. "Good" compared to what—21-year-olds? Other residents of the hospice? Even if it turns out that the applicant was not in good health, the law, at least in New York, is that an insurance policy cannot be terminated if the insured "in good faith believed and was justified in believing that his health was not impaired by any condition that would ordinarily be regarded as a 'disease' ..." (*Chicago Insurance Company v Halcond* citing *Berkshire Life Insurance Company v Owens,* 910 F.Supp. 132, 134 (SDNY, 1996)).

The policy application asked whether any facts or circumstances that had occurred in the past year "might give rise to a claim or suit." The nurse anesthetist answered "no." Obviously, the nurse anesthetist was wrong, but was that a misstatement of fact or an opinion that turned out to be incorrect? Was it so clear that these patients would bring suit that the nurse anesthetist's failure to disclose the bad outcomes did not truthfully portray his mental state?

Ironically, in some ways the nurse anesthetist's position when renewing the policy was similar to that of the insurance company trying to decide if it had an obligation to hire a lawyer to defend the nurse anesthetist. A decision has to be made, and serious consequences arise if it is made incorrectly. The insurance company was able to ask the court for help by suing for a declaratory judgment. The nurse anesthetist chose not to disclose the existence of 2 badly injured former patients and hoped for the best.

The nurse anesthetist submitted an affidavit saying that at the time of filling out the insurance application he did not believe that any claim or suit was in prospect. Since this was the only evidence on the nurse anesthetist's mental state, the court ruled that this was a factual issue that could only be determined at trial. But for purposes of this motion for summary judgment, the court will have to accept the nurse anesthetist's affidavit as correct. At trial, the insurance company will be able to try to show that the nurse anesthetist was not justified in this belief through cross-examination or the testimony of other nurse anesthetists. It does not seem very likely that a nurse anesthetist would believe that a patient who had suffered such a catastrophic result as occurred in these 2 cases would be unlikely to bring suit. This could rule out any reasonable probability that there were no facts or circumstances "that might give rise to a claim or suit." However, the case is before the court for summary judgment. In order to prevail, the insurance company has to show that there are no facts that the nurse anesthetist could offer under which a reasonable person could believe that the nurse anesthetist was correct. The case is simply in too preliminary a position for the court to make this judgment.

A material misrepresentation?

The insurance company next argued that the policy was void because the nurse anesthetist made a material misrepresentation when he said that he was a CRNA. Clearly the nurse anesthetist made a misrepresentation, but was this material enough to justify the voiding of the contract? It is on this point that I think the trial court failed to give appropriate consideration to the nature of nurse anesthesia.

One of the insurance company's underwriters was perhaps a little casual in his testimony that the nurse anesthetist "was not properly *licensed* to practice as a CRNA in New York State"(emphasis added) at the time he submitted his application. The court states that New York does not require that anyone be "licensed" in New York as a "certified registered nurse anesthetist" and concludes that the insurance company "is operating on a mistaken premise." The court analyzed New York law and came to the conclusion that because the nurse anesthetist was properly licensed as a registered nurse, the nurse had sufficient authority, from a regulatory standpoint, to administer anesthesia "whatever the actual practice or preferred standards may be in the medical community." The court stated that it can find nothing in the New York licensing laws that requires that anesthesia be administered only by a Certified Registered Nurse Anesthetist. While the New York hospital code includes a requirement in that anesthesia may be administered only by a qualified anesthesiologist, a physician or dentist qualified to administer anesthesia, or a Certified Registered Nurse Anesthetist, the court points out that the section only governs ambulatory surgery services and not in-hospital care.

What the court's analysis failed to point out is that licensing is only an initial step in determining suitability to practice. For example, in the medical field, surgeons and psychiatrists hold the same license, but you would not let a psychiatrist surgically remove a tumor. The court overlooked the remarkably high percentage of nurses administering anesthesia that are CRNAs. This high percentage suggests that it is more than a "preferred standard," it is in fact *the* standard. In reality, the statement of the insurer's underwriter that the

nurse anesthetist would not have been insured if the insurance company had known that he was not a CRNA is undoubtedly correct. Had the court recognized the high percentage, the court would have had no choice but to acknowledge that the misrepresentation was "material." It would have been interesting to ask whether Chicago Insurance Company knowingly insured nurse anesthetists who were not CRNAs. Again, the case may simply have been in too preliminary a phase for the court to come to any other conclusion.

Having ruled that it was not a material misrepresentation because the licensing laws did not specifically require that a nurse anesthetist be a Certified Registered Nurse Anesthetist, the court then analyzed the nurse anesthetist's failure, after being sued, to notify the insurance company. Here, the court sided with the insurance company. The court determined that the failure to provide copies of the lawsuits to the insurance company for periods of 68 days and 38 days could not, under any reasonable interpretation, mean that the nurse anesthetist had given prompt written notice. The failure to provide notice constituted a breach of the insurance policy and meant that the insurance company was not obligated to provide a defense. The nurse anesthetist's excuse for the delay was his alleged good faith belief that nothing had occurred in either of these incidents that would give rise to a claim. However, once it did give rise to a claim, his mental state no longer mattered, and the terms of the contract obligated the nurse anesthetist to provide notice to the insurance company.

Lessons for nurse anesthetists

At the time this column was written, the court was ruling on a motion for summary judgment, and the case was scheduled for trial. Thus, it is still possible that the insurance company will be able to show at trial that the nurse anesthetist's misstatements about being a CRNA were material and excuse the insurance company from any obligations to provide a defense under the insurance policy. Whether or not this occurs, the case sharply underscores some very important lessons for nurse anesthetists.

First, it is important to maintain recertification. The status of being a Certified Registered Nurse Anesthetist is recognized legislatively in many states even if the trial court is correct that it is not recognized by the statutes of New York. Moreover, the fact that 99% of nurses administering anesthesia are CRNAs is proof of the reliance of the healthcare industry upon it. Administering anesthesia without being certified as a CRNA may expose a nurse anesthetist to cancellation of insurance, loss of job, and a substantial increase in the likelihood of being held liable for unfortunate outcomes even in the absence of negligence. It hardly seems necessary to make this point when so few nurse anesthetists practice without the certification. But the *Chicago Insurance* case makes clear that many people think certification is important (including, by the way, me). In those states that require certification as a CRNA, the argument becomes irrefutable.

Second, be careful to be honest and accurate when answering questions or making representations about yourself on insurance applications and similar documents. It also is important to note that it is possible to make a misrepresentation without even answering a question. The insurance company claimed that the wrongful addition of the initials "CRNA" after the applicant's signature also was a misrepresentation. Even if the nurse anesthetist in this case had been successful in forcing the insurance company to defend and indemnify him, the "punishment" of having to face a lawsuit and at best being uncertain as to whether he had insurance coverage should have been a substantial incentive to answer questions honestly and accurately. In a field where many cases are decided by *res ipsa loquitur*, which is basically an assumption of negligence when there is a bad outcome, what factors justify an opinion that suit is unlikely?

Finally, insurance policies and lawsuits are matters to be taken seriously. It is important to follow the terms and procedures set forth in an insurance policy. When an insurance policy requires prompt notification of an insurer, waiting 2 months does not meet anyone's definition of "prompt."

It would be a terrible tragedy if the nurse anesthetist was correct in believing that the plaintiffs had no case and that he did not have to worry about a suit, but because of his failure to give prompt notice and his efforts to conceal his lack of a CRNA certification, his defense became costly and stressful.

Certification and recertification

The Council on Certification of Nurse Anethetists grants initial certification for all nurse anesthetists who meet the criteria for certification. The Council on Recertification of Nurse Anethetists grants recertification to the CRNA who meets the criteria for recertification.