



LEGAL BRIEFS

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DUE PROCESS

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In December 2001, the US Court of Appeals for the Tenth Circuit decided the case of *Ferraro v Board of Trustees of Labette County Medical Center* (106 F.Supp.2d 1195, Kan, 2000; appeal denied 2001 WL 1558763 (10th Cir. [Kan 2001] unpublished)). After 20 years of practice, Ferraro, a nurse anesthetist, had been accused of inappropriate behavior. The hospital's chief executive officer (CEO) directed the chief of surgery to discuss the incident with Ferraro. Ferraro was warned that if the allegations were true, his behavior was inappropriate and could not continue. In less than a year, 2 nurses reported they had observed similar acts. These reports were forwarded to the chief of surgery and the hospital's CEO. The chief of surgery interviewed all of the reporting nurses and took written statements from them. Within a week, Ferraro was sent letters suspending his privileges to practice at the Medical Center. In suspending his privileges, the chief relied on the CEO's representations that the medical executive committee had met and voted to summarily suspend Ferraro. In fact, no such meeting of the medical executive committee had taken place.

When the medical executive committee finally met with him, Ferraro was presented only with excerpts of the written statements

of his accusers. He was not provided with the names of the patients involved, or their records, or the dates of his supposed inappropriate behavior. Ferraro denied any wrongdoing and refused to answer any questions without the presence of an attorney. The medical executive committee recommended that the suspension continue. Ferraro then requested a "fair hearing." At the hearing, Ferraro was able to examine witnesses and present arguments. Following the fair hearing, the hearing officer issued his report recommending that Ferraro be reinstated but finding that the suspension was not arbitrary, capricious, or irrational. He was reinstated. Subsequently, Ferraro brought a lawsuit alleging violation of "substantive and procedural due process, as well as a violation of a liberty interest in his professional reputation."

What is due process?

What is "due process?" Where does it come from? And to whom does it apply?

"Due process" must be important. It is mentioned twice in the US Constitution. The first time it is mentioned is in the Fifth Amendment, part of the Bill of Rights, which was added to assure the adoption of the Constitution. There had been a split among the founding fathers regarding adoption of the Constitution. Thomas Jefferson, and others, insisted that a Bill of Rights be added to the Constitution to protect the citizens

of the United States from the newly created federal government and to assure his support for the adoption of the Constitution. The Fifth Amendment provides that the federal government, including its courts and agencies, cannot take a person's life, liberty or property without "due process" of law. Immediately after the Civil War, the Fourteenth Amendment was added, which imposed the same requirements on the states.

It is hard to provide a complete and meaningful definition of "due process." The cases that arise under the due process clauses arise when something is challenged as depriving a citizen of due process. The courts do not sit down with a list of 30 or 40 principles to ask if they were complied with. The courts look at the facts and circumstances and a complaint that something happened during a trial that deprived a party of due process. Nonetheless, some generalities can be said about due process.

Much of our law comes from the English common law. Historically, the impetus for the settlement of North America reflected dissension and instability in England. As we learned in elementary school, religious strife in England first convinced the Puritans to migrate to North America. But, in 1650, the Puritans succeeded in England by removing the king and taking control of the English government. Now, the shoe was on the other foot. While this made England a more desirable place for Puritans,

it had the opposite effect on their foes and a new migration began, of their opponents, to America. The dissension and instability in England was to continue with varying degrees of intensity until just before the American Revolution. Thus, the founding fathers, despite their different backgrounds, shared a common recollection of strife and instability in England and the misuse of government powers by whatever side was in power.

England also presented a vibrant history of efforts by statesmen and political philosophers to develop institutions and mechanisms to make it possible for those out of power to remain in the country until their turn to be in power. From this history, there developed a sense of the rights of all Englishmen and these rights included due process, the rights and procedures to be followed when citizens were confronted with the power of the state.

It would be a mistake to try to describe due process in anything shorter than a textbook, but it might be useful to summarize some of the principles that our founding fathers thought of when they referred to due process. In addition, the Constitution is not a rigid document. We reinterpret its terms and its meaning in every generation as new factors and as sensibilities develop.

To our founding fathers, "due process of law" included a number of very specific rights. Laws themselves should not be vague, overbroad, or unfair. They should be applied fairly. A citizen's treatment or punishment by the government should not be unreasonable, excessive, or uncivilized. Due process requires a hearing, held in a competent manner with an impartial fact finder and decision maker, using a process and procedures that are fair. Due process requires

that the accused receive notice that there is an action pending and of the charges faced. The accused should receive this notice in sufficient time to be able to prepare an adequate defense. The accused should have an opportunity to be present and to examine witnesses, to address the decision maker, and to obtain and offer evidence. When property is taken, it should be taken only for public purposes, and owners of property taken for public purposes should be fairly compensated. There should be a right to learn of the decision promptly and to appeal if the process or procedures are incorrectly applied.

The concept of due process is still being examined by the courts. It was only in 1963 that the Supreme Court ruled that a person accused of a crime not only had a right to be represented by an attorney but also if the accused was poor, to have one appointed and paid for by the state.

Ferraro v Board of Trustees of Labette County Medical Center

Getting back to the *Ferraro* case, what were his complaints about the lack of due process? Ferraro brought suit in the federal district court. He complained that he was only provided with excerpts of written statements from the nurses who reported that he was engaged in inappropriate conduct, that the patients' records were not provided, and that he was not given the dates of the alleged misbehavior or even the names of the patients with whom he was accused of misbehavior. Thus, he claimed a deficiency in the due process he was given. Without specifics of the claims, he could not defend himself. When he received the information, he received it just prior to the scheduled date of the hearing when it was too late to pre-

pare a defense, another due process violation. The hearing officer concluded that Ferraro should be reinstated, but he also ruled that his suspension was not arbitrary, capricious, or irrational.

Due process, thus, gives us the assurance that things will not be done to us simply because our boss takes a dislike or punishes us for some real or imagined slight. It is a powerful right, but it is not available to everyone. Our legal system, closely associated with the free enterprise economic system, does not want the government or its courts telling people what to do. The system preserves the ability of an owner of a business to act in as arbitrary a manner as he or she might choose. Ferraro was entitled to a due process hearing because the hospital in which he worked was a county hospital. The Fourteenth Amendment prohibits state governments from depriving citizens of property without due process of law. It applies to states and subdivisions of the states including counties.

In discussing Ferraro's claim that he was denied due process, the court summarizes several due process requirements:

Due process requires that plaintiff have had an opportunity to be heard at a meaningful time and in a meaningful manner before termination.... This requirement includes three elements: 1) an impartial tribunal; 2) notice of charges given a reasonable time before the hearing; and 3) a pretermination hearing except in emergency situations. (106 F. Supp. 1201)

The court says that due process "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." The Medical Center argued in return that Ferraro received adequate due process and second, that it had done no harm because his privileges were reinstated. The court quoted with favor a statement in

another case that “the standard for judging a substantive due process claim is whether the challenged government action would ‘shock the conscience of federal judges.’” The court claimed that Ferraro had not presented evidence sufficient to raise a genuine issue of material fact as to whether the Medical Center’s actions “shocked” its conscience.

In asserting a claim for damages through the courts, Ferraro was adversely affected because he was an independent contractor, not an employee. Had he been an employee, he might have been reimbursed for lost wages. However, he was an independent contractor and could be terminated at will. The lower court assumed that he was entitled to due process but found that he was not entitled to damages because his privileges were reinstated. A summary of his earnings showed that despite a decline in 1996 (when he was suspended), his earnings were higher in 1997 and 1998 than they had been in 1995. Ferraro appealed the court’s decision to the US Court of Appeals for the Tenth Circuit. He claimed that his due process rights included a right to be awarded back pay if he was not provided with a hearing that met the requirements of due process. The Tenth Circuit disagreed. They noted that the lower court had assumed that Ferraro was entitled to a due process hearing as if he had been an employee. As an independent contractor, he did not have a property claim in lost wages. Whatever property claim he might have had was restored when his privileges were reinstated.

As we can see from the *Ferraro* case, having due process rights can be very valuable. Even if he was not awarded back pay, without the due process hearing, Ferraro would have lost his position at the hospital and would have had to seek

work elsewhere. People may have due process rights because they work for a governmental entity as did Ferraro, or they may have due process rights by contract or in some other way. In some hospitals, nurse anesthetists are credentialed as members of the medical staff. Hospital bylaws may require that members of the medical staff cannot be deprived of privileges without due process.

Tenet Health, Ltd v Zamora

In *Tenet Health, Ltd v Zamora* (13 S.W. 3d 464, Court of Appeals of Texas, 2000), the Texas Court of Appeals upheld a trial court’s decision that when a hospital entered into an exclusive contract to allow certain kinds of procedures to be conducted by only one physician, this did not constitute a reduction in the privileges of other physicians on the staff who had customarily been performing the same procedures. The physicians used to perform the procedure, but after the awarding of the exclusive contract they could not. The hospital entered into an exclusive contract with a physician to perform cardiovascular surgery. Another surgeon at the hospital claimed that the exclusive contract, as a practical matter, eliminated his privileges to conduct cardiovascular surgery at the hospital and therefore constituted a reduction in privileges. Because his privileges were reduced he expected a hearing and due process. The court relied on 2 previous cases holding that a hospital could grant an exclusive contract to one physician without being deemed to have reduced the privileges of other physicians. The plaintiff contended that the exclusive provider contract would effectively diminish his own hospital privileges by prohibiting him from performing cardiovascular surgery.

Hospital bylaws provided that when privileges were reduced, physicians had the right to be present at a hearing, and have the opportunity to present evidence even though formal rules of evidence (those followed by the judicial system) need not be followed. Also, there was a Texas statute that provided that hospitals must afford each physician, podiatrist, and dentist procedural due process before renewing, modifying, or revoking privileges. The court’s determination that the doctor’s privileges were not reduced because he still had some privileges to practice seems a very narrow interpretation and has been widely criticized. What is missing from most of the criticism was the fact that the hospital was forced to consider changes to its cardiovascular program after what it referred to as a “surge of deaths.” The mortality rate for its cardiovascular program was 11% compared to a national average of only 3%.

Lipson v Anesthesia Services

In *Lipson v Anesthesia Services, PA* (790 A. 2d 1261, Del. 2001), the court was faced with the termination of a professional relationship between an anesthesiologist and his former partners on what the court termed as “less than amicable terms.” When Lipson was hired as an anesthesiologist, he wanted to develop a critical care medicine component in the anesthesiology practice. Over time he came to the conclusion that his partners were reluctant to allow him to do so. He resigned and set up a new practice that tried to compete with his former partners. Lipson complained that he got fewer and less attractive assignments. Eventually, the hospital granted Lipson’s former partners an exclusive contract and Lipson moved to another state.

Without getting into the details of what he and his partners charged against each other, the anesthesiology group defended on the grounds that their treatment of Lipson was protected conduct because they were acting as a professional review body under the federal Health-Care Quality Improvement Act. The court used the lack of due process as proof that the anesthesiology group did not intend its actions to be peer review activities. The Health-Care Quality Improvement Act protects certain qualified healthcare providers from being sued for participating in peer review activities. Lipson pointed out that the anesthesiology group was not engaged in peer review activities because the format and process it employed did not meet the due process protections in the group's bylaws. His privileges were restricted, and he was removed from the call scheduled by the board of directors at a meeting from which Lipton claimed he was excluded. If he was not, in fact, allowed to attend the meeting, this would have been a denial of due process. The court held that the anesthesiology group was not engaged in peer review activities because if they had been, they would have followed due process protections. The anesthesiology group argued that they did not feel the need to pursue formal and time-consuming measures. Rather than a defense of their actions, their admission that they had not provided the due process rights proved that they were not following the procedures of a formal peer review.

Weyandt v State of Texas

The original area where due process rights were guaranteed was in criminal prosecution. *Weyandt v State of Texas* (35 S.W.3d 144, Court of Appeals of Texas, 2001) is a very unusual case in which a

nurse anesthetist was accused of illegally practicing medicine, not because she was administering anesthesia but because, as a medical school graduate, she was found to be misleading people into thinking she was a medical doctor. She objected to her prosecution for illegally practicing medicine, among other grounds, because the statute was so vague it denied her due process.

The statute under which Weyandt was prosecuted read as follows:

It shall be unlawful for any individual, partnership, trust, association, or corporation by the use of any letters, words, or terms as an affix on stationary or on advertisements, or in any other manner, to indicate that the individual partnership, trust, association, or corporation is entitled to practice medicine if the individual or entity is not licensed to do so. (Texas Rev. Civ.Stat. Ann. Art 4495b, Sec 3.07(c).)

Weyandt claimed that the statute was unconstitutionally vague because the words "in any other manner" did not provide an objective standard by which to measure conduct. The court disagreed. It found a line of cases holding that statutes were unconstitutionally vague only when they interfered with some other constitutionally guaranteed right. Here, Weyandt claimed that she was deprived of her freedom of speech in not being able to say that she had a medical degree. The court stated that she was free to tell people she had a medical degree, but she was not free to tell them in such a way as to imply that she was a physician.

Carlton v Trustees of the University of Detroit Mercy

Another example of the application of due process rights was *Carlton v Trustees of the University of Detroit Mercy* (2002 W. L. 533885 (Mich. App.)). The public interest in education of professionals is very high. While one must be fair to students

who have invested a great deal in cost and effort in trying to qualify as nurse anesthetists, the public also has an interest in making certain that persons who enter the profession are well qualified and capable of carrying out their responsibilities. In this case, a committee put the plaintiff on probation because of clinical problems she was having during her third term. The committee reviewed her clinical evaluations daily and despite the fact that the plaintiff was entering her fourth term found that she had not yet met third term program objectives. They recommended that she be dismissed from the program. The nurse anesthetist took advantage of a University-provided due process hearing for students who thought they had been unfairly dismissed. After the parties presented their evidence, the due process committee determined that the University had followed proper procedures and upheld the decision to dismiss the student. The student brought suit, but the trial court found that because she was given a hearing, the University had given the student more due process than was required and that the University's decision was based on substantial material and competent evidence. The student appealed to the Michigan Court of Appeals, which affirmed the trial court's decision. Because the University had established that its decision was not arbitrary or capricious, the appellate court agreed that the trial court had no authority to review the decision.

Abaqueta v US

In *Abaqueta v US* (255 F Supp. 2d 1020, USDC Arizona, 2003), an anesthesiologist was dismissed from the Department of Veterans Affairs. A patient was having breast implants replaced. After the patient was anes-

thetized, the anesthesiologist touched her breasts. Two nurse anesthetists observed the anesthesiologist and filed written reports of the incident. The anesthesiologist was relieved of his duties the following day. A board of investigation was convened, and the board found that the anesthesiologist had engaged in unprofessional conduct. The anesthesiologist was dismissed for "conduct prejudicial to the government."

The anesthesiologist's defense was that, among other things, "conduct prejudicial to the government" was too vague a standard to meet requirements of due process. Because the Department of Veterans Affairs is a division of the US

government, the government is required to provide due process to an employee before depriving the employee of a job. The trial court disagreed with the anesthesiologist's contention. It found that the anesthesiologist's actions were violations of professional conduct and an intentional violation of the dignity of the patient. The Medical Center had a number of regulations that prohibited patient abuse and required respect for the dignity of the patient. The trial court had no difficulty in finding that the anesthesiologist's actions fell within the category of "conduct prejudicial to the government." The only thing that is surprising about the case is

that the defendant was able to find another anesthesiologist to testify on his behalf that it was not "inappropriate at all for a doctor to examine a patient."

Conclusion

For all the reasons why due process protections were historically valuable, they continue to provide basic protection today. A nurse anesthetist with due process protections has a much better chance to be insulated from an employer's irrational behavior. Even when nurse anesthetists do not work for a branch of the government, they may still have due process protections because of provisions in contracts or bylaws.