

Legal Issues: Five Days at Memorial

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Key Players

Healthcare organizations

Tenet Healthcare Corporation (Tenet), for-profit company that owned and operated Memorial Hospital

Lifecare Hospital (Lifecare), operated a stand-alone specialized hospital and also operated a ward on the 7th floor of Memorial for acute patients

State of Louisiana Law Enforcement

Charles Foti: In his first term as the Attorney General (AG) for the State of Louisiana. He had been Sheriff of New Orleans Parish (the highest law enforcement position in New Orleans) for 30 years before becoming state Attorney General. A state Attorney General is the head of that State's Department of Justice.

Arthur "Butch" Schafer: An Assistant Attorney General in the Medicaid Fraud Control Unit, part of the Criminal Division of the Louisiana Department of Justice.

Virginia Rider: Special Agent in the Medicaid Fraud Control Unit. The investigator assigned to work with Schafer on the Memorial case.

Local Law Enforcement

Eddie Jordan, New Orleans District Attorney (DA)

Michael Morales, Assistant District Attorney. Lead prosecutor in Memorial case. Led the grand jury proceedings.

Doctor/Nurses charged in the warrant obtained by Schafer

Dr. Anna M. Pou, Associate Professor at LSU Medical School and on staff at Memorial

Lori L Budo, a nurse at Memorial

Cheri A. Landry, a nurse at Memorial

Attorneys

Harry Rosenberg, Attorney for Tenet

Eddie Castaing, Attorney for Tenet (went with employees who were subpoenaed to appear and be interviewed by AG's office). Represented Lori Budo.

Audrey Andrews, Assistant General Counsel for Tenet

Richard ("Rick") T. Simmons, Jr., attorney for Anna Pou

Others

Frank Minyard, New Orleans Coroner

Cyril Wecht, forensic pathologist and coroner of Allegheny County, Pennsylvania brought in to assist Minyard

Background on Government Agencies Involved

Medicaid Fraud Control Unit: There is a Medicaid Fraud Unit in each state supported by state funds and by federal funds from the U.S. Department of Health and Human Services. Medicaid provides coverage for medical expenses for individuals who meet strict guidelines for income

and who have minimal assets. The Medicaid Fraud Units typically investigate financial crimes, such as a doctor billing for fictional patients or for services that were not really provided. The Fraud Units recover huge amounts of money for the government. Fraud Units can also investigate other misuses of Medicaid funds or other issues with service providers, such as abuse or mistreatment of patients, but these cases represent only about a quarter of their overall case load.

Criminal Charges

Pou, Budo, and Landry were initially accused of four counts of principal to second degree murder in the deaths of Hollis Alford, Rose Savoie, Ireatha Watson, and Emmett Everett. The Louisiana statute that defines second degree murder is Louisiana Revised Statute 14.24(30.1). Students can locate the exact statute on Westlaw Campus by going to the “Law” tab on Westlaw Campus and typing La. R. S. 14:24(30.1) into the “Find” box. Under Louisiana law, second degree murder includes several different types of actions that lead to death. The specific part of the statute that Pou, Budo, and Landry were accused of violating was, “Second degree murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm . . .” A second Louisiana statute, La. R.S. 14:24, also was cited in the warrant. This statute provides an expansive definition of a “principal” to a crime (someone who can be held responsible) and includes persons who participated, but were not necessarily the primary actors. For a discussion of why the AG chose a second degree murder charge, see pp. 256-257 and 336-337.

Chronology

September 13, 2005: Schafer and Rider begin investigating the case.

October 1, 2005: Agents from the Medicaid Fraud Control Unit and the Inspector General’s Office of the US Department of HHS execute a search warrant at Memorial. Patient records are not found.

October 7, 2005 – Tenet makes patient records available to investigators. They are incomplete.

End of October, 2005 – Schafer subpoenas 73 Memorial employees in order to force them to appear for interviews.

July 17, 2006 - Rider submits an affidavit to the District Court requesting arrest warrants.

District Court Judge Calvin Johnson signs the warrants. See complete documents at:

www.nola.com/katrina/pdf/072006_nolacharges.pdf. Pou, Budo, and Landry are arrested, booked, and released on bond.

February 1, 2007 – Coroner Frank Minyard issues his finding that there is no evidence of homicide in the Memorial deaths. (Note – see pages 387, 409-411 for summaries of conclusions reached by experts consulted by Minyard)

March, 2007 – District Attorney Eddie Jordan convenes a grand jury to investigate the Memorial cases. Assistant DA Michael Morales handles the grand jury proceedings.

May, 2007 – Grand jury begins hearing testimony. Morales presents charges against Pou alone. Grants immunity to Budo and Landry in exchange for their testimony.

July 24, 2007 – Grand jury returns a verdict of “no true bill” and refuses to indict Pou.

Courts Involved/Court and Grand Jury Procedure

The criminal arrest warrant for Pou, Budo, and Landry was issued by Calvin Johnson, a District Court Judge for the New Orleans Criminal District Courts, a state court. The District Court is the lowest level of state court. An arrest warrant can be issued if a law enforcement officer submits an affidavit (a sworn statement) showing that a crime has been committed by the persons named in the warrant. Crimes of this type (homicide) are prosecuted at the local level. The State AG's office had the power to request arrest warrants, but did not actually have the power to bring charges against Pou, Budo, and Landry. This was left to the office of the New Orleans District Attorney. A copy of the affidavit and arrest warrants for Pou, Budo, and Landry can be found at: www.nola.com/katrina/pdf/072006_nolacharges.pdf. After these three women were arrested they were all released on bond.

The book indicates that Assistant District Attorney Morales chose to convene the grand jury as an "investigative" grand jury (p. 411). This means that Morales was asking the grand jury to gather evidence to determine whether crimes were committed. Morales assisted the grand jury in summoning witnesses. The grand jury was not limited to investigating the four deaths mentioned in the arrest warrants. Morales brought eleven possible cases of homicide before the grand jury, the four deaths mentioned in the arrest warrant and the deaths of patients Harold Dupas, Elaine Nelson, Alice Hutzler, Wilda McManus, and George Huard. The bill of indictment prepared by the DA's office included ten counts against Pou, one count of second degree murder for the death of Everett and nine counts of conspiracy to commit second degree murder for the deaths of all nine of the patients (p. 445). Nurses Budo and Landry were granted immunity in exchange for their testimony (see below).

It is important to note that Pou, Budo, and Landry were never actually "charged" with crimes. The purpose of the grand jury proceeding was to determine whether charges would be brought. A grand jury is usually selected from the same pool of people from whom petit juries (regular juries who sit at trials) are selected. There are important differences between grand jury proceedings and regular court proceedings. Grand jury proceedings are secret. No transcript is kept and jurors and other participants are not allowed to talk about the proceedings. In addition, hearsay evidence may be considered by the grand jury. A prosecuting attorney conducts the proceedings and the persons who are subpoenaed to appear before the grand jury are not entitled to have attorneys. The grand jury can determine that there is or is not sufficient evidence that a crime has been committed. If the grand jury finds that there is sufficient evidence that a crime was committed, the defendants will be indicted and the case will proceed in court. Otherwise, no charges will be brought. Even if a grand jury makes a finding that no crime has been committed, the accused parties can be charged with other crimes arising from the same incident. A grand jury can also be reconvened if new evidence is discovered. Note – page 286, Schafer conferred with U.S. Attorney Jim Letten to see if there were any federal charges that could be brought and together, they decided against pursuing federal charges.

In Pou's case, twelve grand jurors were originally seated. Nine votes are required for an indictment. At the time that the grand jury reached its decision, only ten of the original grand jurors remained, due a death and illness.

One of the key aspects of the grand jury proceedings was the decision of the DA's office to grant **immunity** to Budo and Landry in exchange for their testimony. They, like all other persons subpoenaed to appear before a grand jury, had the 5th Amendment right to refuse to testify on the ground that the testimony might incriminate them. However, it is important that the DA only granted them "use" immunity, rather than immunity from prosecution. "Use" immunity means that a person's compelled statements and information gained as a result of the statements cannot be used against the person in a later prosecution, but it does not protect the person from prosecution if charges can be proved using other evidence (p. 423).

One of key legal rulings in the case (p. 323), was made in response to a motion by Pou's attorney, Rick Simmons, to protect information given by Anna Pou to attorney Audrey Andrews and Steven Campanini of Tenet when they spoke with Pou immediately after Katrina. Simmons argued that this information was protected by **attorney/client privilege**. Although there are some exceptions, attorney/client privilege generally protects communications between an attorney and the attorney's client and allows the client to prevent them from being disclosed. Schafer argued Pou's statements to Andrews and Campanini were not privileged, because Andrews was Tenet's attorney, not Pou's. Both sides appealed the District Court's ruling and the case ultimately was heard by the Louisiana Supreme Court in a case titled, "In re: A Matter of an Offense Under Investigation." In November 2005, the Louisiana Supreme Court upheld a ruling that anything Pou told Andrews and Campanini before Andrews told Pou that Andrews was only representing Tenet was confidential (p. 329). Schafer agreed to a hearing in District Court to establish exactly when Andrews told Pou she was only representing Tenet. At the hearing, the District Court judge ruled that any information given to Andrews before that point was confidential, even if it was repeated later by Pou – a great victory for Pou and her attorney. This protection was extended to other doctors and nurses who had given statements to Andrews.

It is very important for students to consider how DA Morales chose to present evidence to the grand jury. Critics (including the state AG) argued that important evidence was not presented. For example, agent Rider was never called to testify. See pp. 433-435.

For more on the Louisiana courts, see: http://louisiana.gov/Government/Judicial_Branch/#Jurors

Civil Cases

In the aftermath of Katrina there were many civil cases filed against Tenet, Lifecare, doctors, nurses, and other defendants. These are described in the book on pp.366-372 and pp. 450 on. Civil cases were brought by the families of patients who had died at Memorial and also, in some cases, by health care providers themselves. A civil case is generally filed so that the plaintiff can recover money damages.

It is important to note that the civil cases against doctors and nurses who were at Memorial during Katrina proceeded totally independently of the criminal case. In other words, the outcome of the grand jury proceedings did not have any legal bearing on the civil cases and many doctors and nurses who were not named in the criminal case faced civil lawsuits. The types of claims raised in the civil cases varied, but the case of *Elmira Preston v. Tenet Health System Memorial Medical Center, Inc. D/B/A Memorial Medical Center, et al.*, a case ultimately certified as a class action, gives a good example of the types of legal theories used by plaintiffs. In that case:

Preston brought suit against Memorial in the Civil District Court for the Parish of Orleans. Preston asserted claims for negligence and intentional misconduct, “reverse patient dumping” under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, and involuntary euthanization. Preston alleged that Memorial failed to design and maintain the premises in a manner that avoided loss of power in the building. Preston further alleged that Memorial and LifeCare failed to develop and implement an evacuation plan for the patients. According to the petition, Memorial's and LifeCare's failure to maintain the premises and timely evacuate the facility resulted in the deaths and injuries of hospitalized patients. <http://caselaw.findlaw.com/us-5th-circuit/1298826.html>

The class action in the *Preston* case was ultimately settled for 25 million dollars (p. 451).

It is important to note that Louisiana, like other states, has a cap on damages for medical malpractice claims (p. 371). As a result, plaintiffs added other legal claims to their suits to avoid the cap.

One week before the grand jury verdict, Pou filed suit against Foti and the State of Louisiana for payment of her legal fees (p. 428). Ultimately the state paid her \$456,979.41 to reimburse her for her legal fees (p. 450).

Pou and others were also successful in a lawsuit to prevent disclosure of the state DA's investigative file (p.450). See, <http://caselaw.findlaw.com/la-supreme-court/1453606.html> ruling on attempt of news organizations to get Attorney General Investigative file.

The case against Pou spurred a movement to pass legislation to provide immunity to medical professionals who provide care during an emergency (p. 428). Legislation of this type has been passed in Louisiana and other states.

Commentary discussing legal liability of hospitals:

https://www.law.asu.edu/Portals/31/Hodge_Fuse_Brown_JAMA_2011.pdf

Also, see PowerPoint “Caring in a Crisis” prepared by nurse/attorney Chad Priest: http://www.massnurses.org/files/taana_encore_priest_handouts.pdf Contains photos taken during Katrina.

Other Issues

The concepts of triage and methods for apportioning care during an emergency are very significant to an understanding of the issues in the book. Beginning on page 139 there is a discussion of various approaches to triage as well as philosopher’s theories about what “doing good” means. Also, see pp. 420-421. For legal purposes, it is also important to distinguish medical treatment intended to relieve pain that, incidentally, causes death from care that is intended to cause death. (See p. 160)

Discussion Questions

Was justice done in this case? (when no criminal charges were brought against Pou or anyone else)

How did political considerations influence the justice system in this case? Did political influences cause a more or less just result?

Should the government mandate systems of triage or should this be left to the discretion of doctors and hospitals? Who are the stakeholders who should be involved in establishing a method of triage?

What did the newly-elected Orleans Parish District Attorney Cannizzaro mean when he said in 2009, “Whether or not there was a homicide and whether or not there is a case that can be brought are different matters.”? Should these be different matters?

Is the legal system equipped to make laws that effectively and fairly regulate behavior in this type of emergency situation?

Should the investigative records have been disclosed to the media? How should one balance the privacy interests of patients and medical professionals against the public’s interest in knowing about (and perhaps learning from) what happened?

Explain how the different levels of government (local, state, federal) were involved in the criminal case.