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Retaliation and Healthcare Providers: Navigating Health and Safety Code Section 1278.5

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Retaliation and Healthcare Providers: Navigating Health and Safety Code Section 1278.5

CAMSS 45th Annual Education Forum & Anniversary

May 19-20, 2016

**Retaliation and Healthcare Providers:
Navigating Health and Safety Code
Section 1278.5
CAMSS 45th Annual Education Forum & Anniversary**



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Elements of a Retaliation Claim

- Plaintiff Engaged in Protected Activity
 - Opposed harassment, discriminatory or other offending conduct; or
 - Participated in filing complaint, investigation, testifying, etc.
- Adverse Action
 - Materially adverse
 - Demotion, termination, negative review
- Causal nexus between Protected Activity and Adverse Action
 - Substantial motivating
 - A contributing factor
 - THE contributing factor

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Health & Safety Code, § 1278.5

- Public policy of the State of California to encourage health care workers to notify government entities and hospitals of suspected unsafe patient care and conditions.
- Legislature wanted to encourage this reporting in order to protect patients and to assist accreditation and government entities charged with ensuring that health care is safe.
- Legislature found and declared that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a health care facility

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Health & Safety Code, § 1278.5 (cont'd)

- (b) (1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has done either of the following:
 - (A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity; or
 - (B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

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Health & Safety Code, § 1278.5 (cont'd)

- Also applies to entities who own and operate health care facilities.
 - “health facility” includes a facility’s administrative personnel, employees, boards, and committees of the board and medical staff.
- A violation 1278.5 is subject to a maximum civil penalty of twenty-five thousand dollars (\$25,000).
- Any person who willfully violates 1278.5 is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars (\$20,000).

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Health & Safety Code, § 1278.5 (cont'd)

- Presumption of Retaliation– 1278.5(d)(1)
 - Rebuttable presumption that an adverse action was discriminatory if it occurs within 120 days of the filing of the grievance, report or complaint

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AB 632-Protection of Physician Members of Medical Staff

- 2008 revision to Health & Safety Code, § 1278.5
- Amended § 1278.5 to include medical staff (physicians) and “other medical personnel” who are not employees
- Extended whistleblower protections to complaints made to an entity responsible for accrediting or evaluating the health facility
- Extends protections to participation or cooperation in an investigation or administrative proceeding
- Extends prohibition on discrimination or retaliation to any entity that owns or operates a health facility

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Discriminatory Treatment—§ 1278.5(d)(2)

- Discriminatory treatment of a health care worker includes:
 - Discharge
 - Demotion
 - Suspension
 - Any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the health care worker of the health care facility; or
 - The threat of any of these actions

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Possible Remedies for Retaliation— § 1278.5(g)

- Reinstatement
- Reimbursement for lost income
- Legal costs
- Any remedy deemed warranted by the court

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Medical Staff Peer Review Protection– § 1278.5(h)

- The medical staff can petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the medical staff member who has filed a whistleblower action
 - Applies if the evidentiary demands would impede the peer review process or endanger the health and safety of patients during the peer review process.
 - Prior to granting an injunction, the court conducts an in camera review of the evidence to determine if production of documents would impede a peer review hearing.

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Hospital Concerns About AB 632

- Chilling effect of revisions on peer review
 - May compel peer review committee to not initiate peer review for fear it could be construed as retaliation
 - Possibility of subjecting committee and its members to misdemeanor penalties and/or fines
 - Evidentiary protections and immunity from liability still available for peer review participants?

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Complications of Health & Safety Code, § 1287.5

- What is a Complaint/Report?
- What is an adverse action?
- Substantially Motivating vs. Motivating Factor
- When does presumption apply when the health care worker makes multiple complaints?

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Health & Safety Code, § 1278.5- Whistleblower Cases

- *Fahlen v. Sutter Central Valley Hospitals* (2014)
 - A physician is not required to exhaust administrative remedies in the peer review process before proceeding with a civil complaint for retaliation under H&S Code, § 1278.5
 - Court rejected application of the long-standing exhaustion requirement established in 1976 in *Westlake Community Hospital v. Superior Court*,
 - In *Westlake*, the Supreme Court held that a physician must exhaust all internal hospital procedures and prevail in an administrative mandamus action in Superior Court prior to bringing a civil action seeking damages arising from a hospital decision restricting or terminating medical staff privileges

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Implications of Fahlen

- Employee or physician may submit patient safety complaints to secure “whistleblower protection” prior to investigation or adverse action by a health care facility
- Physicians can file a superior court action claiming whistleblower protection before peer review proceedings or during peer review by a health facility
 - Proceed with dual JRC and state court action?

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Health & Safety Code, § 1278.5- Whistleblower Cases

- Right to a Jury?
 - *Shaw v. Superior Court* (2014)
 - Supreme Court granted review, currently pending
 - Court held that Plaintiff has right to jury trial on retaliation claim under Health & Safety Code, § 1278.5
 - Plaintiff alleged that during her employment she complained to Defendants about conditions of the facilities that affected the quality of care and services provided to patients
 - In alleged retaliation for Plaintiff's complaints, Defendants took adverse employment actions against Plaintiff, including her ultimate termination

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Health & Safety Code, § 1278.5- Whistleblower Cases (cont.)

- What type of “grievance, complaint or report” is required under 1278.5?
 - *Lin v. Dignity Health-Methodist Hosp. of Sacramento* (2014)
 - US District Court Case, California Eastern District
 - Under 1278.5, a physician's notation in a patient's Death Discharge Summary summarizing the patient's stay at the facility did not qualify as a “report”

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Health & Safety Code, §1278.5- Whistleblower Cases (cont.)

- Rebuttable Presumption
 - *Yau v. St. Francis Memorial Hospital* (2015)
 - Non-reported
 - US District Court Case, California Northern District
 - Rebuttable presumption disappears once contrary evidence is introduced whether or not the contrary evidence is sufficient under the appropriate standard of proof to disprove the presumed fact.
 - Even though Plaintiff was terminated within 120 days after Plaintiff's first complaint, the record contained contrary evidence rebutting the presumption
 - According to Defendants, Plaintiff was terminated for accessing patient records without a medical need to know and disclosing confidential patient information to her husband
 - As a result, the presumption of unlawful retaliation “disappears”

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Medical Staff Considerations

- Medical Staff must always be aware of potential whistleblower claim when proceeding with peer review of a physician
 - Conduct separate investigation of patient safety concerns raised by medical staff member
 - Peer Review decision may not be in retaliation for physician's complaints about patient care or conditions
 - Advise Medical Executive Committee of patient safety complaints?
 - Carefully document peer review proceedings and separate quality investigation
 - Tell Medical Staff member about outcome of the patient care investigation?

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Employee Considerations

- HR should immediately contact Quality Department when receiving employee complaint about patient care or conditions
- Like the Medical Staff, keep complaints about patient care and the HR employee review separate
- Carefully document investigation of patient complaints and HR proceedings
 - Tell employee about outcome of patient care investigation?

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Conducting a Proper Investigation

- Identifying “whistleblower” complaints
- Who should conduct investigation of the complaints?
 - Third party who is not involved in the peer review or HR proceedings against the employee
 - Conduct interview the complaining party?
 - Different when complaint is made by an employee verses a medical staff member
- Continue to proceed with peer review or HR investigation of employee
 - Keep patient complaint information separate from peer review or HR investigation

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Preparing Your Defense

- Important to nail down specifics
 - Make sure that you know when each complaint was made, how many complaints were made, to whom the complaints were made, and the substance of each complaint
 - Can do this through deposition of plaintiff or discovery requests
- Helpful to present timeline of events
 - If health care worker made complaint after peer review or HR investigation, beneficial for health care facility
- Present conclusion of patient care investigation
 - Were there really patient care issues? If so, how did the entity address those concerns?

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Richard D. Barton, Partner

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Professional Summary

Richard D. Barton has represented healthcare providers and health systems for more than 30 years. Richard's consulting and litigation practice focuses on health systems, hospitals, health associations, physician groups and individual healthcare providers. He is experienced in assisting provider organizations with their quality oversight compliance obligations and governance. He also serves as an Adjunct Professor of Law for the University of San Diego School of Law teaching Health Law and Policy.

Recognitions

- *The Best Lawyers in America*® – 2007-2015
- Martindale-Hubbell® AV Preeminent Rating
- *San Diego Super Lawyers*® – 2007-2015 (Health Care)
- *San Diego Magazine's Best Lawyers*
- ADL Torch of Liberty Award
- "Top Lawyers," *San Diego Magazine*, 2013 - 2015
- "Southern California Super Lawyers," *Super Lawyers Magazine*, Southern California 2014

Community

- University of California President's Advisory Council on Campus Climate, Culture, and Inclusion (2010-2012)
- American Board of Trial Advocates
- Anti-Defamation League - San Diego Regional Advisory Board Chairman (1998-2002), ADL National Commissioner (2000 to present), National Executive Committee (2002 to present), Vice Chair of International Affairs (2003-2006), National Chair of Leadership (2006-2009), National Chair of Education (2009-2012), Chair Education Equity Task Force (2012 to present)
- Litigation Counsel of America – Fellow
- San Diego County Bar Association and San Diego County Medical Society – Co-Founder Joint Medical Legal Committee
- National Immigrant Women's Advocacy Project – Board Member
- International Association of Judicial Independence and World Peace International Project of Judicial Independence – Member

Education

- JD, University of Southern California Gould School of Law, 1981
- BA, University of California, Los Angeles, 1977

News Coverage

- Clark, Cheryl. "Out to Pasture: Age-Based Personnel Policies Rankle With Docs," *MedPage Today*, July 30, 2015.

Seminars

Rick has been a guest lecturer at the University of San Diego Law School, California Western School of Law, University of Vermont School of Law, Dartmouth College, San Diego State University and is a regular guest speaker on health care issues at venues around the country. He has lectured and is a regular speaker on the conflict in the Middle East, Anti-Semitism, Holocaust, Religious Freedom in the U.S. and Church-State issues.

- Co-presenter. "Confidentiality and Reporting Requirements for Physician Well-Being Committees," CPPPH, San Diego, CA, May 7, 2016.
- Panelist. "When Age Becomes Impairment: Issues Involving Older Physicians," Administrators in Medicine 2016 Annual Meeting, San Diego, CA, April 27, 2016.
- Co-presenter. "Impact of Recent Regulatory Changes on Medical Staff Bylaws: Proposed Amendments and Best Practices," Strafford Productions, San Diego, CA, March 3, 2016.
- Sharp Healthcare Medical Staff Leadership Retreat, January 22, 2016.
- Co-presenter - "Navigating Health and Safety Code Section 1278.5," ACC-SD, San Diego, CA, August 26, 2015.
- "Managing the Multiple Layers of Physician Oversight," CAMSS Desert Chapter, 16th Annual Educational Conference, August 14, 2015.
- "Legal Aspects of Assessing the Aging Physician", Federation of State Physician Health Programs, Inc. - Annual Education Conference & Business Meeting - April 25, 2015.
- Medical Staff Boot Camp - Sharp Memorial Hospital - New Department Chair Orientation, February 10, 2015.
- "Managing the Multiple Layers of Physician Oversight," 2015 CAMSS 44th Annual Education Forum, Universal City, CA, May 20, 2015.
- "Legal Aspects of Assessing the Aging Physician," CMA OMSS Assembly, San Diego, CA, December 4, 2014.
- "Legal Aspects of Assessing the Aging Physician," CSHA Annual Fall Seminar, Los Angeles, CA, November 7, 2014.
- "Medical Staff Bootcamp - Representing Healthcare Clients," California Western School of Law, San Diego, CA, October 20, 2014.
- Co-presenter. "SD Health Law Roundtable: To Report or Not Report - Ending Relationships with the Employed or Contract Providers," ACC-SD, San Diego, CA, September 30, 2014.
- "Legal Aspects of Assessing the Aging Physician," SCCMA Workshop, San Jose, CA, September 27, 2014.
- Co-presenter. "Dismantling the School-to-Prison Pipeline," KPBS, San Diego, CA, September 16, 2014.
- Co-presenter. "Medical Staff Bylaws: Meeting New Medicare Conditions of Participation and Joint Commission Requirements," Strafford, Webinar, September 11, 2014.
- "Medical Records Training" Southern Indian Health Council, Alpine, CA, July 29 and August 14, 2014
- "Assessing the Aging Physician - Legal Aspects," CPPPH, Los Angeles, CA, July 26, 2014.
- Co-presenter. "Meet Your Counterpart: Landmark Healthcare Legislation - Revealing the Real Impact of the ACA - 2014 Update," Association of Corporate Counsel, San Diego, CA, June 19, 2014.
- "Assessing the Aging Physician - Legal Aspects," CPPPH, Oakland, CA, June 7, 2014.

- “The Dilemma of the Aging Physician: Legal and Practical Challenges,” 43rd Annual CAMSS Education Forum, Sacramento, CA, May 9, 2014.
- “Assessing the Aging Physician – Legal Aspects,” CPPPH, Sacramento, CA, May 3, 2014.
- “Medical Staff Boot Camp,” Sharp Chula Vista Medical Center, Chula Vista, CA, February 27, 2014.
- “The Dilemma of the Aging Physician: Legal and Practical Challenges,” Association of Corporate Counsel, San Diego, CA, February 20, 2014.
- “Age-Based Policies for Physician Faculty: Legal and Practical Challenges,” Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions Conference, Washington, DC, January, 23, 2014.
- “Legal Aspects of Assessing the Aging Physician,” CPPPH, San Diego, CA, November 16, 2013.
- “Pursuing Quality Through Medical Staff and Physician Oversight: A Report from the Trenches,” September 12, 2013.
- “Pursuing Quality through Medical Staff and Physician Oversight,” Tri-City Board Training, San Diego, CA, July 10, 2013.
- “Promoting Quality Medical Management in Multi-Hospital Systems: A View from the Front Lines,” CSHA Annual Meeting and Spring Seminar, Newport Beach, CA, April 13, 2013.
- “Pursuing Quality Through Medical Staff and Physician Oversight - A Report from the Trenches,” ACC-SD/Procopio Health Law Roundtable, San Diego, CA, January 31, 2013.

Publications

Rick served as the primary author of an Amicus Curiae brief to the California Supreme Court on behalf of Jewish and Islamic medical ethics scholars in *Benitez vs. North Coast Women's Group* in a nationally publicized matter involving the right of a physician to refuse treatment on religious grounds on the basis of a patient's sexual orientation. In his role in the Anti-Defamation League, Rick has traveled to the Middle East and Europe for meetings with officials of the Israeli Government, the Palestinian Authority, the United Nations and European Governments. He has served as a contributor to the San Diego Union Tribune on the Israeli Palestinian conflict and Anti-Semitism.

- Contributor. “Assessing Late Career Practitioners: Policies and Procedures for Age-based Screening,” California Public Protection and Physician Health, Inc., 2015.
- “Whistleblowers and the California Supreme Court’s Decision in *Fahlen v. Sutter Central Valley* – Toward a Workable Balance for Promoting Advocacy for Patient Care,” *The Legal Secretary*, February 2015.
- Co-author with Jamie D. Quient. “The Single Shared Governing Body in Multi-Hospital Systems – CMS Revisions to 42 CFR 482.12 in a Climate of Change,” *The American Health Lawyers Association - MedStaff News*, April 2013.