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Legal Aspects of Assessing the Aging Physician—An Update

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LEGAL ASPECTS OF ASSESSING THE AGING PHYSICIAN—AN UPDATE

Administrators in Medicine 2016 Annual Meeting

April 27, 2016

**Legal Aspects of Assessing the
Aging Physician—An Update**
Administrators in Medicine
2016 Annual Meeting



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Meet Poppi- He is Still with Us and Still Driving



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The Aging Physician Population

- According to the American Medical Association (AMA), the total number of physicians 65 years or older *quadrupled* between 1975 (50,993) and 2013 (241,641)
 - 39.3% of those above 65 were actively engaged in patient care
- In 2012, 42% of the nation's one million physicians were older than 55 and 21% were older than 65. This is compared with 35% and 18% respectively in 2006. These percentages are increasing.

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The Study of Aging and its Impact on Clinical Performance

- Research regarding the affect of aging on physician performance has been extensive in the US and beyond
 - 2005 - Choudry, *et al.*- systematic review of 62 studies in “The Relationship Between Clinical Experience and Quality of Healthcare”
 - “Overall 32 of the 62 evaluations (52%) demonstrated a negative association between increasing experience and performance (that is, performance decreased as experience increased) for all outcomes assessed”
 - AMA Medical Education Committee 2015 Report
 - “Published data demonstrate a negative impact of increasing age on physician assessment results”

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The Study of Aging and its Impact on Clinical Performance

- Impact of age on individual physician is highly variable
 - Studies do not produce uniform results
 - Age highly correlated with wisdom, more accurate diagnoses, and tolerance of stress
- Studies do show overall decline with aging in:
 - Cognitive function
 - Manual dexterity
 - Visuospatial ability
 - Fluid intelligence (“mental efficiency”)
 - Attention
 - Verbal and non-verbal learning

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The Study of Aging and its Impact on Clinical Performance

- AMA Medical Education Committee Report summary of findings relative to physician age show deficits in
 - History taking
 - Physical exams
 - Communication skills
 - Problem solving
 - Patient management
 - Record keeping
- Choudry, *et al.* document
 - Decreasing knowledge
 - Lower adherence to evidence based standards of care
 - Worse patient outcomes

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Impaired Physician Policies

- Every hospital is required to have a policy for acting upon concerns that a practitioner is impaired
 - To assure patient safety by providing guidance on how to identify, report, and treat impaired medical staff members.
 - To provide assistance and rehabilitation to aid impaired medical staff member.
 - To provide medical staff members with information and education regarding potential

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Impaired Physician Policies

- Question- Are impaired practitioner policies sufficient to address impairment related to aging?
 - *Definition of Impairment:* Unable to practice medicine with reasonable skill and safety to patients because of a physical or mental illness, including deterioration through natural causes or loss of motor skill, or excessive use or abuse of drugs, including alcohol.

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Impaired Physician Reporting

- AMA Opinion 9.0305- Physician Health and Wellness
 - To preserve the quality of their performance, physicians have a responsibility to maintain their health and wellness...When health or wellness is compromised, so may the safety and effectiveness of the medical care provided
- AMA Opinion 9.031 - Reporting Impaired, Incompetent, or Unethical Colleagues
 - Physicians have an ethical obligation to report impaired, incompetent, and/or unethical colleagues in accordance with the legal requirements in each state

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Impaired Physician Reporting

- State Laws
 - 11 states contain some variation of mandate to report impaired colleague, often referring to the state statute setting forth grounds for discipline
 - Arizona:
 - Any person may, and a doctor of medicine, the Arizona medical association, a component county society of that association and any health care institution shall, report to the board any information that appears to show that a doctor of medicine is or may be medically incompetent, is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine.

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Impaired Physician Policies

- Physician willingness to self-report or report colleagues is highly variable
 - DesRoches, *et al.* – 2009
 - 64% of surveyed physicians agreed with the professional commitment to report physicians who are significantly impaired or otherwise incompetent to practice.
 - 17% had direct personal knowledge of a physician colleague who was incompetent to practice medicine in their hospital, group, or practice.
 - 67% reported this colleague to the relevant authority
 - Campbell, *et al.* –
 - 45 percent of those with direct personal knowledge of a physician in their hospital group or practice who was impaired or incompetent did not always report that physician.

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The Dilemma of the Aging Physician

- Hospitals and their medical staffs have an affirmative duty to oversee the quality of care rendered by medical staff members and monitor impaired physicians
- Anti-discrimination laws prohibit discrimination on the basis of age and disability

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Late-Career Practitioner Policies in Hospitals

- Mandatory retirement vs. screening for age-related impairments
 - There are no reports of any hospital or medical staff requiring mandatory resignation from the medical staff based on age.
 - Advisory Board article estimates 5-10% of hospitals have adopted screening policies.
 - University of Virginia – 70
 - Stanford – 75
 - Swedish Hospital
 - Screening processes
 - Physical exam
 - Neurological or Cognitive exam
 - FPPE/Peer review

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Late-Career Practitioner Policies in Hospitals (cont'd)

- If screening uncovers an impairment, hospital must determine if physician can safely practice with reasonable accommodations
- Goal is to be supportive and respectful and to suggest resources to assist the physician

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Response of Medical Organizations

- AMA Medical Education Committee Policy 2015
 - It is the opinion of the Council on Medical Education that physicians should be allowed to remain in practice as long as patient safety is not endangered and that, if needed, remediation should be a supportive, ongoing and proactive process.
 - Physicians must develop guidelines/standards for monitoring and assessing both their own and their colleagues' competency.
 - Formal guidelines on the timing and content of testing of competence may be appropriate and may head off a call for mandatory retirement ages or imposition of guidelines by others.

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Response of Medical Organizations

- American College of Surgeons Statement on the Aging Surgeon January 1, 2016.
 - No specific recommendation for screening at particular age.
 - "ACS does not favor a mandatory retirement age because the onset and rate of age-related decline in clinical performance varies among individuals. Furthermore, a mandatory retirement age may have a deleterious impact on access to experienced surgical care, particularly in rural and underserved areas. Objective assessment of fitness should supplant consideration of a mandatory retirement age."

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History of Age Discrimination Laws

- Civil Rights Act of 1964 signed into law by Lyndon B. Johnson on July 2, 1964



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History of Age Discrimination Laws

- Title VII of the Civil Rights Act of 1964
 - Age discrimination *not* included because age is not an immutable characteristic
 - “Age discrimination is not the same as the insidious discrimination based on race or creed prejudices. These discriminations result in non-employment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older worker. Discrimination arises for him because assumptions are made about the effects of age on performance.” – Representative Burke

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History of Age Discrimination Laws

- 1967 – Age Discrimination in Employment Act (“ADEA”)
 - Prohibited age discrimination for individuals ages 40-65
 - Employers may not “fail or refuse to hire, or fire, any worker based on age”
 - Applied to employers with more than 20 employees
 - Did not apply to states or local governments
 - Administration and enforcement by U.S. Dept. of Labor

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History of Age Discrimination Laws

- Age Discrimination Act of 1975
 - Prohibits age discrimination in all programs or activities receiving federal financial assistance
 - Includes state and local government

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History of Age Discrimination Laws

- 1978 – Amendments to ADEA
 - Extended age range of protected employees to 40-70
 - Eliminated mandatory retirement for most federal employees
 - Created exceptions for:
 - Highly paid executives
 - Companies not prohibited from imposing mandatory retirement for employees 65 years old who for 2 years before have been employed in a bona fide executive or high policy-making position
 - Tenured professors and teachers
 - Compulsory retirement of teachers and professors at 65 is not prohibited if serving under a contract of unlimited tenure at
 - » An institution of higher learning; and
 - » Local education agency

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History of Age Discrimination Laws

- 1986 – Amendments to ADEA
 - Removes upper age limit of 70, thus banning mandatory retirement
 - Allows state and local governments to keep in place age restrictions for firefighters and law enforcement officers
 - Directs Secretary of Labor and Equal Employment Opportunity Commission (“EEOC”) to conduct a study to determine whether physical and mental fitness tests are valid measurements of the ability and competence of law enforcement officers and firefighters
 - Increases compulsory retirement age of tenured professors to 70
 - Directs EEOC to study the consequences of eliminating mandatory retirement for professors

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History of Age Discrimination Laws

1990 – Older Workers Benefit Protection Act

- Protects older workers from discrimination in implementation of employee benefit plans
- Prohibits reduction in benefits based on age such as life insurance, health insurance, disability benefits, etc.

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Bona Fide Occupational Qualification (“BFOQ”) Defense

- It is not discrimination if an employer establishes that an age requirement is in furtherance of a *bona fide occupational qualification*
 - In industries in which public safety is at risk, Courts have allowed legislatures and industries to establish age-based retirement, screening, or restrictions
 - 42 U.S.C. § 2000e-2(e)(1)

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Age-Based Restrictions Permitted for Certain Professions

- Pilots (49 U.S.C. § 44729)
 - Federal Law
 - 1959 – Mandatory retirement at age 60 for commercial pilots
 - 2007 – Domestic flights with two pilots up to age 65; international flights require one pilot under 60
 - Case Law
 - Trans World Airlines, Inc. v. Thurston 469 U.S. 111 (1985)
 - Courts reject all challenges to pilot retirement at 60
 - Permit challenge to 60 retirement for flight engineers
 - Struck down restriction requiring new hires under 35
 - No cases challenging right of airlines or private companies to require pilots to submit to a medical exam
 - E.E.O.C. v. Exxon Mobil Corp., 560 F. App'x 282 (5th Cir. 2014) Court upheld Exxon's requirement that its corporate pilots retire at 60.

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- Law Enforcement (5 U.S.C. § § 8335(b)(1) and 8425)
 - Age: 57
 - Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984)
 - State police officer who was mandatorily retired at age 50 brought action challenging forced retirement under ADEA.
 - The Court of Appeals held that bona fide occupational qualification exception was to be analyzed in general terms of recognized vocations rather than by analysis of actual duties of specific individual
 - Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)
 - Police Officer involuntarily retired pursuant to statute setting mandatory retirement age at 50
 - Supreme Court held that the age classification was rationally related to furthering a legitimate state interest, *i.e.*, protection of the public by assuring physical preparedness of its uniformed police
 - State's choice not to base decision on individual physical testing after age 50 was acceptable

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Age-Based Restrictions Permitted for Certain Professions

- Air Traffic Controllers (5 U.S.C. § § 8335(a) and 8425)
 - Age: 57
 - Federal Aviation Administration established maximum entry and retention age provisions
 - Maximum entry age is 30 years old
 - Exceptions for those with military or prior air traffic control experience
 - Dungan v. Slater and Yap v. Slater, 252 F.3d 670 (3d Cir. 2001) – court finds law constitutional and not in violation of ADEA or Equal Protection clause

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Age-Based Restrictions Permitted for Certain Professions

- Bus Drivers

- Hodgson v. Greyhound, 499 F.2d 859 (7th Cir. 1974)
 - Greyhound demonstrated that it had reasonable cause to believe that safety would be endangered by hiring drivers over 40
 - Question of BFOQ requires analysis of economic and human risks involved in hiring unqualified applicant
 - Where job clearly requires a high degree of skill and risks in hiring an unqualified applicant are great, burden imposed on employer to justify age limitation will be lighter.

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Age-Based Restrictions Permitted for Certain Professions

- Bus Drivers

- Usery v. Tamiami, 531 F.2d 224 (5th Cir. 1976)– Established Test for Age Restrictions on Bus Drivers:
 - Employer (bus company) must prove that:
 - The age restriction is reasonably necessary to the essence of the business – the safe transportation of passengers;
 - It reasonably believed that all or substantially all of individuals over age restriction could not operate a bus safely; or
 - The safety risks cannot reasonably be ascertained by tests or means other than an age-based restriction
- Usery highlights case-by-case nature of the analysis

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Additional Age-Based Restrictions Permitted for Certain Professions

- Firefighters
 - 5 U.S.C. § § 8335(a) and 8425
- Tenured Professors
 - Certain states like California (Cal. Gov. Code § 12942(c)) and New Jersey (N.J.S.A. 10:5-2.2) allow higher education institutions to impose retirement policies for tenured faculty members
- Judges
 - 33 states and District of Columbia have mandatory retirement ages; Majority of states require that judges retire at 70, Vermont allows Judges to serve until age 91. (4 V.S.A. § 609.)
- High Policy-Making Executives
 - 29 CFR 1625.12
- Law Firms
- Physicians?
 - Cal. Gov't Code § 12942(c)

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Challenges to Age-Based Screening

- E.E.O.C. v. Com. of Mass.
 - 858 F.2d 52 (1998)
 - Court strikes down Massachusetts law requiring all state employees over 70 to take an annual physical examination as violation of the ADEA
- Epter v. New York City Transit Authority
 - 216 F.Supp.2d 131 (2002)
 - New York Transit Authority policy of requiring all candidates over 40 seeking promotion to undergo a physical exam is discriminatory on its face
 - Court distinguishes cases where public safety is involved e.g. police officers

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Disability Discrimination Laws

- 1990 – Americans with Disabilities Act (ADA)
 - Prohibits discrimination based on disability in the private sector
- 2008 – ADA Amendments of 2008
 - Intended to give broader protections for disabled workers and nullify court rulings that Congress deemed too restrictive

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Americans with Disabilities Act (“ADA”)

- Title I
 - Prohibits employers from discriminatorily terminating an otherwise qualified individual due to a disability
 - Must make “reasonable accommodations” unless would cause an “undue hardship” to employer
 - Must engage in interactive process with employee to find ways to reasonably accommodate

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Americans with Disabilities Act

Title III

- Prohibits discrimination on the basis of disability with respect to public accommodations
- No employment relationship requirement
- Courts have held Title III of the ADA applies to non-employee medical staff members
 - *E.g. Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (1998)
 - Physician has standing to sue under Title III
 - Hospital summarily suspended medical staff privileges of physician with Attention Deficit Disorder, despite psychologist's report that it would not affect his ability to treat patients.

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ADA Limitations on Disability-Related Inquiries

- Job related and consistent with business necessity
- Generally, a medical staff can request an examination and documentation from a member regarding a disability so long as it is **reasonably related to job functions and based on reliable information that clinical performance and/or safety may be impaired.**

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Periodic Testing and Monitoring Under the ADA

- Direct Threat – Medical Staff may require examination if it reasonably believes physician poses a direct threat to safety of him or herself, or others.
- Question of whether physician poses a direct threat must be based on individualized assessment of employee's ability to safely perform job duties.

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Responding to Concerns of Age-Related Impairments

- If screening uncovers an impairment ADA requires:
 1. Interactive process for addressing impairments
 2. Reasonable accommodations
 - Create co-management privileges to transition from independent privileges to refer-and-follow
 - Refer-and-follow privileges are ambulatory privileges that allow physicians to refer patients to the hospital, order ancillary studies from an outpatient setting, and follow their patients in the hospital

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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 (Medical Malpractice Law – Defendants, Personal Injury Litigation – Defendants)
- 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. "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.



Health Care

Lawyers in our Health Care practice represent many groups comprising the healthcare industry including hospitals, physician groups, Health Maintenance Organizations (HMOs), County Organized Health Systems (COHSs), public agencies, medical equipment and device companies and ancillary providers. Our healthcare attorneys are frequent speakers and authors on a wide range of healthcare issues and stay up to date by participating in professional and industry organizations such as the California Association Medical Staff Services (CAMSS). We also provide legal analysis for a California task force reviewing the issue of aging physicians.

Our Services

Our healthcare attorneys provide counsel on a wide range of issues including:

- Accreditation, Licensing and Certification
- Billing and Payment
- Business and Transactional Matters
- Fraud and Abuse
- HIPPA, Privacy and Security
- Labor
- Laboratories
- Healthcare litigation
- Managed Care
- Medical Staff
- Medical Technology
- Public Agency
- Regulatory and Governmental Compliance

Business and Transactional Matters

- Facilitation work for affiliation of healthcare organizations
- General corporate issues
- Mergers and acquisitions
- Corporate reorganizations
- Taxable and tax-exempt financing for public and private healthcare providers
- Vendor contract negotiation
- Intellectual property issues
- Tax, including nonprofit tax matters
- Antitrust analysis
- Real estate and land use matters

Representative Matters

Whistleblower. Represented our client against a physician plaintiff who brought a claim under Health & Safety Code Section 1278.5. We pursued a strategic and investigative approach and were successful in demonstrating that the plaintiff's whistleblower claims were without merit. In a mere 3 ½ hours after a 4-week trial, we secured a unanimous verdict in favor of our client.