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Rick D. Barton

Natalie V. Mueller

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Barton, Rick D. and Mueller, Natalie V., "2018 Legal Update: NPDB Reporting, Retaliation, Physician Well Being, and Medical Staff Litigation, Preparing for a Successful Judicial Review Hearing" (2018). *Center for Health Law Policy and Bioethics*. 54.

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2018 LEGAL UPDATE: NPDB REPORTING, RETALIATION, PHYSICIAN WELL-BEING, AND MEDICAL STAFF LITIGATION

Preparing for a Successful Judicial Review Hearing

**CAMSS Orange County and San Diego County Chapters
2018 Joint Education Conference
El Camino Country Club, 3202 Vista Way, Oceanside, CA 92056
February 23, 2018**



Rick D. Barton
Partner

Rick.Barton@procopio.com



Natalie V. Mueller
Associate

Natalie.Mueller@procopio.com



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Richard D. Barton
Partner
Procopio, Cory, Hargreaves & Savitch LLP
rick.barton@procopio.com

Natalie V. Mueller
Associate
Procopio, Cory, Hargreaves & Savitch LLP
natalie.mueller@procopio.com

2018 Legal Update: NPDB Reporting, Retaliation, Physician Well-Being, and Medical Staff Litigation

Educational Objectives

- 1) To gain an understanding of recent changes in the laws directly affecting Medical Staffs
- 2) To understand changes in the interpretation of reporting requirements for the NPDB
- 3) To gain an understanding of the legislation affecting the California Diversion Program and possible effect on Medical Staff Members

2

Frank S. Walker, M.D. v. Memorial Health System

- U.S. Federal District Court for the Eastern District of Texas
- Dr. Frank Walker was a surgeon with privileges at Memorial Health System
- As the result of a peer review process initiated to address concerns regarding Dr. Walker's performance of bowel surgery, the Hospital's Board approved a requirement for mandatory proctoring for Dr. Walker's next five bowel surgery cases, with the proctoring to end whenever the fifth surgical case was completed
- The proctoring was a restriction for NPDB reporting purposes because Dr. Walker could not exercise his bowel surgery privileges without approval of the proctor

3

Frank S. Walker, M.D. v. Memorial Health System (cont.)

- After 30 days, the restriction on Dr. Walker's privileges was reported to the NPDB
- Dr. Walker filed suit and requested a preliminary injunction ordering that the NPDB report be voided
- The district court ruled that because the duration of the proctoring requirement was not specified, the action was not reportable
- Held that proctoring requirements are reportable only if *affirmatively imposed* for more than 30 days

4

Frank S. Walker, M.D. v. Memorial Health System (cont.)

- Notably, the district court reached this decision despite the absence of any such requirement in the plain language of the statute:
 - Section 11133(a)(1)(A) requires a report from an entity that “takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days.”

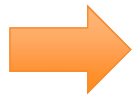
5

NPDB Policy Statement in Response

- In response to this decision, NPDB issued “Length of Action for Reporting Clinical Privilege Actions”
- Clarified NPDB’s position regarding reporting requirements for restrictions
 - A restriction begins at the time a physician cannot practice the full scope of his or her privileges and is reportable to the NPDB once that restriction has been in place for 31 days
 - If a physician cannot perform certain procedures without proctor approval or presence, this is considered a restriction on privileges.
 - The inability to practice the full scope of privileges without a proctor’s presence or approval is a restriction
 - The number of cases required to be proctored at the time of imposition, or *the expectation that a restriction be concluded in fewer than 31 days, is irrelevant for reporting purposes*
 - The reportability of an action hinges on whether the restriction *is in fact in effect* for a period longer than 30 days

6

MSP Take Away- Walker v. Memorial Health System



The length of time a restriction ultimately remains in place is the trigger for reporting the adverse action to the NPDB, not how long the anticipated restriction, such as proctoring, will remain in place

7

People v. Superior Court (Sahlolbei)

- June 2017 California Supreme Court Decision
- District Attorney criminally charged a surgeon under Government Code section 1090, which prohibits **public** officers and employees from making contracts in which they have a financial interest when they act in their official capacities
- The surgeon was a member (and sometimes Chief of Staff) of a **public** hospital's Medical Executive Committee
- The surgeon recruited and negotiated a contract with an anesthesiologist to receive \$36,000 per month plus benefits to work at the hospital
- Then the surgeon went to the Board and convinced the hospital to hire the anesthesiologist for \$48,000 per month plus benefits
 - He arranged to receive the greater sum and remit the lesser sum to the anesthesiologist

8

MSP Take Away- People v. Superior Court



For MSPs practicing at public district hospitals, Section 1090 is not restricted to public employees, it can also apply to members of the Medical Staff

- Be careful of contracts where a physician, in a leadership position, might have a financial interest
 - Ex. a physician who advises a hospital about the effectiveness of certain drugs could be deemed to have participated in the making of a contract if the hospital enters into a contract with the supplier of those drugs

9

Dhillon v. John Muir Health

- Currently Pending Before California Court of Appeals
- A colleague alleged Dr. Dhillon violated the John Muir Medical Staff Code of Conduct
- In response to the complaint, Dr. Dhillon requested an investigation of his colleague's complaint
- The medical staff appointed an ad hoc committee which interviewed the complainant, Dr. Dhillon, and other witnesses
 - Dr. Dhillon was afforded notice and multiple opportunities to respond and be heard with regard to the complaints made against him and the ad hoc committee's investigation
- Following the investigation, the MEC concluded that Dr. Dhillon repeatedly violated the Code of Conduct
- The MEC mandated that both parties, the complainant and Dr. Dhillon, attend an anger management course
 - The complainant complied with the directive; Dr. Dhillon refused

10

Dhillon v. John Muir Health (cont.)

- After months of trying to get Dr. Dhillon to comply with the mandate, the MEC imposed a limited suspension of fourteen days
- Dr. Dhillon requested a hearing challenging the MEC's decision to suspend him
- MEC told him that because the suspension was not reportable, he was not entitled to a hearing pursuant to the Bylaws

11

Dhillon v. John Muir Health (cont.)

- John Muir Bylaws stated:
 - “Except as otherwise specified in these Bylaws...any one or more of the following actions, if taken *for medical disciplinary cause or reason, as defined in Business and Professions Code Section 805* or its successor statute, shall be deemed adverse and shall constitute grounds for a hearing...”
- The Court of Appeals is in the process of determining whether Dr. Dhillon is entitled to a hearing for a suspension lasting less than 14 days

12

MSP Take Away- Dhillon v. John Muir Health



Check your bylaws!

- Make sure hearing section explicitly ties hearing to 805 reporting
- *Sample Language:*
 - » *Unless otherwise provided in these bylaws, any one or more of the following actions or recommended actions, if taken for a medical disciplinary cause or reason, as defined in California Business and Professions Code Section 805 or its successor statute, and **which qualify as reportable** under California Business and Professions Code Section 805, shall be deemed adverse and shall constitute grounds for a hearing*

13

Senate Bill 1177

- Approved on September 24, 2016
- Authorized the creation of a Physician and Surgeon Health and Wellness Program
 - Medical Board of California must adopt regulations for how the new program will work
 - The Medical Board announced its proposed regulations on October 4, 2017, ongoing process for public comment and approval of regulations
 - Must also choose entity to administer the program
- The new program, with services for physicians with substance use disorders, now has a projected start date of 2019

14

Retaliation Cases (H&S Code 1278.5)

15

Health and Safety Code Section 1278.5

- The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions
 - To protect patients
 - Protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations

16

Health and Safety Code Section 1278.5 (cont.)

- Protects patients, employees, members of the medical staff, or any other healthcare worker who 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

17

Health and Safety Code Section 1278.5 (cont.)

- Protects patients, employees, members of the medical staff, or any other healthcare worker who has:
 - Presented a grievance, complaint, or report
 - to the facility;
 - to an entity or agency responsible for accrediting or evaluating the facility;
 - to the medical staff of the facility; or
 - to any other governmental entity

18

Melamed v. Cedars-Sinai Medical Center

- February 2017 California Court of Appeal Decision
- Hospital summarily suspended the privileges of a surgeon who performed an unsuccessful spinal surgery that caused complications and required corrective surgery
- The summary suspension was upheld at every level of administrative peer review
- The surgeon did not seek judicial review of those proceedings
 - Instead, he sued the hospital for retaliation under Section 1278.5
 - For the first time, he alleged that the hospital suspended him because he had complained about patient safety issues

19

Melamed v. Cedars-Sinai Medical Center (cont.)

- The Court of Appeal held that because the complaint arose from protected activity under the anti-SLAPP statute (e.g. peer review), the burden shifted to the surgeon to prove a probability of success on the merits
- The Court of Appeal held there was no merit to the surgeon's retaliation claim because he could not show that he had presented a "grievance, complaint, or report" to the hospital
 - He did not use any of the hospital's channels for reporting safety concerns
 - The surgeon had asked a nurse (mid-surgery) whether larger pads or a different operating table was available, told the patient's family that the hospital lacked a proper operating table (an allegation that the surgeon later retracted), and documented his request for a different table and pads in his post-operation report
 - None of those alleged complaints notified the hospital "as to what wrongful conduct it should investigate or correct."

20

Melamed v. Cedars-Sinai Medical Center (cont.)

- Moreover, the Hospital could not have retaliated based on the post-operative report because it had already initiated the investigation leading to the summary suspension before that report was available
- The court also held that the surgeon's remaining claims were barred by his failure to exhaust judicial remedies

21

Armin v. Riverside Community Hospital

- 2016 California Court of Appeal Decision
- Dr. Armin filed a lawsuit alleging claims of religious discrimination and retaliation pursuant to Section 1278.5
- Dr. Armin sued both the hospital that summarily suspended his medical staff privileges and two doctors who had initiated peer review proceedings against him
- Court of Appeal held that a doctor need not complete peer review proceedings before filing a Section 1278.5 action
 - Legislature intended Section 1278.5 claims and peer review proceedings to run concurrently
- Section 1278.5 permits whistleblower claims against hospitals and the uniplural “hospital staff” entity only
 - claims against individual physicians who instigated adverse peer review proceedings are not actionable

22

Brenner v. Universal Health Services of Rancho Springs, Inc.

- June 2017 California Court of Appeal Case
 - The wife and son of a deceased patient sued the patient’s hospital and doctor for negligence, retaliation in violation of Section 1278.5, and elder abuse
 - Plaintiffs’ complaint alleged that the defendants retaliated against the patient as a result of the wife’s complaints to the hospital’s nursing staff about the patient’s care

23

Brenner v. Universal Health Services of Rancho Springs, Inc. (cont.)

- The court held that plaintiffs lacked standing to sue for retaliation under section 1278.5, both individually and as representatives of the patient's estate
 - First, retaliation claims are not authorized against individual doctors, as explained in *Armin*
 - Second, plaintiffs lacked standing to sue the hospital because section 1278.5, subdivision (b), does not apply to complaints made by a patient's family

24

MSP Take Away- Conducting a Proper Investigation



Identify “whistleblower” complaints

- Who should conduct investigation of the complaints?
 - Third party who is not involved in the peer review proceedings
 - Conduct interview of the complaining party?
- Continue to proceed with peer review investigation
 - Keep patient care complaint separate from investigation
- Document, document, document!

25

Preparing for a Successful Judicial Review Hearing

26

Educational Objectives

- 1) To gain an understanding of the processes which govern judicial review hearings in California
- 2) To understand how MSPs can successfully prepare for JRC proceedings by revising bylaws, maintaining appropriate documentation, and understanding which actions lead to hearings
- 3) To gain an understanding of issues and problems that arise during JRC proceedings and how to successfully prepare for those challenges

27

Success Depends on Six Factors

- Process, Process, Process
- Documentation, Documentation, Documentation

28

Success at a JRC Begins Well Before the JRC

- JRC's are the Result of a Failure of the System or a Failure of the Physician
 - System Issues
 - Failure to Understand what the Bylaws and the Law Require
 - Failure to Understand what a Physician's Colleagues will Perceive as Fair
 - Failure to Create an Adequate Record to Support a Decision
 - Treat Every Issue of Concern as if it will be an Exhibit

29

Success at a JRC Begins Well Before the JRC

- System vs. Physician Failure
 - Physician Issues
 - “The Outlier”- see DSM
 - Conflicts within the Hospital
 - Conflicts within the Medical Staff

30

Investigation

- The Path You Follow will Determine the Outcome
- Understand what the Ultimate Question Will Be
 - What is the History?
 - A lot of little things vs. a big event
 - Who is raising the concerns? Competitors?
- Who Is Your Team?
 - Will they be perceived as Fair?
 - Will they be perceived as Committed to Patient Safety?

31

Investigation

- Lay out a plan for what needs to be done to investigate the concerns
 - Follow Your Bylaws
 - Appointment of Ad Hoc Committee
 - Use of External Reviewer
 - FPPE
 - Interview the practitioner
 - Notice of investigation to practitioner and opportunity to respond

32

Documentation

- *If you don't document it, it didn't happen*
 - Document the Process
 - Include all documents utilized by the Ad Hoc Committee or other investigatory body
 - Create a report of the investigation
 - Make sure minutes are kept of different steps of investigation
 - Keep copies of anything provided by practitioner during investigation

33

Fairness to Practitioner- “You Didn’t Do Enough”

- Recognize practitioner’s argument that the Medical Staff did not do enough
 - Ask the practitioner to provide documents and/or evidence that he/she would like the Medical Staff to consider
 - Allow practitioner to appear before Medical Staff Executive Committee
- Make sure that your record includes steps taken to provide practitioner with opportunities to engage in peer review process
- Consider alternatives to corrective action

34

The Judicial Review Hearing

35

Selecting Appropriate Hearing Officer

- Utilize experienced Hearing Officers
 - California Society of Healthcare Attorneys- List of Approved Hearing Officers
 - All individuals on the list are required to attend CSHA Hearing Officer training and must document participation as lead counsel in at least 5 completed peer review hearings
- Ask for recommendations from fellow MSPs
- Consider Use of Arbitrator
 - Most Important– Make sure Hearing Officer understands his/her role

36

Selecting Judicial Review Committee

- Number of Committee Members Required
 - No formal law for how many Committee members are required
 - Should have at least three to hear case
 - Consider use of alternates
 - If anticipate that hearing will be lengthy, utilize additional alternates
 - Choose practitioners who will be engaged in the process
 - Make sure they understand the commitment
 - Dig out those skeletons!
 - If potential JRC member might have bias (actual or perceived) against the Medical Staff or physician, want to learn it before selecting them for the panel

37

Pre-Hearing Conference Prior to JRC

- Consider Adding Pre-Hearing Conference to Judicial Review Hearing
 - Add provision to your bylaws requiring that parties meet before hearing to determine length of witness testimony, exchange documents and evidence, and address other evidentiary, procedural, and discovery issues prior to hearing
 - Assists in estimating the length of hearing and eliminating repetitive witness testimony

38

Going “Green” During The Hearing

- Consider Alternative Ways of Presenting Evidence and Testimony
 - Video testimony for experts
 - Instead of paper exhibits, utilizing computers or I-Pads for each panel member to view exhibits
 - Allow JRC to view clinical cases in EMR

39

Creating Your Record

- Making sure witnesses are prepared
- Tell the story through witnesses, exhibits
 - Explain the process and how decision was made
- Utilize an Expert
- Understand that this is the first step in a multi-layer process
 - Setting up eventual appeal to Board and Court

40

Overview of Administrative Proceedings Following Corrective Action

- **Judicial Review Committee (“JRC”)**
 - Was MEC or Board decision reasonable and warranted?
- **Appeal to Board of Directors**
 - Was physician afforded a fair procedure?
 - Was JRC decision supported by substantial evidence?
 - Affirm, Modify, or Revoke JRC’s decision
- **Petition for Writ of Mandamus to Superior Court CCP § 1094.5**
 - Was physician afforded a fair procedure?
 - Was the Board decision supported by substantial evidence?
- **Court of Appeal**
 - Was physician afforded a fair procedure?
 - Was the Board decision supported by substantial evidence?
- **California Supreme Court**

41

Questions?



Richard D. Barton
rick.barton@procopio.com
619.515.3299



Natalie V. Mueller
natalie.mueller@procopio.com
619.515.3299



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