

## Whistleblowers and the California Supreme Court's Decision in *Fahlen v. Sutter Central Valley* – Toward a Workable Balance for Promoting Advocacy for Patient Care

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On February 20, the California Supreme Court handed down its long awaited decision in *Fahlen v. Sutter Central Valley Hospitals*. In a lengthy opinion, the Court ruled that a physician is not required to exhaust administrative remedies in the hospital peer review process before proceeding with a civil complaint for retaliation under California's "whistleblower" statute, Health & Safety Code Section 1278.5. In so holding, the Court rejected application of the long-standing exhaustion requirement established in 1976 in *Westlake Community Hospital v. Superior Court*, 17 Cal. 3rd 465. 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. In eliminating the exhaustion requirement for physicians claiming whistleblower status, the *Fahlen* Court opened a window that has significant implications for hospitals and medical staffs. Indeed, the Court in several passages acknowledged issues the decision creates for the peer review process, but declined to address those questions, stating that it would "await their development in future cases."

In its unanimous decision, the Court focused on the structure and legislative history of the amendments added to section 1278.5 in 2007. Those amendments were introduced by the California Medical Association ("CMA") to add physician members of medical staffs to nurses, patients and other healthcare workers already protected from retaliation for filing grievances regarding unsafe patient care and conditions. The legislature declared in the original statute its intent to "encourage patients, nurses and other healthcare workers to notify government entities of suspected unsafe patient care and conditions." It provided civil remedies, including damages and reinstatement, for any action by a hospital in retaliation for such reports. The statute as amended in 2007 prohibits a health facility from discriminating or retaliating against a member of a medical staff that presents a "grievance, complaint or report to the facility, to an agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other government agency."

In the case before the Court, Dr. Fahlen's application for reappointment to the medical staff of Sutter Central Valley Hospital was denied in 2008 after a series of reports alleging he had engaged in disruptive interactions with nursing staff. The record also documented a series of confrontations between Dr. Fahlen and hospital administrators which Dr. Fahlen alleged were retaliatory. After the hospital's Medical Executive Committee denied his application for reappointment, Dr. Fahlen requested a judicial review hearing at which he prevailed. The judicial review committee ("JRC") found that the evidence failed to show Dr. Fahlen was professionally incompetent or had engaged in behavior endangering the delivery of patient care. The medical staff appealed the JRC decision to the Sutter Central Valley Hospital Board of Trustees. The Board reversed the JRC decision, thereby denying Dr. Fahlen's application.

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Instead of seeking review by administrative mandamus, Dr. Fahlen filed a civil complaint in Superior Court alleging multiple causes of action, including retaliation by the hospital for his reporting unsafe patient conditions in violation of section 1278.5. Sutter Central Valley asserted that the civil complaint violated the *Westlake* exhaustion requirement in that Dr. Fahlen had not sought, nor prevailed in, a mandamus proceeding challenging the Board's decision. It was this assertion that the Supreme Court rejected.

In many ways, the Court's decision represents an extension of the extensive battle fought by the California Hospital Association ("CHA") over passage of the amendments to section 1278.5 in 2007. The *Fahlen* Court specifically cited the legislature's rejection of the CHA's insistence that section 1278.5 should protect medical staff peer review proceedings by not allowing a whistleblower suit unless a hospital's final disciplinary decision failed to survive mandamus review by a trial court.

In lieu of an outright prohibition of civil lawsuits before conclusion of the peer review proceedings, the legislature included provisions in the amendments allowing medical staffs to petition a court for an injunction "to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing." Section 1278.5(h) further allows a trial court to keep the injunction in place until the completion of the peer review hearing if that process would be "impeded" by the evidentiary demands. In its opinion, the Supreme Court cited these provisions as evidence of the legislature's understanding and intent that a civil complaint under section 1278.5 could be litigated concurrently with the peer review process. Thus, the Court concluded the legislature did not intend for the exhaustion requirement to apply in this discrete context.

It is difficult to argue against the basic principle underlying the legislature's extension of the protection of section 1278.5 to physician members of a medical staff. The law should protect all categories of providers from retaliation for drawing attention to legitimate patient care concerns. The hospital, CHA and others were rightly concerned, however, with the implications of allowing a civil action for retaliation to proceed outside of the long recognized process for addressing patient care issues with physicians.

One of the more concerning issues presented by the Courts ruling is the very practical reality of how the issues involving disruptive physicians play out in the medical staff setting. In this context, physicians exhibiting disruptive and abusive behavior almost uniformly defend their conduct by insisting it was out of concern for patient safety. We once represented a medical staff in a lengthy JRC hearing in which the physician created an extensive file every time he was called before the MEC to address his conduct. The file documented what he believed were deficiencies in hospital operations. All of these complaints were used to explain and justify his outbursts toward nursing staff and his entire defense at hearing was based on his assertion that his disruptive and inappropriate behavior was the result of his concern for patient care. It is not hard to imagine a physician making similar arguments attempting to utilize whistleblower status through a civil complaint alleging that the medical staff's action was in retaliation for his or her "advocacy" on behalf of patients.

Over the past decades, there has been an evolution of the hospital industry's awareness of physician behavior and its impact on the team approach to providing quality care. In its Sentinel Event Alert issued in 2008, the Joint Commission mandated that hospitals address "behaviors that undermine a culture of safety." The behaviors identified by the Joint Commission include intimidation, verbal outbursts, physical threats, condescending language or voice intonation, and impatience with questions. The Commission stated, "to assure quality and to promote a culture of safety, health care organizations must address the problem of behaviors that threaten the performance of the health care team."

The reality is that carrying out the Joint Commission's mandate to address disruptive behavior is complicated by myriad factors, and the potential for these issues to be diverted to the civil arena raises very difficult questions. While section 1278.5(h) allows a medical staff to seek an injunction to preclude evidentiary demands of a peer review process, little guidance is provided for the standard to be used by a court in deciding whether the demand "impedes" the peer review process. For better or worse, the judicial review hearing process can proceed very slowly, taking years depending on the complexity of the issues involved. Courts on the other hand employ hard deadlines for the completion of discovery and trial. For those of us who litigate matters in dual

forums, e.g., court and arbitration, it is not at all unusual for a court to decide it cannot wait for resolution of an outside process before forcing a matter to proceed in court. This creates the very real possibility of a court demanding that a whistleblower complaint proceed to trial before a decision by judicial review committee as to whether the decision to restrict or terminate privileges was reasonable and warranted.

The provisions in section 1278.5(h) are also limited to a medical staff protecting itself from evidentiary demands for protected peer review information. This omits a crucial component arising from the prospect of parallel proceedings in the civil and medical staff contexts. By law, the issue of physician disruptive conduct and ensuring quality of care reside in the organized medical staff whose proceedings are to remain confidential. Should a court require that a whistleblower complaint proceed in court, most, if not all, of the evidence that a hospital will require to defend itself will have taken place within the privileged medical staff context. This presents a terrible dilemma for hospitals and their medical staffs. If the civil complaint is ordered to proceed during or even after the medical staff's proceedings, the hospital will be forced to decide whether to reveal evidence of the deliberations of peer review bodies, or its case in a hearing, to rebut the contention in court that the medical staff's actions were retaliatory.

While retaliation should not in any way be tolerated, the issues in *Fahlen* pose fundamental questions regarding the forum in which oversight of physician conduct and advocacy for patient care should take place. Indeed, the entire peer review and quality assurance system contemplates a vast structure for healthcare workers to address concerns regarding patient care. Both federal and state law have heretofore mandated that the hospital and organized medical staff undertake those functions in an environment which encourages physicians' peers to engage in free and open discussion of information relevant to protecting patients. What *Westlake* and all of the court decisions upholding the exhaustion requirement have recognized is that the balance of the competing interests are best served by allowing a physician the right to challenge a medical staff action while at the same time shielding the process from the intrusion of the civil justice system.

The *Fahlen* decision now provides a path for physicians to compel adjudication of these issues in civil courts which do not in any way resemble the notion of a peer review process envisioned by both federal and state law.

It is not hard to understand how the unanimous Court came to its conclusion in *Fahlen*. In looking solely at the language in section 1278.5 and the legislative record surrounding the 2007 amendments, the Court applied a traditional deferential approach to the legislature and its analysis is entirely logical within that context. The stakes, however, are too high for this to be the end of the discussion. As the Court itself acknowledged, the practical implications will need to be addressed in the future. An understanding of the reality of how these issues play out and the difficulties of conducting parallel proceedings must be considered by trial courts and the legislature to protect physicians, hospital employees, and medical staffs. Hopefully this issue will be revisited in ways that effectively balance the interests involved.

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