What Has Fahlen Wrought?

BY KURT W. MELCHIOR

The California Supreme Court’s decision in Fahlen v. Sutter Central Valley Hospitals has confirmed (not created) a sea change in the relations between hospitals and their medical staffs, on the one hand, and physicians on such staffs, on the other hand. I say “confirmed” because the court’s opinion did not create but rather upheld a change brought about by the California Legislature.

Some background: California has a well-established program whereby hospitals, medical staffs, and other health provider organizations can discipline and even remove medical practitioners from their medical staffs through a peer review process. Providers subject to that process are entitled to only limited review in the courts, and are essentially barred by res judicata and collateral estoppel from challenging such procedures in other ways. On the other hand, California has long encouraged and protected whistleblowers. In 2007, the Legislature created a direct conflict between these two legal principles when it amended Cal. Health & Safety Code § 1278.5, the “healthcare whistleblower statute,” to provide that “no health care facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker, . . . because that person has . . . presented a grievance, complaint or report to the facility . . . or the medical staff of the facility, or any other governmental entity.” This law gave physicians a chance to counter contemplated or actual disciplinary actions by contending that those actions were taken in retaliation for their complaints about poor patient care or like matters. The statute did not address the question of how these two potentially contradictory procedures would interact. Fahlen is the first definitive decision that addresses the interplay between these two important public policies.

The Fahlen Decision

The question before the Fahlen court was whether the nearly 30-year-old Westlake rule continues to provide a barrier against claims of whistleblower retaliation, despite many provisions in the whistleblower statute that appeared to assume that such claims could proceed independently and would not have to await the finality of any medical disciplinary proceedings, as Westlake had required.

The California Supreme Court was unanimous in holding that “when a physician claims . . . that a hospital’s quasi-judicial decision to restrict or terminate his or her staff privileges was itself a means of retaliating against the physician ‘because’ he or she reported concerns about the treatment of patients, the physician need not first seek and obtain a mandamus judgment setting aside the hospital’s decision before pursuing a statutory claim for relief.” This is so, the court found, because the whistleblower statute “forbid[s] a health care facility to retaliate or discriminate ‘in any manner’ against a staff member because of whistleblowing activity, and entitles the worker to prove such violation and obtain ‘appropriate relief, in a civil suit before a judicial fact finder.’” (“Judicial fact finders” would be juries in appropriate cases, including most whistleblower claims.) In addition to serving as a basis to sue, violation of Section 1278.5 is deemed a crime (misdemeanor) on the retaliator’s part.

The court observed a difference between disciplinary proceedings, which it said are “ostensibly focused on

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2 Cal. Civ. Proc. Code § 1094.5(b) and (c).
4 Cal. Gov’t Code § 8547 et seq.

Kurt W. Melchior is a partner at Nossaman LLP, in San Francisco. He is a member of the California Trial Lawyers Hall of Fame and has extensive complex litigation experience, including health care and insurance coverage litigation. He can be reached at 415-438-7279 or kmelchior@nossaman.com.
concerns about the physician’s professional fitness,” and “the physician’s statutory right to litigate, in court [i.e., not in the administrative forum of fellow-professionals which determined his professional fitness], his or her distinct claim that whistleblower retaliation was a reason for the exclusionary effort.”

Note the court’s careful phrasing: A whistleblower needs to allege only “a reason”—not “the reason” or “the only reason,” or even “the main reason”—for the disciplinary decision in order to separately challenge that decision. This seems to mean that as long as there is *enough evidence* that there may have been some animus toward the whistleblower for his unsettling activity, his whistleblower claims survive for civil litigation, seemingly even where the disciplinary case has been clearly established. And note also the court’s observation that the disciplinary proceedings might have been “ostensibly” focused on fitness concerns, which seems another suggestion that even a final adverse outcome of a disciplinary proceeding does not preclude a physician from pursuing a whistleblower complaint which would be tried before a different venue, namely a court and a jury.

The court based its reasoning that the new whistleblower statute allows a civil court challenge to administrative decisions that impose discipline on physicians, on the legislative history of the 2007 legislation. The court noted the strong lobbying of hospital groups against, and of medical groups for, the proposed bill, and the Legislature’s insertion of a provision

6 that upon petition, a court may order that there be no current “evidentiary demands” on the peer review body “until the peer review hearing is completed.” Even that stay provision is subject to the court’s optional review of the evidence in question in camera to determine whether disclosure of the evidence would actually impede the peer review hearing—note: the hearing only, not the entire peer review process.

There is little room for argument about this unanimous decision. Plainly, as the opinion recites in detail, the Legislature was fully informed by the interested parties on the issue, and presented the body extending the right of action to physician whistleblowers. And the statutory language clearly indicates that the Legislature intended to create or protect the right of physicians and other hospital workers to call attention to perceived irregularities that might have an adverse effect on health care, and provided protections for that right. The court really had little choice but to follow the Legislature’s apparently expressed intent. Whether the Legislature understood the complexities it created is another question.

The California Supreme Court deliberately limited its decision to the question of whether such whistleblower actions can proceed, even where the whistleblower did not overturn the peer-review procedure. It specifically and deliberately left all other questions—and there are many—for another day.

This article identifies some of those questions and tries to address some issues this decision is certain to raise.

The court stated early in its 41-page opinion that “future litigants may argue that proper attention to . . . various concerns should affect the trial timing, the issues, and the available remedies in an individual physician’s whistleblower suit under section 1287.5,” noting that such concerns might include issues of qualified immunity under both federal and state law for “reasonably founded” peer review decisions, and “mixed motive” cases where there is reason to determine that both a need for disciplinary action to protect patient well-being and retaliation for whistle blowing are present in the same case. Clearly, that was not intended to be an exclusive list, but the court took a pass on all of them, stating that “[s]uch matters . . . are beyond the scope of the narrow question before us here.” It left those issues to “appropriate future development.”

These and other unresolved issues raise many problems. *Fahlen* did not leave either side with an open road to its destination. This article addresses some of the problems—but few or no solutions—in its survey of things likely to come.

**Some Predictions**

**Double Track Is Likely to Be a Common Feature of Such Matters**

Not every doctor who becomes subject to peer review and possible disciplinary proceedings will try to cast him or herself as a whistleblower. Doing so will be a long, arduous and costly undertaking and, even where it succeeds, financial rewards are far from certain. But there is no doubt that some doctors facing staff discipline—perhaps a significant faction—will assert a whistleblower position. Hospitals, in particular, are large, complex facilities where many professionals and paraprofessionals constantly interact in situations fraught with urgency, tension and danger. They offer plenty of points where complaints, valid or not, can be brought forward.

Where that happens, under *Fahlen* the physician now has a reasonably clear right to bring his case for retaliation. Indeed, if he anticipates disciplinary action—not hard to do, because almost all hospital and medical staff by-laws provide that except in emergencies, disciplinary action must be preceded by an investigation of which the physician is informed—he can be expected to lodge a complaint or grievance about patient care, or even file a whistleblower complaint in court, before the peer review proceeding commences because there is a rebuttable presumption under Section 1278.5(d)(1) that any peer review proceeding commenced within 120 days of the health care worker’s complaint is based on retaliatory motives. “Within 120 days” can mean on either side of the disciplinary action, but it seems to make little sense to give the doctor the benefit of the presumption if he files suit within 120 days after the peer review proceeding begins. It has been said that a complaining doctor might keep renewing his complaints while such an investigation is pending so that he would always have the 120-day window to claim this presumption. And, as noted above, retaliatory action is forbidden by Section 1278.5 and can constitute a misdemeanor crime on the part of anyone engaging in forbidden retaliation.


8 Id.
Implications About Finality of Peer Review Decision

There were probably two key points under the Westlake rule. One was that unless the quasi-judicial proceedings of a peer review body had been reviewed and upheld by a court, the findings in those proceedings were not entitled to finality in later proceedings. If upheld on such review, however, the peer review findings were final and binding. The other was that a party could not circumvent that judicial review (which, however, is limited to a determination of whether the peer review body was acting within its jurisdiction and whether there was any abuse of the panel’s discretion9 by bringing an action that involved the same fact finding process before a Westlake review had occurred, with that review establishing that certain requirements of fair procedure had been met. However, it was only those found facts—not the legal conclusions of the peer review process—that were binding in later litigation between the parties. Even there, the court has held that a view process—that were binding in later litigation be found facts—not the legal conclusions of the peer review findings.10 These rules apply to all court cases reviewing actions of administrative and quasi-administrative agencies, such as hospitals, not just to discipline within medical settings.

By deciding that a whistleblower may maintain a separate action without the precondition of Westlake exhaustion, it seems that the Fahlen court also determined—though it did not explicitly so decide—that the adverse outcome of a health care peer review case does not bar the ongoing or later pursuit of a whistleblower case. It intimated as much at p. 20 of the slip opinion. That result is also consistent with similar treatment the court previously gave to a whistleblower’s right to sue despite adverse conclusions in—a however much less carefully structured—administrative hearing.11 The distinction appears to be that the general governmental whistleblower statute12 specifically prohibits andpunishes any use or attempt to use official authority to interfere with the whistleblower’s efforts to assert whistleblower rights. As this article explains, Section 1278.5 has different provisions, which, despite such differences also are designed to protect the whistleblower function.

It is difficult to predict the effects of such a rule, assuming that this reading of the tea leaves is correct. Certainly, the court pointed to a possible duality of issues—the medical integrity requirements of the peer review proceeding and the whistleblower protection of Section 1278.5. If my reading is correct, there will be no critical preclusion of the main whistleblower issues by a concluded peer review proceeding (whether Westlake-reviewed by a court or not). That should provide greater freedom for the whistleblower to develop his issues as broadly as he may, although the defendants in the whistleblower’s action will surely try to introduce evidence of the whistleblower’s disruptive or deficient conduct that might have endangered patient care, so as to show the jury their view of the context for the whistleblower’s complaints.

If there is a hidden meaning of Fahlen, its potential restriction of evidence of the physician’s conduct that led to the medical discipline could be a large unexpected boost to the whistleblower case, since that creates a possibility that the jury might not even hear about the problems the hospital saw in the plaintiff’s performance.

Meaning of the Presumption of Retaliatory Motive

The presumption of retaliatory motive is an odd one, seemingly illogical.

There are two kinds of rebuttable evidentiary presumptions in California: Under Cal. Evid. Code § 601, a “rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” The former kind is defined in Cal. Evid. Code § 603 as one “established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied,” whereas the latter, a presumption affecting the burden of proof, “is established to implement some public policy” other than disposing of the particular case in question, and has the effect of “impos[ing] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.”13 Thus, the Section 603 version, which serves no public policy other than the production of evidence, simply requires the introduction of some contrary evidence, whereupon the presumption disappears entirely and the case is judged on the evidence alone. Witkin14 has described this form of rebuttable presumption as “‘expressions of experience’ designed to dispense with unnecessary proof.”15

Consistent with its public policy purpose, the second form of rebuttable presumption has been held to have a weight of its own, so that its opponent has the burden of persuading the jury of the nonexistence of the presumed fact.16

The Legislature plainly established a rebuttable presumption that certain conduct by the health-care facility against the whistleblower was motivated by retaliation, and one would think that such a presumption clearly established a public policy of protecting whistleblowers against retaliation (why else would it be enacted?), which would have some weight of its own and would not disappear as soon as someone took the witness stand and swore to the contrary. But yet, Section 1278.5(e) specifies that these presumptions “shall be presumptions affecting the burden of producing evidence as provided in section 603. . . .” That disappearing presumption does not seem consistent with the balance of the legislative plan, but it is there in plain English.

So, it seems that although the Legislature created an elaborate structure of presumptions, these presumptions will mean little, if anything, in practice, since under the explicit language of the statute the presumption will disappear as soon as anyone on the defense of a

10 State Bd. of Chiropractic Exam’rs v. Superior Court, 45 Cal. 4th 963, 201 P.3d 457 (2009); see also Johnson v. City of Loma Linda, 24 Cal. 4th 61, 5 P.3d 874 (2000).
11 State Bd. of Chiropractic Exam’rs, supra note 10.
12 Cal. Gov’t Code § 8547.3
whistleblower case in the medical facility context testifies that there was no animus and no retaliation. After such testimony, the whistleblower would need to establish through independently admissible evidence that there was enough basis for the retaliation claim to allow that issue to go to the jury.

Despite its claim of abstention on such issues, the California Supreme Court seems to have foreshadowed the outcome of the question of whether a peer review decision that discipline was properly imposed for valid reasons preempts the whistleblower’s right to have the question of retaliatory intent decided by the jury. In Fahlen, the court explains at some length that a peer review proceeding is “not . . . designed to consider, and to redress,” a claim of retaliation, and that it is “not a potential remedy for the discrimination [the health worker] allegedly suffered, but [at least as alleged, it] was itself the instrument of that discriminatory treatment.”

Thus, a panel of lay citizens will decide whether a peer review proceeding took place in good faith, which the defendants, a hospital or other body, would have to prove to them by a preponderance of the evidence. Whether the discipline was undertaken for malicious, retaliatory reasons. That is a complete new departure in the law.

**Anti-SLAPP Strategies**

The “anti-SLAPP” statute, Cal. Civ. Proc. Code § 425.16, interjects even more complexity into these cases. That statute allows any defendant who claims to be a victim of a cause of action “arising from any act of that person in furtherance of the person’s right of petition or free speech,” to move to strike that cause of action. Such “anti-SLAPP” motions stop all discovery, and denial of an anti-SLAPP motion can be appealed, with the discovery stay remaining in effect while the appeal is pending. If the court finds that the claim involves such a protected right, the plaintiff can defeat the anti-SLAPP motion by establishing “a probability that he or she will prevail on the claim.”

Peer review proceedings are subject to the anti-SLAPP statute, and therefore it seems probable that any whistleblower suit in the context of a Fahlen situation, where peer review discipline and whistleblower claims compete, will be met by an effort to end it through an anti-SLAPP motion.

The anti-SLAPP strategy will not necessarily take the hospital parties home, since the court must deny the motion if it finds that the whistleblower would “probably” prevail on his claims, but it would gain substantial time for the hospital parties and greatly increase the whistleblower’s costs and burdens even if the whistleblower ultimately can show the court that he would “probably” prevail in his suit. For that matter, at least initially there may be complex new questions with unpredictable answers about the availability of information from the peer review proceedings for use in this motion practice, given the interaction between Cal. Evid. Code § 1157 and Section 1278.5, discussed below.

If the whistleblower’s claims are clearly invalid, the anti-SLAPP procedure should be a fairly effective way to limit the damage from the whistleblower suit. And a defendant who prevails on an anti-SLAPP motion is entitled to its attorneys’ fees. If the anti-SLAPP motion fails, there is no fee award for the plaintiff unless the court finds that the motion was frivolous.

**Timing: Discovery and Trial**

There is an obvious advantage to a practitioner who files his retaliation suit before the peer review discipline begins because he then gets the benefit of the presumption of improper motive. But the hospital has a weapon available to it that may delay the whistleblower case. Section 1278.5(h), which as the Fahlen opinion explains at great length was the Legislature’s concession to the hospital lobby, provides that the medical staff may petition the court “for an injunction to protect the peer review committee from being required to comply with evidentiary demands on a pending peer review hearing.” Such injunction, if granted, lasts only “until the peer review hearing is completed” (emphasis added).

That phrasing seems to create at least two problems. One is the limitation of the injunction period to the time until the hearing is completed. Cal. Bus. & Prof. Code § 809.2 defines “hearing” in that context to mean the time when the peer review committee hears witnesses and deliberates. But the entire peer review process commonly includes not only a hearing before a medical staff committee, but also an appeal to the governing board. Yet, by the language of Section 1278.5(h) the injunction can last only through the hearing. And even if the term “hearing” were extended to include the entire peer review proceeding to its completion within the hospital, after that point the whistleblower plaintiff would have access to the enjoined material.

**Scope of Discovery and Evidence in the Whistleblower Case**

How does Section 1278.5(h), which certainly suggests that when the hearing is complete the whistleblower can have access to the enjoined information, square with Cal. Evid. Code § 1157, which provides degrees of protection against discovery or testimonial use of peer review proceedings? Can the whistleblower argue that the later-enacted Section 1278.5(h) trumps whatever prohibition against compelled disclosure of peer review testimony exists under Section 1157? Section 1157 precludes compelled testimony about “the proceedings and records” of bodies such as peer review committees, but expressly allows voluntary testimony about such events “by any person in attendance” thereat.

This difference between the two statutes may be more noise than substance. While Section 1157 does preclude compelled discovery or testimony about peer review proceedings and thus seems to conflict with Section 1278.5(h), which suggests that such material is protected only against compulsory production while the peer review hearing goes on, it seems likely that in defending against a whistleblower action, peer review panel members would want to offer testimony to the effect that those proceedings were well founded and fairly conducted. Section 1157 allows them to do so. It is difficult to conceive of circumstances where peer re-

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view members would not want to defend their process against such accusations of unfairness and retaliation. That seems to make this part of Section 1287.5 substantially moot except for timing questions.

Immunity: State and Federal

The Fahlen court noted that both federal and state law provide for immunity of peer review body members. The federal Health Care Quality Improvement Act (HCQIA),21 provides extensive immunity from "damages . . . under the law . . . of any [s]tate" for actions by a peer review body, and case law under this provision protects the peer review parties if they acted in the reasonable belief that their actions protected patients—a question to which the reviewer’s correctness or bad faith is irrelevant as long as an "objective inquiry" "considering all the circumstances" so determines.22

The Fahlen court called specific attention to the fact that Cal. Civ. Code § 43.7 limits immunity to actions taken "without malice." But Section 11111(a) extends immunity (with a not immediately relevant exception) for all fairly conducted and properly reported "professional review actions" to the review body, its members and staff, and anyone "who participates with or assists [that] body with its action." But the standards for immunized professional review actions include among other things the "reasonable belief that the action was in the furtherance of quality health care" and "in the reasonable belief that the action was warranted by the facts known . . .".23 It thus seems that the immunity provisions both under the HCQIA and under Section 43.7 require a showing of some measure of good faith. Under the HCQIA, this means reasonable belief in the need for and the reasonableness of the actions taken, and under Section 43.7, a lack of malice is required. Both standards may well raise issues to be determined by a jury on disputed facts. Despite these potentially applicable immunities, Section 1278.5(g) specifically provides that a health-care worker who has a case under that section "shall be entitled to reimbursement for lost income" as well as legal fees and "any remedy deemed warranted by the court"—an open ended formula if there ever was one.

The Fahlen court seemed to suggest that even if the HCQIA does apply, it doesn’t foreclose all remedies—leaving open what might still be available. How either party—a plaintiff or defendant in a whistleblower case—can make these respective showings in a context of somewhat different immunity provisions and of evidentiary difficulties caused both by the discovery delays under Section 1278.5(h) and by whatever the Section 1157 limitations may mean in a specific context, are questions left for answer on another day. The Fahlen court referred to these and related problems but provided no hint of any answers.24

Non-Hospital Settings

The duality highlighted by Fahlen also exists in non-hospital settings. Peer reviews are authorized for a large variety of health care environments in addition to acute care hospitals. Thus, Section 1157 provides for protection of the peer review records of “organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker, professional clinical counselor or veterinary staffs” 25 as well as those of peer review committees defined for half a page in Cal. Bus. & Prof. Code § 805(1)(B). Realistically, this duality extends throughout organized institutional health care bodies, so that the reverberations of Fahlen are likely to reach into all areas of the health care provider segment in California.

Can Both Sides Prevail?

Absolutely. It seems perfectly logical that one tribunal—the peer review process—may find that a physician has performed poorly and must be disciplined for the safety of patients, while a separate tribunal—a jury panel—will find that this discipline was, at least in some part,25 retaliation for the physician’s complaints about "suspected unsafe patient care and conditions." The same facts may be interpreted one way by the peer review panel and the opposite way by the jury, particularly since the questions for which a first judicial decision would otherwise be deemed preclusive will likely not even be the same or even parallel: Did the physician represent a danger to patient care? And did the discipline imposed on him have a basis in any considerations at all other than purely questions of proper patient care, i.e., recrimination or retaliation? Yet, was the physician also a true whistleblower?

The California Legislature has created these two equally worthy but seemingly inconsistent rights. Both rights have strong and valid foundations in the public interest. Surely, both rights have been abused, and in light of Fahlen’s acknowledgment of this legislative inconsistency they are likely to be further abused as time goes on. But this decision does not change hospitals’ well-established right to discipline physicians’ disruptive conduct and even to remove them from their staffs when such actions are properly motivated as necessary to protect patient care, and not as retaliation for a complaint or grievance. Fahlen should not insulate abusive physicians from the consequences of their behavior.

While this decision lays out significant protections for whistleblowing activities, its basic premise is that these two considerations, or rights, will exist side by side. It appears that in the future, just as in the past, there will be both bad doctors who must be disciplined or removed, and legitimate whistleblowers who serve a public interest by calling attention to matters that can and should be improved.

There will be many problems and many uncertainties in the wake of this seminal decision. Eventually there may well have to be some structural changes that avoid some of the ambiguities and dualities outlined in this article. But that will take considerable time. Meanwhile, our world has become more complicated.

Conclusion

Time will tell what effect the whistleblower statute, and its acknowledgment by the Fahlen case, will have on the well-being of both sides—the need to maintain

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21 42 U.S.C. § 11101 et seq.
23 42 U.S.C. §§ 11112(a)(1) and (4).
competence and integrity within the hospital medical staffs, and the need to protect those who legitimately raise issues of misconduct or mismanagement that warrant attention. But for now, it seems safe to predict that there will be many Fahlen-type cases and that hospital and other peer group discipline, while a necessary process for dealing with those bad and disruptive doctors who threaten patient safety, has become more difficult, time consuming and expensive.