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CIVIL LITIGATION UPDATES

Issue: How California's Patient's Right To Know Act [SB1448] Assists The Defense of SIU And Other Medical-Legal Fraud Litigation.

PATIENT'S RIGHT TO KNOW ACT

In 2018 California passed the "Patient's Right To Know Act" [SB1448] designed to require certain health care providers to affirmatively disclose to their patients any disciplinary action against them by the Medical Board of California. Though the Medical Board of California and the State Board of Chiropractic Examiners ["Board"] routinely post on their websites the names of doctors and chiropractors disciplined by these agencies, for the most part their patients are unaware of the existence of these websites. As a result, doctors and chiropractors disciplined by these Boards have been able to hide in plain sight.

Until the enactment of the Patient's Right To Know Act [SB 1448] chiropractors and doctors were not obligated to affirmatively disclose their disciplinary record to their patients. However, under SB 1448 chiropractors [as well as doctors (including radiologists), surgeons, osteopaths and acupuncturist] are now affirmatively required to provide this information to their patients. The main provisions of this new disclosure law became effective **July 1, 2019**.

PRACTICAL EFFECT OF THIS NEW DISCLOSURE LAW

We have known for many years that doctors, chiropractors, surgeons and other medical professionals can be publically disciplined by the Board. During the depositions of these medical practitioners this information is openly revealed and discussed. Though these charges and the subsequent disciplinary actions taken against these doctors and chiropractors significantly reduce their credibility during trial, the patient-plaintiffs usually deny ever knowing that their doctors and chiropractors were ever disciplined. Additionally, the *other* doctors and healthcare providers [except hospitals] associated with the plaintiff's case have also been able to distance themselves from these tainted doctors and chiropractors. In most of these types of cases plaintiff's counsel have been successful in distancing the plaintiff and ultimately the entire case from these disciplined doctors and chiropractors. Consequently, defense attorneys have struggled to draw a direct link between the disciplined chiropractor, the plaintiff and the entire case.

SB 1448 now *requires* chiropractors [doctors] to affirmatively disclose to the plaintiff [patient] the fact that they have a disciplinary record. Since the chiropractor is now required to disclose this information to the plaintiff, plaintiffs will find it more difficult to effectively feign ignorance of the chiropractor's disciplinary record. Under this new disclosure law chiropractors are required to prepare a separate disclosure sheet identifying the chiropractor, the charge, length of probation and the means of obtaining further information. In order to ensure that the patient is

aware of this information the patient-plaintiff must now sign the disclosure form. As a result, defense counsel will now be in a stronger position to establish a direct link between the plaintiff and the tainted chiropractor.

Under this new mandatory disclosure act, during the deposition of the chiropractor, defense counsel will be able to confirm that the chiropractor is aware of the "Patient's Right To Know Act" and that the chiropractor has created a procedure for the communication of this information to the patient-plaintiff. We then proceed to walk the chiropractor through the ways in which his/her office has created a mechanism to inform the patients of the fact that the chiropractor was subject to disciplinary action. We anticipate that these chiropractors will set up reliably means to verify and confirm that their patients have been, in fact, informed of these disciplinary actions.[1] After having established that the chiropractor informed the plaintiff of his/her disciplinary record, defense counsel will proceed to take the deposition of the plaintiff. We anticipate that the plaintiff will likely try to assert he/she was completely unaware their chiropractor had been disciplined. But defense counsel will be able to corner the plaintiff into either asserting that the chiropractor *never* disclosed this fact to the plaintiff [a violation of SB 1448 and very difficult to prove if the plaintiff signed the disclosure form] or that the plaintiff *forgot* whether or not he/she was told of this information or signed the disclosure form. Based upon the provisions of this new disclosure law, it is unlikely plaintiff's counsel will be able to effectively argue to the jury that the plaintiff was unaware of the chiropractor's disciplinary record. Thus this new law requiring certain health care providers to affirmatively disclose their disciplinary record to the plaintiff-patient allows defense counsel to create a direct link between this disciplinary action, the plaintiff and ultimately to the entire case.

CONCLUSION

"Patient's Right To Know Act" became effective July 1, 2019. Though this act was designed to protect patients by requiring certain health care providers to disclose to these patients any disciplinary action against them, it has also had the effect of forever linking these tainted doctors and chiropractors to the plaintiff and ultimately the entire case.

[1] Since the main purpose of SB 1448 is to ensure that the patients are actually informed, the failure to implement such institutional administrative means of communication puts the chiropractor in legal jeopardy. Though violation of the law is not a separate criminal action, chiropractors, themselves, on probation are not likely to run the risk of violating the terms of probation and having their license suspended.