Memorandum

Date: January 3, 2022

To: Juan Arguello
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Medical and Psychiatric Clinical Operations

From: Elizabeth G. O'Donnell
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Subject: **Circumstances Under Which Legal Representation and/or Indemnity Will Be Provided to Clinical Staff**

Question Presented; Under what circumstances will DSH provide clinical staff with representation and/or indemnity in legal matters.

Short Answer: The question presented implicates three separate scenarios: (1) civil litigation in which past or present employees are named; (2) civil litigation in which contract employees are named; and (3) administrative inquiries and hearings.

(1) DSH will provide a defense to both past and present clinical staff employed by DSH in civil litigation matters in which they are named when that litigation arises from the course and scope of their employment.

(2) DSH will not provide a defense to contract clinical staff. They are contractually obligated to maintain their own insurance. However, DSH will cooperate with those contract staff to the extent that it is able, in providing information and access to the counsel retained by the contract employee or the contract employee's insurance carrier.

(3) DSH will not provide legal representation or defense to clinical staff in any administrative inquiries or hearings, such as those made or held by licensing boards.

Analysis

It should be noted initially that there is a difference between defense and indemnity, although they are usually dealt with at the same time. "Defense" refers to providing or paying for an attorney to represent the employee in the litigation and "indemnity" refers to payment of any judgment or settlement reached in the matter. They are addressed separately below.

For the purposes of the below information, an "employee" of a Department of the State of California (Department) is defined as "an officer, … employee, or servant, whether or not compensated, but does not include an independent contractor." (Govt. Code § 810.2.)

Defense of Past and Present Employees in Civil Litigation – Representation Provided

Pursuant to California Government Code section 995, with some exceptions, "upon request of an employee or former employee," the Department of the State Hospitals, shall provide for the defense of "any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity." There are both general and specific exceptions to this obligation, which are discussed below.

One general exception to this obligation is found in Government Code section 995.2 which provides that a Department may refuse to provide a defense in any action or proceeding if any of the following conditions are present:

1. The act or omission was not within the scope of his or her employment.
2. The employee acted or failed to act because of actual fraud, corruption, or actual malice.
3. The defense of the action or proceeding would create a specific conflict of interest between the Department and the employee or former employee. "Specific conflict of interest" means a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the Department.

If a Department provides a defense and an actual or specific conflict of interest later becomes apparent, the Department may withdraw its

defense and refuse to further provide a defense, specifying the reason why. (Govt. Code § 995.2, sub. (c).)

Pursuant to Government Code section 996, a public agency may provide for a defense of an employee or former employee by:

1. Using its own attorney or by employing other counsel for the purpose; or
2. Purchasing insurance which requires that the insurer provide the defense.

It should be noted that while Government Code allows a public agency to provide a defense using "its own attorneys", it also requires Department of the State of California to engage the Attorney General's Office for the purpose of providing a defense of the Department or its employees and former employees, unless the Attorney General authorizes otherwise. (Govt. Code §§ 11040 and 11042 sub (b).) DSH does not purchase insurance on behalf of its employees as referenced in the second option above.

Regardless of who provides the defense, the costs of providing a defense are to be borne by the public entity and cannot be recovered from the employee of former employee. (Govt. Code § 996.)

Defense of Past and Present <u>Contract</u> Employees in Civil Litigation – Representation Not Provided

As noted in Government section 810.2 above, independent contractors are not considered employees for the purposes of the duty to provide a defense. For this reason, as part of the contracting process, DSH requires licensed independent contractors such as doctors, psychologists and nurses, to carry their own malpractice insurance.

On those occasions where a contract physician, psychologist or nurse is named in litigation in connection with providing services under the contract, they are advised to alert their malpractice carrier regarding the suit in order to have counsel appointed for them at the cost of the malpractice carrier. [1]

[1] There have been occasions where the private insurance carrier for the contract healthcare provider has denied coverage when the patient has couched the complaint in terms of a civil rights violation versus malpractice. In those instance, DSH Legal can provide healthcare providers with a letter to send their carrier which explains that the claim, while called a civil rights claim, should be covered since the standard applicable to these claims is "gross negligence" or lack of professional judgment as opposed to intentional deliberate indifference which CDCR faces under the 8th Amendment.

As a practical matter, if the Attorney General's Office is representing employees or DSH in the same litigation it will usually coordinate with the counsel hired by the contractor to ensure that the attorney or the contractor can obtain the information needed to defend the lawsuit.

Defense of Past and Present Employees in Administrative Inquiries or Actions/Accusations - Representation Not Provided

While section 995 makes reference to a "proceeding" brought against an employee, pursuant to Government Code section 995.6, a Department is specifically not required to provide for the defense of an administrative proceeding, such as a complaint brought by a licensing board, against an employee or former employee.

While Government Code section 995.6 sets out conditions under which the Department *may* provide representation, as a matter of policy DSH does not provide representation or a defense to its licensed personnel when they are faced with licensing board complaints/ inquiries or Accusations[2] due the nature of the licenses at issue, the nature of services provided by DSH and the Legal Division, and the costs that would be associated with such an act.

First, it is the obligation of the licensed individual to keep their license in good standing as a condition of employment. Thus, the licensee has a duty to take all acts necessary to main the license, not the employer.

In the case of medical or health care services licensing, the various requirements to keep the license in good standing can only be performed or provided by the employee and there are a multitude of factors outside of employment status or acts taken on the job which may affect the status of a license. If at any time the license is not in good standing, it may affect the licensees continued employment.

Second, DSH Legal Division represents DSH and the hospitals, and not the employees. To this end DSH Legal Division handles employee discipline matters and hearings before the State Personnel Board on behalf of DSH *against* employees. As part of this representation DSH

[2] A Complaint consists of a verbal or written complaint made to a Board. An "Accusation" is the formal action of discipline initiated against a license by the Board. Complaints are not public record; Accusations are public record. Complaints will only be converted to Accusations if the investigation conducted by the Board reveals a licensing violation. Most complaints are resolved or closed and do not result in a formal Accusation being filed.

may, and in the past has, been in the position of being the entity that reports a licensing violation to the governing license board.

Finally, and most importantly, were DSH to provide representation of employees before the licensing boards, such representation would involve gaining confidential information from the employee regarding the acts and omissions which are the subject of the complaint or Accusation. Even if a licensing board complaint or inquiry did not lead to an Accusation against the employee's license, *any* derogatory information learned by DSH while representing the licensed employee would trigger an obligation on the part of DSH to institute disciplinary action against that employee. As such, representing the employee in a complaint or Accusation would present a conflict of interest for DSH since it would be required to both represent the licensee *and* discipline the licensee for what it learned.

As noted above, if DSH did provide representation in administrative hearings, pursuant to Government Code 995.6, it could only do so by using its own counsel, hiring counsel or purchasing insurance for each of its Clinical Staff. Because using its own counsel would result in a conflict of interest, DSH would be required to use the services of the Attorney General's Office. However, the Attorney General's Office represents the various licensing Board in formal disciple or Accusations <u>against</u> health care licensees. Because of this, it cannot also represent the licensees in administrative investigation or Accusations brought by the Board.

Neither DSH attorneys not the Attorney General's Office can represent licensees before the Boards, and DSH is not allocated a budget item for the purchase of either outside counsel services or the purchase of insurance for all of its licensed personnel which might cover administrative matters. For this reason, licensees must self-represent or obtain their own counsel at their own cost.

In the event that an employee is contacted by a licensing Board requesting information regarding a patient complaint, DSH recommends that the licensee either inquire of his or her union if assistance can be provided by the union, or if there is no union, to either respond to the Board by letter or retain counsel at his or her own costs to communicate with the Board. Many inquiries can be resolved by a simple letter. It should be noted that cooperation with the governing board is a condition of the license and therefore no inquiries should be ignored since that may result in penalties against the license, regardless of the merit of the underlying complaint.

When the Board seeks information relative to a complaint made by a patient, any written response to the Board should begin with an explanation of the patient population at the Hospital so that the Board is aware of context of the complaint. Assuming that the Board has provided an ROI, the licensee may then respond to the Board inquiry and complaint with information specific to the complaining patient. In this situation the Hospital should make every effort to provide the licenses with access to the patient's records, if they are no longer the treating professional, and/or make witnesses available for the licensee to present in written or interview form. Only the hospital, however, and not the license, should provide the Board with any of the patient's medical records since they are the property of the hospital and not the licensee.

Indemnity of Past and Present Employees in Civil Litigation

Government Code section 825 states that if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity shall pay any judgment or settlement of the claim or action to which the public entity has agreed. If the public entity has defended under a reservation of rights, it must pay once it has been established that the judgment or compromise meets the terms of the reservation. However, no Department may indemnify an employee for an award of punitive damages unless the legislature makes specific findings and authorizes such payment.

As it relates to DSH, this section is modified by operation of Government Code section 854.8 which immunizes DSH from liability for damages arising out of a claim of injury to or by a patient. (Govt. Code §854.8 sub (a).) This immunity applies to DSH even in circumstances where the employee may not have immunity such as identified under section 854.8 subdivision (d).

While granting an immunity to DSH, Government Code section 854.8 subdivision (d) also notes that the immunity does not extend to DSH's employees who *can* be held liable for injury proximately caused by their negligent or wrongful act or omission. This section also makes it clear that DSH may but is not required to indemnify any public employee, for any judgment based on a claim against the employee for malpractice arising from an act or omission in the scope of his employment, unless it agrees to do so it must do so.

DSH Special Order 715, effective July 1, 1995, establishes the DSH **will** defend and indemnify its former and current employees for malpractice

claims arising from an act or omission in the scope of their employment. Thus, while DSH does not have a legal obligation to indemnify its employees for judgment of settlement in claims of medical/healing arts malpractice, it has chosen to do so.

One source of some confusion regarding indemnity provided to healthcare providers may be caused by Government Code section 827. That section calls for the State to indemnify certain healthcare providers against civil rights allegations, only if the healthcare provider maintains its own malpractice insurance. It states:

> A provider of health care, as defined in Section 56.05 of the Civil Code, its officers, employees, agents, and subcontractors, who are defended by the Attorney General pursuant to Section 12511.5, or other legal counsel provided by the state, shall be indemnified in accordance with Section 825, subject to the same conditions and limitations applicable to state employees, except that no provider of health care shall be indemnified in a civil rights action unless the health care provider maintains insurance for professional negligence. To the extent that negligence constitutes the basis of liability of the health care provider, the provider's private insurance shall be the source of recovery.

However, a reading of the statute itself makes it clear that it applies to contractors, not employees, and further, only relates to those individuals defended by the Attorney General pursuant Government Code section 12511.5. Government Code section 12511.5 authorizes the state to provide a defense to contract health care providers who contract with Department of Corrections in civil rights lawsuits but only if the contractor has its own malpractice insurance. Thus, this section is inapplicable to DSH.

As noted above, DSH will not indemnify an employee for an award of punitive damages unless the legislature makes specific findings and authorizes such payment.

Questions

Any question as to whether a defense or indemnity will be provided to an employee under specific circumstances should be directed to the DSH Legal Division and no representations should be made by staff or supervisors.