How the Law Applies to Conscience-Based Objections in the ICU

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Exception
Dispensation

Surrogate
Medical board
DA / AG
Civil
Criminal
Disciplinary

Hospital
Duty to accommodate
Power to enforce own CBO

Surrogate
Medical board
DA / AG

Treatment Relationship

NO treatment relationship
No duty

Unless
Invidious discrimination
(e.g. race, disability)
Statutory duty
(e.g. EMTALA)
Existing treatment relationship

Continue to treat

Until relationship terminated

Patient fires
Need ends
Clinician ends

Termination (typical)
Sufficient notice to find alternative
Medical Boards often require 30 days

Termination (ICU)
“free to refuse . . . upon providing reasonable assurances that basic treatment and care will continue”

Couch (N.J.A.D. 2000)

“A licensee shall not terminate . . . relationship . . . where . . . no other licensee is currently able to provide the type of . . . services . . . licensee is providing . . .”

1. Abandonment law
3. Conscience clauses

State HCDAs

“Except as provided in subsections (e) and (f), … provider… shall … [c]omply …”
16 Del. Code 2508(d)

“… provider … may decline to comply … contrary to generally accepted health care standards . . . .”
16 Del. Code 2508(f)
“...provider may decline to comply... for reasons of conscience”
16 Del. Code 2508(e)

“not subject to civil or criminal liability or to discipline for... [d]eclining to comply”
16 Del. Code 2510(a)(5)

“[If] decline... provide continuing care... until a transfer can be effected”
16 Del. Code 2508(g)(2)

BUT

Want to refuse
Try to transfer

No transfer
Must comply
“Provide continuing care . . . until a transfer can be accomplished OR until it appears that a transfer cannot be accomplished.”

Cal. Prob. Code 4736(c)

Want to refuse

Try to transfer

No transfer

Comply until transfer looks impossible

“If transfer . . . is impossible, the provision of life-sustaining treatment . . . may not subject . . . provider to . . . sanction . . . .”

20 Pa. Stat. 5424(d)
Want to refuse
Try to transfer

No transfer
May provide LSMT

Negative  Positive

Abandonment
HCDA’s

Conscience Clauses
All “healthcare services”

Counsel, advise, perform, assist

Treat ‘til transfer

Right to refuse
Right to block
Right to obstruct

“to the extent that patient access . . . is not compromised”
“No strings” conscience clauses

No treat ‘til transfer

No duty to refer


H.B. 279 (2013) (over veto)

L.B. 564 (2013)

Hospital Duties

“identify, in writing, as soon as practicable ... declination to provide a service”

1 of 3
Fed Law
“unlawful . . . to discriminate . . . terms, conditions . . . of employment, because of . . . religion . . .”

Reasonable accommodation

De minimus burden

2 of 3
Fed Law

Church Amendment
1973
“No entity . . . may discriminate in the employment, . . . or extension of staff or other privileges . . . because he performed or assisted . . . refused . . . any lawful health service . . . on the grounds . . . contrary to his religious beliefs or moral convictions . . .”
Compelling state interest

Least restrictive alternative

208 federal government hospitals

State law

“unlawful . . . discriminate . . . hiring, promotion . . . staff appointment . . . privileges . . . because of . . . conscientious refusal . . .”
State RFRA

1045 state government hospitals

Hospital CBO

15% U.S. hospital employees (500,000)
<table>
<thead>
<tr>
<th>Refusing Individual</th>
<th>Refusing Institution</th>
<th>Willing Institution</th>
</tr>
</thead>
<tbody>
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<td>Refusing Individual</td>
<td>No conflict</td>
<td>Individual wins</td>
</tr>
<tr>
<td>Willing Individual</td>
<td>Institution wins</td>
<td>No conflict</td>
</tr>
</tbody>
</table>

**Diagrams:**
- **CANH PSU:**

- **Table:**

- **Refusing Individual:**
  - No conflict
  - Institution wins
- **Willing Individual:**
  - No conflict
  - Institution wins

- **Refusing Institution:**
  - Individual wins
  - Individual wins

- **Willing Institution:**
  - No conflict
  - Institution wins

T.M. Pope, *Conscientious Objection*, 17 LAHEY CLINIC MED. ETHICS J. 6-7 (Winter 2011).