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

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American Thoracic Society
Philadelphia • May 21, 2013

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Exception

Dispensation

Surrogate

Medical board

DA / AG

Civil

Criminal

Disciplinary

Hospital

Duty to accommodate

Power to enforce own CBO

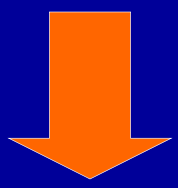
Surrogate

Medical board

DA / AG

Treatment Relationship

NO treatment relationship



No duty

Unless

Invidious discrimination
(e.g. race, disability)

Statutory duty
(e.g. EMTALA)

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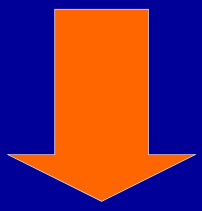
Existing treatment relationship



Continue to treat

Until relationship terminated

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Patient fires

Need ends

Clinician ends

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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)

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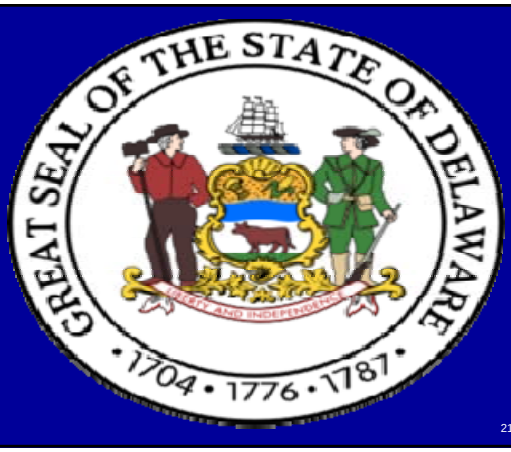
"[A] licensee **shall not terminate** . . . relationship . . . [w]here . . . no other licensee is currently able to provide the type of . . . services . . . licensee is providing . . . ."

N.J. Bd. Med. Exam. 13:35-6.22

1. Abandonment law
2. Healthcare Decisions Acts
3. Conscience clauses

State HCDAs



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"Except as provided in subsections (e) and (f), . . . provider. . . **shall . . . [c]omply . . .**"

16 Del. Code 2508(d)

Treatment relationship

Follow surrogate

". . . 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"

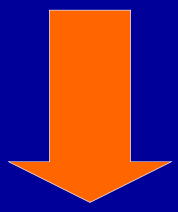
16 Del. Code 2510(a)(5)

BUT

"[If] decline ... provide continuing care ... **until a transfer can be effected**

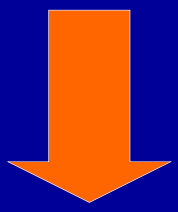
16 Del. Code 2508(g)(2)

Want to refuse



Try to transfer

No transfer

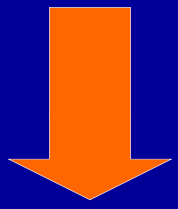


Must comply

"Provide continuing care . . . until a transfer can be accomplished **OR** until it **appears** that a transfer **cannot** be accomplished."

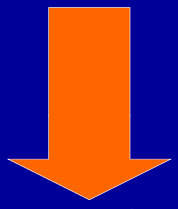
Cal. Prob. Code 4736(c)

Want to refuse



Try to transfer

No transfer



Comply until transfer looks impossible

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"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

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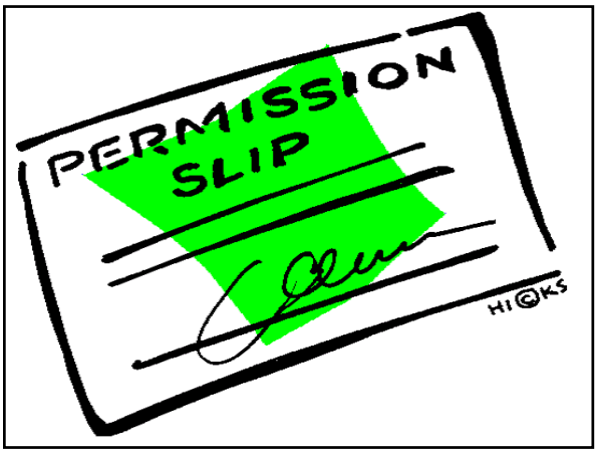
Conscience Clauses

All "healthcare services"

Counsel, advise, perform, assist



Treat 'til transfer

Right to refuse

~~Right to block~~

~~Right to obstruct~~

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"**to the extent** that patient access . . . is not compromised"

La. Rev. Stat. §1299.35.9

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"No strings" conscience clauses

No treat 'til transfer

No duty to refer

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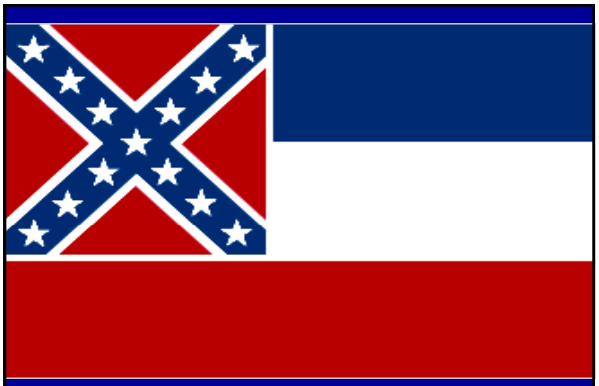

Miss. Code 41-107-5 (2004)

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

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L.B. 564 (2013)

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Mich. S.B. 136 (2013)

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MHA
MICHIGAN HEALTH & HOSPITAL ASSOCIATION

MICHIGAN HOSPICE
& PALLIATIVE CARE ORGANIZATION

Michigan Nurses Association
An Affiliate of National Nurses United

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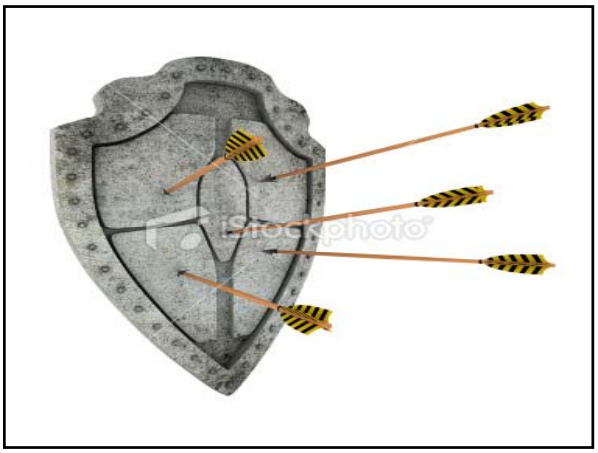

Hospital Duties

"identify, **in writing**, as **soon as practicable** . . . declination to provide a service"

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1 of 3

Fed Law

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"unlawful . . . to discriminate . . . terms, conditions . . . of employment, **because of . . . religion** . . ."

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Reasonable accommodation

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De minimus burden

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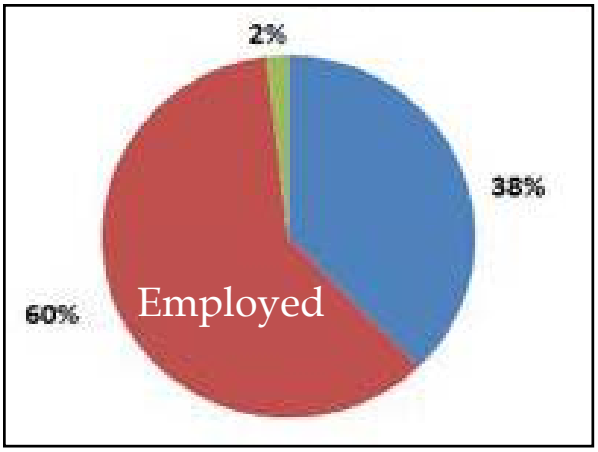

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Fed Law

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Church Amendment

1973

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"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 . . . ."

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DEPARTMENT OF HEALTH & HUMAN SERVICES·USA

Office for Civil Rights

113TH CONGRESS
1ST SESSION

H. R. 940

To amend the Patient Protection and Affordable Care Act to protect rights of conscience with regard to requirements for coverage of specific items and services, to amend the Public Health Service Act to prohibit certain abortion-related discrimination in governmental activities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 2013

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RFRA

Fed Law

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Compelling state interest

Least restrictive alternative

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208

federal government hospitals

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State law

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1 of 2

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"unlawful . . . discriminate . . . hiring, promotion . . . staff appointment . . . privileges . . . because of . . . conscientious refusal . . ."

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State RFRA

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1045

state government hospitals

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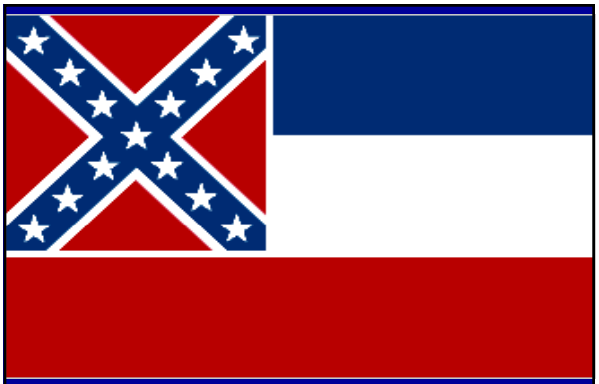
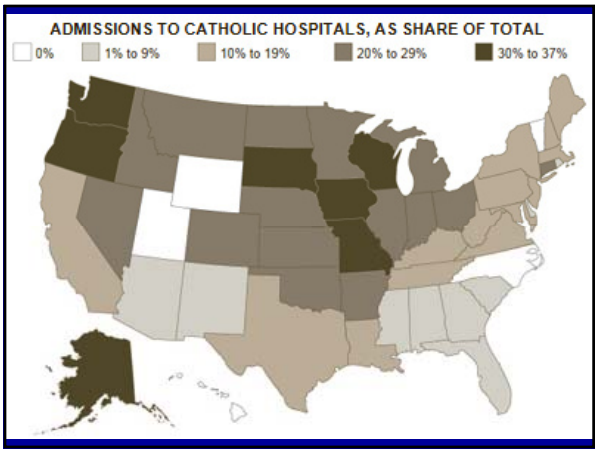


Miss. Code 41-107-5 (2004)

Hospital CBO



15% U.S. hospital employees (500,000)

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CANH PSU

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	Refusing Institution	Willing Institution
Refusing Individual	No conflict	Individual wins
Willing Individual	Institution wins	No conflict

	Refusing Institution	Willing Institution
Refusing Individual	No conflict	Individual wins
Willing Individual	Institution wins	No conflict

	Refusing Institution	Willing Institution
Refusing Individual	[redacted]	Individual wins
Willing Individual	Institution wins	[redacted]

	Refusing Institution	Willing Institution
Refusing Individual	[redacted]	Individual wins
Willing Individual	Institution wins	[redacted]

	Refusing Institution	Willing Institution
Refusing Individual	[redacted]	Individual wins
Willing Individual	Institution wins	[redacted]

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T.M. Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal,* 21(2) J. CLINICAL ETHICS 163-180 (2010).

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

E. Sepper, *Taking Conscience Seriously*, 98 VIRGINIA L. REV. 1501-1575 (2012).

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