

# *Laguna Honda Hospital's Whistleblower Retaliation*

## **The \$750,000 Wrongful Termination Affair**

by Patrick Monette-Shaw

Three years after jointly filing three whistleblower complaints with his colleague Dr. Maria Rivero, Dr. Derek Kerr's wrongful termination settlement agreement was finally approved on second reading by San Francisco's Board of Supervisors on March 26, awarding him \$750,000 in monetary damages and other non-monetary awards.

Kerr's settlement is one of the largest pre-trial (out-of-court) settlements in San Francisco history, although post-trial settlements have been larger.

Like many great mysteries, the great Laguna Honda Hospital Patient Gift Fund scandal of 2010 started with some curiosity, ethical concerns, and a compelling public-interest question: If the fund was nearing "bankruptcy," what had happened to the money?

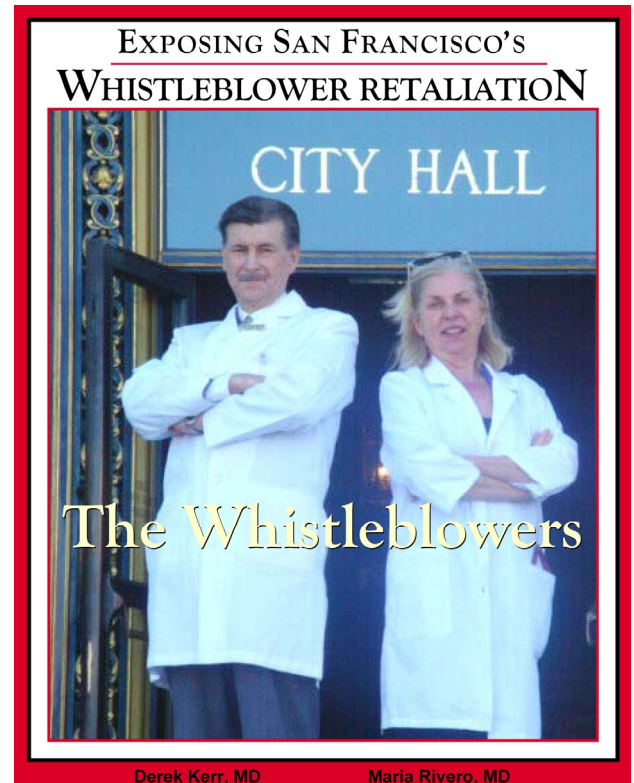
When former Laguna Honda physicians Kerr and Rivero put on their detective hats, neither expected that the age old question "show us the money" would quickly result in prompt retaliation, harassment, and wrongful termination. Neither did they expect Kerr would eventually win the largest pre-trial settlement in City history.

At the outset of their sleuthing, they believed our democracy functions only when citizens know what our government is doing. Believing public participation is essential to our democratic process, the two doctors take seriously their role to speak as patient advocates.

The sordid patient gift fund mystery started with a classic example of mismanagement over a small issue — reimbursement to Dr. Rivero for a mere \$100 she had spent for tacos for LHH's Spanish Focus ward in September 2009. The taco luncheon was to celebrate Fiestas Patrias — Latin America's Independence Day — on a ward where the majority of patients had various forms of dementia. Told that the \$2 million gift fund was nearing insolvency and couldn't reimburse her, Rivero and Kerr became gumshoes when they requested and began researching 10 years of gift fund public records on October 31, 2009.

After examining thousands of pages of public records and placing serial records requests, the pair felt they had no ethical choice but to file an Ethics complaint on March 2, 2010, which clearly documented mismanagement of the patient gift fund. Just hours after submitting copies of their whistleblower gift fund complaint with the Ethics Commission on March 4, it reached the District Attorney and retaliation against them was set in motion, after they had simply exercised their First Amendment rights to free speech.

When San Francisco Department of Public Health officials wrongly retaliated by notifying Kerr orally on Friday, March 5, 2010 that his employment would be terminated, the officials had to have done so willfully. The officials should have known that they would be violating the First and Fourteenth Amendments to the U.S. constitution,



**Terminally Wrong:** Retaliation against Laguna Honda doctors reveals how the City does business.

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other Federal law, at least three State laws, and San Francisco’s own Administrative Code that prohibits retaliation.

If the City had hoped to silence Kerr by firing him, the retaliation backfired, leading the whistleblower doctor to not only speak out more forcefully, the retaliation led to a huge settlement when Kerr prevailed in his wrongful-termination lawsuit.

As Dr. Kerr and Dr. Rivero wrote in their [July 2012 Westside Observer](#) article, “Secret Investigations,” whistleblowers should not be silenced in the resolution of the alleged misconduct they risked their careers to challenge. But that’s exactly what the City of San Francisco attempted to do: To silence the pair of doctors.

When Dr. Kerr and Dr. Rivero filed a trio of Ethics complaints, they believed that a collection of laws would protect them from retaliation. They believed that their fundamental First Amendment rights to free speech and their Fourteenth Amendment rights to due process would protect them from exposing fraud, waste, and corruption. They believed 42 U.S.C. §1983, which provides protections for citizen’s injured by deprivation of Constitutional rights and which provides redress for violations of due process, would help protect them. They hoped that the federal *Whistleblower Protection Enhancement Act of 2012* might help protect them.

They believed that California Government Code §53298, California Health and Safety Code §1432, and California Labor Code §1102.5 — which each provide separate prohibitions against employee retaliation — would protect them.

And they believed the letter of the law in San Francisco Administration Code §4.115, *Protection of Whistleblowers*, which clearly prohibits termination, demotion, or suspension of City employees as retaliation for reporting waste, fraud, and inefficiencies in City government to the Ethics Commission, City Controller, District Attorney, or City Attorney.

Kerr and Rivero were wrong. None of these so-called “laws” ended up protecting them, and Kerr was forced to sue after being wrongfully terminated.

“I didn’t want to sue the City,” [Kerr testified](#) to the Board of Supervisors Rules Committee on March 7, 2013. “But Dr. Maria Rivero and I stumbled upon wrongdoing involving Laguna Honda Hospital’s CEO that we couldn’t ignore,” he testified. [Editor’s Note: Kerr was diplomatically referring to Mivic Hirose, LHH’s then- and current-CEO.]

### **A Public Spanking: Kerr’s Settlement Award**

Kerr and Rivero were represented by the law firm of Kochan & Stephenson — Deborah Kochan and Mathew Stephenson — whose law practice is devoted entirely to representing employees who have suffered discrimination, harassment, retaliation, or — as in Dr. Kerr’s case — retribution for whistleblowing.

In addition to Kerr’s \$750,000 settlement award, there were a number of non-monetary concessions that amount to a public spanking and public apology that are important to him, including:

1. A retraction of the “Statement Concerning the Laguna Honda Gift Fund” posted on LHH’s website by Katz and Hirose on September 2, 2010 alluding to Kerr and Rivero as “detractors” who had intentionally made false or inaccurate statements regarding the patient gift fund, since the [September 2010](#) letter presented incorrect representations of the two doctors. The retraction will be via a notice signed by the Health Department’s current director, Barbara Garcia, to be posted on DPH’s web site within 10 business days following final approval of the settlement by the Board of Supervisors on March 26, for a minimum 10-month period.

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2. LHH must install a plaque as soon as practicable in a clearly visible location, recognizing Kerr's contributions to the hospital generally, and his contributions to LHH's Hospice and Palliative Care Program in particular, in either LHH's new Hospice or the gazebo/garden area, once it is completed.
3. LHH must provide Kerr, within 10 business days of the final settlement approval, a commendation letter signed by defendant Colleen Riley, MD, and LHH's Chief of Staff, Steven Thompson, MD, stating that Kerr was a physician in good standing and widely respected by his LHH colleagues for his skills and accomplishments as a hospice and palliative care physician, and commending his work establishing and running LHH's hospice and palliative care program.
4. LHH's CEO, Mivic [Hirose must announce](#) at both the next scheduled meeting of the Health Commission and the next meeting of LHH's 40-member Senior Staff/Leadership Forum, both the pending installation of Kerr's plaque and read into the minutes the letter signed by Riley and Thompson.
5. The City must provide training to LHH's Executive Committee regarding whistleblower rights, and First Amendment rights, of City Employees.

For their part, Kerr's lawyers Kochan and Stephenson, note: "In our experience, negotiating non-monetary terms as part of a settlement is relatively rare. But here, we believed it very important that LHH's administration publicly acknowledge the lies they told about Drs. Kerr and Rivero, as well as acknowledge the extraordinary service the two MD's provided to the community during their long and distinguished careers at LHH."

As for the two doctors, the monetary and non-monetary awards help convey that their complaints had all along been valid, and that wrongful, retaliatory termination and harassment had ensued.

## The Defendants

Dr. Kerr — a former physician in good standing at Laguna Honda Hospital for over 21 years — filed a lawsuit seeking monetary and non-monetary damages, in part, to recover his good name.

Named as defendants in his lawsuit were the City and County of San Francisco and three named individuals — Dr. Mitchell Katz, former Director of Public Health; Mivic Hirose, RN, Laguna Honda Hospital's Executive Administrator; and Colleen Riley, MD, Laguna Honda Hospital's Medical Director.

Legal documents filed in the case show the defendants may have been motivated by retaliatory animus towards Kerr. They subjected him to retaliation for having brought complaints related to the care of patients and services at LHH. Had Kerr's case proceeded to trial, it is very likely a jury would have concluded the defendants had been highly motivated to silence Kerr by subjecting him to retaliatory termination — and a jury would likely have awarded him much more than three-quarters of a million dollars, if for no other reason than sympathy for LHH's patients.

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## Basis of Kerr's Lawsuit

Dr. Kerr's "[Complaint for Damages and Demand for Jury Trial](#)" lawsuit filed in San Francisco Superior Court on November 16, 2010 — subsequently transferred to a Federal District Court over First Amendment freedom of speech issues — listed five causes of action for violations of Federal and State law:

- Deprivation of his First Amendment freedom of speech activities;
- Deprivation of due process rights guaranteed by the Fourteenth Amendment;

- Violation of California Government Code §53298 that prohibits reprisals against employees who file complaints regarding gross mismanagement or a significant waste of funds, or an abuse of authority;
- Violation of California’s Health and Safety Code §1432 that prohibits discrimination or retaliation against employees for initiating or participating in proceedings relating to care, services, or conditions of a long-term health facility; and
- Violation of California Labor Code §1102.5 that prohibits retaliation against any employee for disclosing information to a government or law enforcement agency when an employee has reasonable cause to believe that the information discloses a violation of state or federal statutes, or a violation or noncompliance with a state or federal rule or regulation.

Four of the five causes of action noted that the individual defendants participated in, directed, or knew of the retaliatory termination, and they collectively failed to act to prevent it. The causes of action also alleged that the gross retaliation by the individual defendants was done with malice, fraud, or oppression, in reckless disregard of Dr. Kerr’s constitutional rights.

### The Set Up: Pretext for Termination

According to Kerr’s lawyers’ “[\*Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment\*](#),” dated August 9, 2012, there were a number of reasons to suspect the defendants manufactured various pretexts to justify terminating Kerr.

It appears that Dr. Katz and Ms. Hirose had already determined by December 15, 2009 that they were going to lay off Dr. Kerr, hoping to shut him up. They needed a pretext, or pretexts, to do so, since Kerr and Rivero’s Sunshine requests on October 31, 2009 for patient gift fund records had put Katz and Hirose on notice that they were under scrutiny for a host of improper, if not illegal, practices. Hirose had to have known there was a lot at stake over her management, or mismanagement, of the patient gift fund, and that she was likely in deep trouble.

After all, by that point Kerr and Rivero had already filed in September 2009 two Whistleblower complaints about DPH contracts tainted by conflicts of interest, and had put the City on notice with their October 31 request for 10 years of patient gift fund public records that the two whistleblower doctors were serious about investigating the gift fund scandal. The defendants knew Kerr’s and Rivero’s records requests were very serious, and that the two doctors had a demonstrated record of investigating and thoroughly analyzing data. Hirose was on notice that she was under Kerr’s and Rivero’s microscope, and that it could be damaging to Hirose’s career.

Much of the City’s defense regarding Kerr’s termination was pretextual — pretexts the City manufactured to justify his dismissal, but were actually pretexts for retaliation. The pretexts to lay off Kerr included false claims that:

- Kerr was terminated as a mid-year budget savings reduction, claiming a budget crisis. During FY 09-10, DPH had nearly 8,000 employees on its payroll, but only one employee — Dr. Kerr — was terminated, ostensibly to “save money.” Notably, LHH’s Medical Services Department staff increased by 10% after Kerr’s layoff, and the physician who replaced him — Dr. Denis Bouvier — quickly zoomed to being the City’s highest-paid employee, earning \$332,000 that year. In addition, the City added a Clinical Nurse Specialist, Anne Hughes, RN, PhD, to the Hospice’s budget, paying her \$160,000 annually. LHH’s expenses on Hospice, and throughout the hospital, went *up* after Kerr’s “mid-year budget reduction” layoff. Obviously, money wasn’t the problem, but a clear pretext for retaliation.

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- Kerr had limited himself to a 25-patient case load and was unwilling to take on additional patients, even if keeping his job depended on it.
- The hospice physician in the new hospital would have to carry a 60-patient case load, which didn't apply to doctors on admitting wards, such as the Hospice where Kerr was an admitting physician.
- Kerr wouldn't cover wards outside the Hospice, clearly disproven during depositions.
- The hospice would be undergoing a "fundamental program change," which Hirose eventually testified there had never been any discussion about a "program change."
- Kerr was terminated for budgetary reasons, which was false because when Kerr left LHH in June 2010, he was immediately replaced by another budgeted physician.

Another glaring pretext was Hirose's claim that her decision in mid-December 2009 to terminate Kerr was based on information Dr. Riley had provided indicating Kerr was unwilling to take on covering additional Wards.

During depositions, Riley indicated that she hadn't reported to Hirose Kerr's reluctance to take on additional ward coverage until late February 2010, and that she, Riley, had never asked Kerr if he was willing to take on more patients if retaining his job depended on it.

During Hirose's own initial deposition, she was unable to explain the impossibility of knowing in mid-December 2009 an allegation about Kerr from Riley, since Riley testified she had not shared this information with Hirose until late February 2010. The conversation with Riley that Hirose claimed to have relied on to terminate Kerr wouldn't happen for at least a month until after she and Katz had already cooked up a pretext to eliminate Kerr.

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In a follow-up to Hirose's deposition nine months after her first deposition, Hirose still couldn't explain the "timing problem" that had made her explanation to terminate Kerr clearly impossible, given Riley's false claim that Kerr wouldn't take on additional patients. As set-ups and pretexts often are, Hirose's claim that Kerr wouldn't provide additional Ward coverage was completely insane.

### **Depositions: Discovery Mountain**

Given public records in the case, the mountain of evidence against the City obtained during discovery and depositions in Kerr's case was appalling.

During depositions and discovery, one defendant after another was crushed. Kerr's lawyers deposed a dozen or so City employees; the City Attorney, in return, deposed only Kerr and Rivero. The City didn't bother deposing Kerr's union, UAPD, knowing that the union's deposition would likely be damaging against the City. Kerr's lawyers obtained approximately 3,000 pages of documents and issued multiple interrogatories.

Eventually, the City realized how bad their case looked for Laguna Honda and the Department of Public Health after its own witnesses performed poorly during depositions, and when plenty of smoke rose during discovery.

The City stonewalled Kerr's lawsuit for two years, until his case was finally scheduled for jury trial on November 13, 2012. In mid-summer 2012, the City submitted a *Motion for Summary Judgment* that would have effectively dismissed Kerr's case had the motion succeeded. Kerr's lawyers submitted a *Plaintiff's Opposition to the City's Motion for Summary Judgment* on August 9, stating that given the "genuine issues of disputed fact ... the defendants' motion for summary adjudication ... should be denied."

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Judge Claudia Wilken denied the City's *Motion for Summary Judgment* in part and approved it on other parts in a 47-page ruling dated September 6, 2012. [Wilken's Order Granting In Part And Denying In Part Motion For Summary Judgment](#) noted: "Plaintiff has offered sufficient evidence that he disclosed to his government employer possible violations of state or federal law based on the conflicts of interest involving Dr. Ja and Ms. Sherwood in [Kerr and Rivero's] "A Job Half Done" critique, and that this was causally connected to his termination."

Wilken also wrote: "[Kerr's] media and formal complaints about the mismanagement and misuse of the Gift Fund also implicated several state laws ... However, the public records requests related to the Gift Fund did not show any reasonable belief on Plaintiff's part that he was disclosing alleged violations of [several] sections [of California's Business and Professional Code]. The media reports about the Gift Fund were not complaints directed to a government or law enforcement agency, as required to come under the protection of [California Labor Code] section 1102.5(b)."

Wilken's partial denial — which kept Kerr's lawsuit alive and headed to jury trial — suggests the City then knew it had to settle with Kerr or risk a jury's outcome, since it appeared Kerr had a potentially valid case. Only when the City realized it was on notice to proceed to jury trial did it conclude negotiating an equitable settlement with Kerr.

Laughably, the defendants appeared to have argued that Kerr's speech was not protected by the First Amendment because it "did not address matters of public concern," and would not reach the public at large, as if the raid of funds intended for patients didn't concern public donors to the fund. The City also lamely tried to exonerate the defendants by claiming that Kerr's and Rivero's serial requests for gift fund records was not protected speech because it was "nothing more than a request for [public] information." To support its defense, the City ignored that defendant Hirose had lied repeatedly about the status of the Gift Fund as it existed in late 2009, according to legal documents.

The City also attempted to exonerate Director of Public Health, Mitch Katz, claiming Katz wasn't a policymaker "decider," he was simply a decision-maker. Katz had delegated to Hirose the decision of which staff to lay off (terminate), but Kerr's lawyers adroitly noted that layoff decisions were within the sole discretion of the Director of Public Health, Katz, responsibility for which could not be avoided by delegating that decision to Hirose.

The City also attempted to assert that the Civil Service Commission, not the DPH's Department Head, had final policymaking authority to remove Kerr, though that assumption is supported neither by facts nor applicable law, since appointments of doctors are exempt from Civil Service merit system protections and, instead, serve at the pleasure of their appointing authorities.

The defendants conceded that Katz made a deliberate choice fingering Kerr for layoff from among several competing proposals on how to implement mid-year budget reductions. Katz could have, but failed to, rescind Kerr's layoff notice. Instead, Katz participated in, and explicitly supported, Hirose's decision to terminate Kerr.

Commenting on the discovery and deposition process, Kerr's lawyer Deborah Kochan says, "The deceitfulness and small-mindedness exhibited by members of LHH's administration and its Human Resources Department was, at times, breathtaking."

"The City was boxed in by the inconsistent accounts of its own witnesses and the absolute nonsense of some of their testimony on critical issues," adds Kochan's law firm partner, Mathew Stephenson.

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## Acting Under “Color of Law”: A Federal Crime

42 U.S.C. §1983 provides that every person acting under the “color of law” who causes any United States citizen to be deprived of any Constitutional rights shall be liable to the party injured. “Color of law” involves actions taken that superficially appear to be within an individual’s lawful power, but are actually in contravention of the law. Acting under “color of law” is misuse of power, since it involves acting under real or apparent government authority by people who misuse their authority to violate rights guaranteed by federal law. Depriving a person of his or her federal civil rights under color of law is illegal and grounds for a cause of legal action.

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The City acted under the color of law when it deprived Dr. Kerr of his First Amendment rights to freedom of speech. He was terminated, in part, because he had spoken out on various matters of public concern; he had spoken as a private citizen, not as a public employee; and his protected speech was a substantial or motivating factor in the City’s termination of him.

By reaching a settlement agreement with Kerr for monetary and non-monetary damages, the City has effectively acknowledged that Riley, Hirose, and Katz had engaged in misuse of power and misuse of their authority, depriving Kerr of his Federal civil rights. Despite this, Riley and Hirose are still employed at Laguna Honda Hospital, while Dr. Katz suddenly and mysteriously vanished.

Katz abruptly moved to Los Angeles after the LHH patient gift fund scandal exploded, and after Kerr and Rivero had filed their complaints about tainted DPH contracts. Katz’s sudden departure may have been coincidental, but it was completely odd, given he had previously stated he wanted to remain as Director of Public Health until the rebuild of the new San Francisco General Hospital was completed. It’s unknown whether the City Attorney, or other City Hall Family insiders, had advised Katz to quickly resign when the issue of his HMA consulting fees income became widely known.

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During the Board of Supervisor’s Rules Committee meeting on March 7, 2013 at which it recommended approval of Dr. Kerr’s settlement agreement, [Dr. Rivero testified](#), “What is the message you send when a CEO [such as Hirose] who retaliated against a whistleblower is still in office? It shows that you condone whistleblower retaliation and violations of laws that protect whistleblowers.” Rivero added, “It shows that you will accept executives who pilfer public funds donated to the poorest of the poor, violating a sacred trust.”

That Hirose and Riley remain employed at LHH is shocking in a City that pays a lot of lip service claiming it believes in transparent, open government and public accountability.

## Series of Whistleblower Complaints

Drs. Rivero and Kerr filed three complaints through the Controller’s Office and the Ethics Commission regarding fraudulent practices in the Department of Public Health, including:

- On September 18, 2009, Kerr and Rivero filed their first complaint alleging an improper award of a contract to a City employee’s relative, regarding what became known as the “Ja Report.” In July 2009, Davis Ja and Associates prepared a report examining mental health services for LHH’s residents; defendant Hirose served on the selection panel that awarded Ja his first contract to survey LHH. The Ja Report recommended replacing Laguna Honda doctors with social workers, psychologists, and nurses.

Drs. Kerr and Rivero regarded the reduction in the number of physicians as a threat to, and would negatively impact, the quality of patient care. The Ja report was so deeply flawed that Kerr and Rivero co-authored a 25-

page “[Critical Analysis: The Ja Report – A Job Half Done](#),” highlighting the flawed methodology of Ja’s report and recommendations. Of 22 physicians on LHH’s regular Medical Staff, 20 (91%) co-signed a petition supporting Rivero’s and Kerr’s thoughtful *Critical Analysis*, which detailed serious, ethical conflicts of interest involving several high-level managers in the Department of Public Health. Subsequently, Ja was awarded an additional multi-million dollar contract.

Kerr and Rivero then discovered the additional contract had more than likely been steered to Ja by his wife, Deborah Sherwood, a senior manager in the Health Department’s Community Behavioral Health Services unit. Despite the two doctors’ numerous attempts to bring this improper and probably illegal contract award to the attention of City officials, nearly two years after filing their whistleblower complaint regarding Ja, the City Controller finally stepped in and abruptly terminated Ja’s additional contract, withholding over \$400,000 in remaining contract funds.

- Three days later, on September 21, 2009, Kerr and Rivero filed a second complaint alleging that the then Director of Public Health, defendant Mitch Katz, may have engaged in a conflict of interest by accepting — according to FPPC public records — somewhere between \$30,000 and \$300,000 in consulting fees from Health Management Associates (HMA), a City contractor performing consulting services for the Department of Public Health. Both San Francisco’s Conflict of Interest policies and the California Political Reform Act prohibit government employees from participating in making of contracts with companies in which they have a financial interest.
- On March 2, 2010, Rivero and Kerr filed their third complaint regarding the raid of LHH’s patient gift fund, which scandal has been thoroughly reported in past issues of the *Westside Observer* over the past three years (starting with “[Raiding the Public Trust](#),” in June 2010). The scandal was also broadcast in two KGO I-Team investigative reports in May 2010, which defendants Katz and Hirose had viewed, and which Katz and Hirose had responded to by publically posting on LHH’s web site a statement that Kerr and Rivero were mere detractors who were making false statements.

The two doctors had discovered that patient funds had been quietly diverted to three separate accounts for staff perquisites and amenities, and increasingly used for the “comfort and benefit” of staff and administrators, instead of patients. This feat was engineered by LHH’s then Executive Director, John Kanaley, who had quietly authorized setting up accounts for staff training within the patient gift fund, and had permitted inter-account transfers for staff amenities.

The City Controller’s audit of the clear misappropriation of charitable contributions intended for patient amenities languished for months, but the Controller’s highly-publicized audit finally ordered in November 2010 return of \$350,000 improperly removed from the gift fund. [Editor: The City Controller’s restoration of funds to the patient gift fund is available in the *Westside Observer*’s December 2010 issue, at “[Controller Restores \\$350,000 to Laguna Honda’s Patients](#).”]

## Who Are These Two Doctors?

Rivero and Kerr take their professional and ethical obligations as doctors seriously. They passionately believe, having taken the Hippocratic oath to first do no harm, that among their responsibilities is to fully embrace advocating for patients.

Derek Kerr, MD, CNA attended Harvard Medical School, did his residency at Harlem Hospital and his Oncology Fellowship at Memorial Sloan-Kettering Cancer Center. He has the rare distinction of being Board Certified in three separate medical

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specialties: Internal Medicine, Medical Oncology, and Hospice and Palliative Medicine. Following his medical education and years of practicing medicine, he went back to school and became a Certified Nursing Assistant in 1988 to better understand patient care from a nursing perspective. Kerr was the Attending Physician of Laguna Honda's Hospice for 21 years, was listed as LHH's Palliative Care Consultant on the Medical Staff roster, and had been the Attending Physician assigned to LHH's "Hospice and Palliative Care" service since 1994. During his tenure, LHH's Hospice was widely acclaimed, receiving a national award. Kerr was Chair of the Bioethics Committee at Fairmount Hospital prior to employment at LHH.

Maria Rivero, MD, FACGS, graduated from UCSF Medical School and completed her residency at Beth Israel Hospital/Harvard Medical School. She is Board Certified in both Internal Medicine and also Geriatrics, and is a Fellow of the American College of Geriatrics Specialists. She also has been a Certified Eden Alternative Associate since 1998. Rivero worked at Laguna Honda Hospital for 22 years, and served as LHH's Medical Director and its Assistant Medical Director between 1997 and 1999.

As former co-workers at LHH, Rivero and Kerr were highly regarded by hospital staff as among the best doctors in the hospital. As a team, they became whistleblowers at great professional risk to their careers; their core belief in ethical behavior led them to become whistleblowers, even though they never imagined initially that they would ultimately become involved in exposing fraud and corruption.

### **Correcting the Record: "No One Spoke Up"**

In April 2012, as Kerr's lawsuit dragged on, another former physician at Laguna Honda Hospital, Dr. Victoria Sweet, published her 348-page memoir about the hospital, titled [\*God's Hotel\*](#), which was riddled with errors and which, among other flaws, contained not one date to place her reporting into chronological or historical perspective. Among many other errors, Sweet incorporated three glaring untruths about Dr. Kerr. Sweet should have known better, since events in Kerr's lawsuit had been unfolding for fully two years before she published her memoir. Sweet never bothered fact checking with Kerr or Rivero during the years she spent writing her memoir.

First, Sweet wrongly reported that a "Dr. Talley" — the pseudonym Sweet assigned to Laguna Honda's medical director, Dr. Colleen Riley, one of the named defendants in Kerr's lawsuit — claimed that it had been she, Dr. Talley, who had made the decision to terminate Dr. Kerr. Sweet reported that "Dr. Talley" announced during her first meeting as Medical Director of Laguna Honda's medical staff, that it had been "entirely her decision" to lay off Dr. Kerr, and that then Director of Public Health Mitch Katz and LHH's Executive Administrator Mivic Hirose had had nothing to do with the decision to terminate Kerr.

In fact, Mivic Hirose herself has claimed elsewhere that it was entirely her decision — not Dr. Riley's — to terminate Dr. Kerr. Indeed, during depositions in Kerr's case, it appears that Katz and Hirose decided on December 15, 2009, or earlier, to lay off Dr.

Kerr, several weeks before Riley was appointed Medical Director at the end of December. When she learned of Katz's and Hirose's decision to target Kerr, Riley did nothing as Medical Director between January and March to stop the clear retaliation.

Next, Sweet wrongly opined that one of Dr. Kerr's "principles" was that he would only take care of his own patients [at LHH, and that] he "almost never took call, or helped out, or covered other wards. So no rebellion broke out [when Kerr was terminated], and no one spoke up [when the Bell Told for Dr. Kerr]." But during discovery in Kerr's case, LHH produced Ward Coverage Schedule records showing Kerr had, indeed, often provided coverage on other wards, took call, and often "helped out." During depositions, Kerr's lawyers showed that Kerr had, in fact, performed ward coverage, even more so than Dr. Riley had in some years. Other doctors also testified under oath that Kerr had done his share of coverage.

Sweet's claim no one spoke up, and no rebellion broke out was a complete lie. A [a second petition](#) opposing Dr. Kerr's and Dr. Bouvier's proposed layoffs — which requested both layoffs be rescinded — was signed by 16

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physicians, including Dr. Sweet herself. The second petition, a “Statement of Concern,” was sent to defendant Dr. Colleen Riley and to Steven Thompson, MD, the Chief of Staff of LHH’s Medical Service, who forwarded it to Ms. Hirose.

Of the 20 doctors on the regular staff (excluding MD administrators), Kerr had 18 supporters, 16 of whom signed the petition — representing 80% — who were strongly opposed to Kerr’s layoff; thus, well over three-quarters of the regular Medical Staff had indeed spoken up, which Sweet had to have known but elided. [Although Bouvier’s layoff was rescinded and he went on to become the City’s highest-paid employee, Kerr’s layoff wasn’t rescinded.]

In addition, despite the environment of fear among LHH staff resulting from the culture of intimidation generated by LHH’s administration, all six members of the Hospice team risked their careers by signing and submitting a letter of support opposing Kerr’s layoff. Along with Rivero, the Hospice’s nurse manager, its social worker, and Dr. Monica Banchemo-Hasson and Dr. September Williams also risked their careers by publicly testifying against Kerr’s layoff at a meeting of a Health Commission subcommittee — LHH’s so-called Joint Conference Committee made up of senior hospital administrators and three Health Commissioners.

Dr. Williams — a nationally recognized expert on Ethics, and a member of LHH’s Bioethics Committee — stated during the LHH-JCC’s [March 23, 2010](#) meeting that she “protests the layoff of Drs. Kerr and Rivero because it will impact the provision of quality care to Laguna Honda’s most vulnerable and needy residents, and is against the principles of beneficence.” Sweet had to have known of the groundswell of support by those who, in fact, did speak up defending Kerr.

Third, Sweet also misrepresented the sequence of Kerr’s lay off and the timing of filing of his whistleblower complaints.

Sweet sloppily reported Kerr had filed a whistleblower [law] suit “the day after his layoff ... ‘alleging’ that his investigation of the drained Patient Gift Fund was the reason he was laid off.”

Sweet had to have known Kerr wasn’t making a mere “allegation,” since many of LHH’s physicians knew of the problems with the patient gift fund. The major story that Sweet completely elided from her memoir and which she had to have known of, was that everyone — including doctors on LHH’s medical service — knew Kerr was being eliminated in an act of retaliation.

In fact, the timeline shows that Kerr and Rivero submitted their patient gift fund whistleblower complaint to the Ethics Commission at 12:02 p.m. on March 4, 2010, which was promptly faxed to San Francisco’s District Attorney. Two hours later, Dr. Riley confirmed during a Medical Staff meeting that the only planned physician cut was a previously announced cut of a half-time position that wasn’t Dr. Kerr’s position.

But three-and-a-half hours later on the same day, March 4, Kerr’s Union (the Union of American Physicians and Dentists) was informed by LHH’s H.R. department that Kerr would be receiving a permanent layoff notice. Kerr was orally notified of his layoff on Monday, March 8 and was handed the printed layoff notice that was signed on Friday, March 5. It was ten days later — not one day later under Sweet’s misuse of literary license — when Kerr filed a Whistleblower Retaliation Complaint (not a lawsuit) with San Francisco’s Ethics Commission. Sweet should also have known that it was fully eight months later, on November 16, 2010, when Kerr filed his wrongful termination lawsuit in Superior Court, not the day after receiving his layoff notice, as she deliberately misrepresented.

### **Lightning Strikes Twice**

The wrongful termination of Kerr in 2010 follows on the heels of Laguna Honda Hospital’s wrongful termination of Dr. John Ulrich, Jr. in 1998. Ulrich — who had also spoken up in 1998 about patient care during a Laguna

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**“ Dr. September Williams — a nationally recognized expert on Ethics, and a member of LHH’s Bioethics Committee — stated during the LHH-JCC’s March 23, 2010 meeting that she ‘protests the layoff of Drs. Kerr and Rivero because it will impact the provision of quality care to Laguna Honda’s most vulnerable and needy residents, and is against the principles of beneficence.’ ”**

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Honda medical staff meeting and called the health department's decision to cut two medical staff positions "an injustice to patients" — was summarily terminated by Laguna Honda Hospital, just as was Dr. Kerr. Ulrich was forced to sue the City, after the state medical board had cleared him of any medical wrongdoing and found no problems with Ulrich's care of patients.

Ulrich, whose case had advanced to jury trial, won a \$4.3 million judgment in federal court in 2004, subsequently reduced to a \$1.5 million negotiated settlement. As the [Pittsburgh Post-Gazette](#) newspaper reported in its June 24, 2004 issue, a U.S. District Court of Northern California jury concluded that LHH "had violated Ulrich's first amendment rights to free speech, and denied him a fair hearing to clear his name."

Strikingly, the then San Francisco City Attorney spokesperson, Matt Dorsey, claimed in 2004 that Ulrich's dismissal was "not an instance of reprisal." Dorsey went on to claim there was "not a shred of credible evidence to indicate wrongdoing on the part of the City." Dorsey foamed, "We consider this outcome [Ulrich's award] an aberration."

A decade later, Dorsey is still the City Attorney's spokesperson. Given Kerr's settlement, it's clear Dorsey may be unable to distinguish an aberration from a clear pattern.

Given Kerr's precedent-setting settlement award, it's also clear there is a past- and current-practice pattern documenting that LHH's senior management engages in wrongful termination and willful retaliation against employees who exercise their First Amendment rights to free speech.

The pattern isn't limited to just Laguna Honda Hospital; it happens all too frequently in many City departments.

### **The Costs of 100% Retaliation**

The Ethics Commission did nothing to protect Kerr's career after he submitted his patient gift fund whistleblower complaint with Dr. Rivero. Instead, he was told to get a lawyer, and Ethics took two years to complete investigating Kerr's complaint.

"In retrospect, a lawsuit was our only hope, because Ethics hasn't sustained a single whistleblower retaliation claim since it was founded, not one," Kerr laments. "Many studies show that reprisals against whistleblowers are common, with retaliation rates up to 90%. But with San Francisco's Ethics Commission, the retaliation rate is always zero," Kerr says.

Kerr was referring to the fact that in November 2012 the City Attorney's Office reported that between 2007 and 2012, the City settled 103 cases involving prohibited personnel practices for a total of \$11 million, including wrongful, retaliatory termination; racial-, age-, and disability-discrimination; sexual harassment; and other prohibited personnel practices.

Despite the City Attorney having concluded that at least 13 wrongful termination settlement cases have cost the City \$1.3 million since 2007, San Francisco's Ethics Commission has dismissed every whistleblower retaliation complaint filed at Ethics. Ethics has "dismissed" at least 18 cases alleging prohibited retaliation, for a 100% "clearance" rate, hoping to suggest there is zero retaliation against City employees. Studies show that nationwide, retaliation against whistleblowers is common, with rates up to 90%.

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**"The wrongful termination of Kerr in 2010 follows on the heels of Laguna Honda Hospital's wrongful termination of Dr. John Ulrich, Jr. in 1998."**

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Only in San Francisco would our Ethics Commission dismiss every retaliation complaint received, claiming that zero retaliation ever occurred. Despite Ethics' nonsense that there have been zero retaliation cases, it appears that, in fact, San Francisco may well have a 100% retaliation rate.

Prominent San Francisco open government, public-interest, and accountability advocate James Chaffee — who was an inaugural member of San Francisco's Sunshine Ordinance Task Force serving as its first Vice Chair, and is now affiliated with San Francisco's *ad hoc* Sunshine Posse — wrote to the Board of Supervisors on March 30, 2013, noting “Dr. Kerr’s case has many themes that reverberate throughout City Hall — the influence of private money; the misapplication of purpose of the money; the automatic defense of incompetent administrators; and, most of all, the acceptance of corruption as ‘business as usual,’ all the way to the top.”

Drs. Kerr and Rivero, for their part, hope some public benefit will come from the delayed justice they have endured.

As William Bennett Turner, a faculty member who teaches courses on the First Amendment at U.C. Berkeley noted in his book “*Figures of Speech: First Amendment Heroes and Villains*” published last year, First Amendment heroes are those who say what they believe, and have the courage to face the consequences.

Villains — such as the defendants in Kerr’s lawsuit — are those who want to suppress free speech that they disagree with.

Kerr and Rivero accidentally became First Amendment heroes. We owe them a debt of gratitude for risking their careers exposing fraud and corruption, and for advocating on behalf of LHH’s patients, who are often the poorest of the poor.

Kerr’s monetary and non-monetary settlement awards don’t begin to adequately reimburse him for the damage to his and Rivero’s careers. But there’s a vast community grateful for his and Rivero’s courage to speak out.

*Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California’s First Amendment Coalition. Feedback: [monette-shaw@westsideobserver.com](mailto:monette-shaw@westsideobserver.com).*

### **Postscript: The City and LHH’s CEO, Mivic Hirose, Still Don’t Get It**

On March 26, 2013 — at the same hour that the Board of Supervisors voted to finally approve Kerr’s monetary and non-monetary settlement terms — Drs. Kerr and Rivero, and this reporter, instead attended a meeting of the LHH-JCC (Joint Conference Committee), consisting of three Health Commissioners and LHH’s senior leadership, which meets every other month. Public testimony presented during last Tuesday’s meeting is located [here](#).

Following Hirose’s customary Executive Administrator’s report, the JCC took public comment. Kerr, for his part, testified that bullying and getting rid of whistleblowers is both counter-productive and illegal. As he began to testify that his retaliation settlement agreement requires that LHH’s Executive Committee be provided a one-hour training on employee’s whistleblowing and First Amendment rights — which training Kerr feels should be expanded to all LHH senior managers — Hirose began to openly smirk, just seconds after I took this photo.

You’d think that having being paid \$227,771.94 in calendar year 2012, Hirose would know that CEO-level etiquette doesn’t include smirking inappropriately.

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**“The City Attorney’s Office reported that between 2007 and 2012, the City settled 103 cases involving prohibited personnel practices for a total of \$11 million, including wrongful, retaliatory termination.”**

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**“Kerr’s case has many themes that reverberate throughout City Hall ... most of all, the acceptance of corruption as “business as usual,” all the way to the top’, says Chaffee.”**

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**Let Them Eat Cake:** An aloof Mivic Hirose, during Dr. Kerr’s testimony at the LHH-JCC meeting, on March 26, 2013.

I blurted, quite out of order, “There’s nothing funny about this Mivic, why are you smirking?” She quickly wiped the smirk off of her face, glaring at me, obviously not contrite

Hirose clearly doesn’t get it, or seem to understand the gravity of the \$750,000 settlement plus the City Attorney’s hefty legal fees spent defending the pretext that Hirose, Katz, and Riley were innocent of retaliatory termination. Maybe she thinks money grows on trees in LHH’s new orchard.

Next, Dr. Rivero testified on March 26 that a recent [Coalition on Compassionate Care award](#) to LHH’s Hospice and Palliative Care Service tells a different story than Hirose’s and LHH’s new [press release](#). Rivero noted that the award honors 25 years of hospice care, which couldn’t have happened without Kerr’s 21 years as Hospice physician. Rivero testified that it is shameless self-promotion to aggrandize LHH and Anne Hughes, RN, by ignoring the founder of the hospice program, Dr. Kerr.

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**“The City’s and Defendant’s defense pretext that Hirose was innocent is over, or Kerr’s settlement deal would never have been reached.”**

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Later, I testified that the City’s and Defendant’s defense pretext that Hirose was innocent is over, or Kerr’s settlement deal would never have been reached. Hirose has clearly cost taxpayers over \$1 million — at minimum — between Kerr’s \$750,000 settlement and the \$350,000 ordered restored to LHH’s patient gift fund.

I testified that the Health Commission should recommend that DPH terminate Hirose at once, the sham of her “I’m innocent!” pretext being over.

But there were just more smirks and blank stares all around the table.

As Mr. Chaffee has noted, the acceptance of corruption as “business as usual, all the way to the top,” is what runs San Francisco’s so-called “City Family.” Just ask the current mayor. Or our former mayor, Willie Brown, who both probably view the \$11 million in prohibited personnel actions and wrongful termination settlements awarded during their tenures as mayor — and the ensuing damage to the careers of innocent employees — to just be a cost of doing corrupt business-as-usual. Between corrupt friends, perhaps \$11 million is considered chump change.