S205568

LIU, J.

SUPREME COURT
FILED

SEP 24 2012

Frank A. McGuire Clerk

Deputy

No. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK T. FAHLEN
Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.
Defendants and Appellants.

After a Published Decision by the Court of Appeal,
Fifth Appellate District
Case No. F063023

APPELLANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; SUPPORTING MEMORANDUM; SUPPORTING DECLARATION OF GLENDA M. ZARBOCK

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and STEVE MITCHELL

REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459, Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell hereby request that this Court take judicial notice of the following:

1. The Assembly Committee on Health's analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as introduced February 21, 2007 (attached hereto as Exhibit 1).

2. The Senate Judiciary Committee's analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007 (attached hereto as Exhibit 2).

3. The Senate's amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007 (attached hereto as Exhibit 3).

4. California Medical Association's Floor Alert to the State Assembly Members on Assembly Bill No. 632 (2007-2008 Reg. Sess.) September 11, 2007 (attached hereto as Exhibit 4).

The accompanying Memorandum states the grounds for this Request and the accompanying Declaration of Glenda M. Zarbock authenticates the attached documents.

DATED: September 23, 2012

HANSON BRIDGETT LLP

By: _____
Glenda M. Zarbock
Defendants and Appellants
SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL

MEMORANDUM

I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ASSEMBLY COMMITTEE ON HEALTH'S ANALYSIS OF ASSEMBLY BILL NO. 632, WHICH IS RELEVANT TO THE ISSUES RAISED IN THE PETITION

As a Legislative Committee analysis, the Assembly Committee on Health's analysis of Assembly Bill No. 632 ("AB 632") is judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32, 39; *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1025; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal App.4th 32, 50.)

The Assembly Committee on Health's analysis is material to Appellants' petition for review because it bears on the issue of whether in enacting the 2007 amendment to Health and Safety Code section 1278.5 (AB 632), the Legislature intended to abrogate the *Westlake* judicial exhaustion rule. The Committee's analysis sets forth commentary about the purpose of AB 632 and the forms of retaliation the bill was designed to prevent. That the analysis fails to mention peer review actions as one such form of retaliation is strong evidence that the Legislature had no intention of interfering with medical peer review activities being conducted under existing state law, let alone abrogating long-standing judicial exhaustion requirements applicable to such peer review actions.

While neither the parties nor amici formally sought judicial notice of this document from the Fifth District, amicus curiae California Hospital Association ("CHA") discussed the legislative history of AB 632 extensively in its amicus brief in support of Appellants. Furthermore, it is clear that the Fifth District reviewed the legislative history of AB 632 in connection with this appeal as well. (*Fahlen v. Sutter Central Valley Hosp.*

(2012) 208 Cal.App.4th 557, 577-579.) Accordingly, good cause exists to take notice of the Assembly Committee on Health's analysis of AB 632.

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE SENATE JUDICIARY COMMITTEE'S ANALYSIS OF AB 632, WHICH IS RELEVANT TO THE ISSUES RAISED IN THE PETITION

Similarly, the Senate Judiciary Committee's analysis of AB 632 is a legislative committee's analysis that is judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at 31, 34; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 146.)

The Senate Judiciary Committee's analysis is material to the petition for review because it too bears on the issue of whether in enacting AB 632, the Legislature intended to abrogate the *Westlake* judicial exhaustion rule. The Committee's analysis acknowledges concerns raised during the legislative process about possible "unintended consequences" that the legislation might have on medical peer review. These concerns then led the Senate to amend the bill by adding a provision stating, "Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code." (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, p. 2, attached hereto as Exhibit 3.) The Committee's analysis and the Senate's subsequent amendments to AB 632 support the conclusion that the Legislature did not intend to interfere with peer review activities under existing state law.

Here again, while neither the parties nor amici formally sought judicial notice of this document from the Fifth District, amicus curiae CHA discussed the legislative history of AB 632 in its amicus brief and the Fifth District reviewed the legislative history too. (*Fahlen, supra,* 208

Cal.App.4th at pp. 577-579.) Accordingly, good cause exists to take judicial notice of the Senate Judiciary Committee's analysis of AB 632.

III. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE SENATE AMENDMENTS TO AB 632 ON JULY 17, 2007, WHICH IS RELEVANT TO THE ISSUES RAISED IN THE PETITION

As an official act of a Legislative body, the Senate amendments to AB 632 on July 17, 2007 are judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at 31; *San Rafael Elem. Sch. Dist. v. State Bd. of Educ.* (1999) 73 Cal.App.4th 1018, 1026, fn. 8.)

As set forth above in Section II, the Senate's amendments to AB 632 are material to the petition because they are evidence the Legislature's intent in enacting AB 632 to protect medical peer review activities, not to interfere with them or abrogate the long-standing judicial exhaustion rule.

While neither the parties nor amici formally sought judicial notice of this document from the Fifth District, the Fifth District quoted from the Senate's July 17, 2007 amendments to AB 632 in its published decision. (*Fahlen, supra,* 208 Cal.App.4th at p. 578.) As the Senate amendments are material to the issues in this petition and were quoted in the Fifth District's published decision, good cause exists to take judicial notice of them.

IV. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE CALIFORNIA MEDICAL ASSOCIATION'S FLOOR ALERT TO THE STATE ASSEMBLY ON AB 632 DATED SEPTEMBER 11, 2007, WHICH IS RELEVANT TO THE ISSUES RAISED IN THE PETITION

As a communication to the Members of the State Assembly by the sponsor of AB 632, the California Medical Association's ("CMA") Floor Alert dated September 11, 2007 is judicially noticeable under Evidence

Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at p. 36; *In re Marriage of Siller*, 187 Cal.App.3d 36, 46, fn. 6; *People v. Drennan* (2000) 84 Cal.App.4th 1349, 1357-1358.)

The CMA's September 11, 2007 Floor Alert addressed to Members of the State Assembly is material to the issues raised by the petition. The communication reflects the pronouncement by the CMA, the bill's sponsor, that the bill "is not to interfere with legitimate peer review activities." This confirmation came after the Senate's July 17, 2007 amendments to AB 632, which are referenced above, and on the day that these amendments were before the Assembly for concurrence. Moreover, because the CMA's statements were before the Assembly when it concurred with the Senate's amendments that sought to protect peer review actions from interference by Section 1278.5 claims, this supports the conclusion that the Legislature had no intention of abrogating the well-established judicial exhaustion rule in enacting AB 632.

Here again, neither of the parties nor amici formally sought judicial notice of the CMA's September 11, 2007 Floor Alert to the State Assembly from the Fifth District. However, as stated above, the legislative history of AB 632 was discussed in CHA's amicus brief and the Fifth District's published decision. (*Fahlen, supra,* 208 Cal.App.4th at pp. 577-579.) Accordingly, because the CMA's Floor Alert is material to the issues raised by the petition, good cause exists to take notice of the document.

DATED: September 23, 2012 HANSON BRIDGETT LLP

By: Glenda M. Zarbock
Glenda M. Zarbock
Defendants and Appellants
SUTTER CENTRAL VALLEY
HOSPITALS and STEVE
MITCHELL

DECLARATION OF GLENDA M. ZARBOCK

I, Glenda M. Zarbock, declare:

1. I am an attorney at law duly licensed to practice before the courts of the State of California. I am a partner at the law firm of Hanson Bridgett LLP, counsel for defendants and appellants Sutter Central Valley Hospitals and Steve Mitchell in this action. I have personal knowledge of the following facts, and if called upon as a witness, I could and would testify competently to the contents of this declaration.

2. All documents attached hereto are true and correct copies of the documents described below. I am informed and believe, and on that basis declare, that on or about September 17, 2012, Hanson Bridgett LLP librarian Catherine Hardy, acting at my direction, obtained from Legislative Intent Service, Inc. a file containing the compiled Legislative History on Assembly Bill No. 632 ("AB 632 Legislative History") from Legislative Intent Service, Inc.'s website. Each document attached hereto is included within the AB 632 Legislative History.

3. Attached as Exhibit 1 is a copy of the Assembly Committee on Health's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as introduced on February 21, 2007. This document is found at pages 32 to 36 of the AB 632 Legislative History.

4. Attached as Exhibit 2 is a copy of the Senate Judiciary Committee's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007. This document is found at pages 299 to 308 of the AB 632 Legislative History.

5. Attached as Exhibit 3 is a copy of the Senate Amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) made on July 17, 2007. This document is found at pages 470 to 471 of the AB 632 Legislative History.

6. Attached as Exhibit 3 is a copy of the California Medical Association's Floor Alert addressed to the Members of the State Assembly on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated September 11, 2007. This document is found at page 607 of the AB 632 Legislative History.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California, on September 23, 2012.

By: Glenda M. Zarbock
Glenda M. Zarbock

Date of Hearing: April 10, 2007

ASSEMBLY COMMITTEE ON HEALTH
Mervyn Dymally, Chair
AB 632 (Salas) – As Introduced: February 21, 2007

SUBJECT: Health care facilities: whistleblower protections.

SUMMARY: Provides whistleblower protections to physicians and surgeons that currently apply to patients and employees of health facilities. Specifically, this bill:

1) Prohibits a health facility or its affiliate from discriminating or retaliating in any manner against a physician and surgeon on the medical staff of the health facility or its affiliate because the physician and surgeon has presented a grievance or complaint, or has initiated, participated, or cooperated in an investigation or proceeding of any governmental entity, relating to the care, services, or conditions of the facility or its affiliate.

2) Subjects an affiliate of a health facility that violates existing whistleblower law to a civil penalty of not more than $25,000.

3) Requires that any discriminatory treatment of a physician and surgeon within 120 days of the filing of the grievance or complaint raises a rebuttable presumption that the action was taken by the health facility in retaliation, if the health facility had knowledge of the physician or surgeon's initiation, participation, or cooperation. Requires "discriminatory treatment of a physician or surgeon" to include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of the privileges of the physician and surgeon at the health facility or its affiliate, or the threat of any of these actions.

4) Entitles a physician and surgeon who has been discriminated against pursuant to this bill to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or its affiliate, and the legal costs associated with pursuing the case.

5) Defines "affiliate" as a health facility that is directly or indirectly, through one or more intermediaries, controlled by another health facility.

EXISTING LAW:

1) Prohibits a health facility from discriminating or retaliating in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility. Health facility does not include long-term care facility for these purposes.

2) Subjects a health facility that violates #1) above to a civil penalty of not more than $25,000, and requires the penalty to be assessed and recovered through a specified administrative process established for long-term health care facilities.

3) Requires that any discriminatory treatment against a patient within 180 days of the filing of a grievance or complaint to raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint. (Places the burden on the facility to provide that the treatment is not retaliation against a patient based on the complaint.)

4) Requires that any discriminatory treatment of an employee within 120 days of the filing of the grievance or complaint raises a rebuttable presumption that the action was taken by the health facility in retaliation, if the health facility had knowledge of the employee's initiation, participation, or cooperation. Requires "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions.

5) Specifies that the presumptions in #3) and #4) above affects the burden of producing evidence, as specified.

6) Makes any person who willfully violates #1)-4) above guilty of a misdemeanor punishable by a fine of not more than $20,000.

7) Requires an employee who has been discriminated against in employment pursuant to #4) above to be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.

8) States that it is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. Defines, "to advocate for medically appropriate health care" to mean to appeal a payor's decision to deny payment for a service pursuant to the reasonable grievance or appeal procedure established by a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff and governing body, ~~or~~ payer, or to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

9) Prohibits a person from terminating, retaliating against, or otherwise penalizing a physician and surgeon for advocacy specified in #8) above, or from prohibiting, restricting, or in any way discouraging a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care.

10) Requires medically appropriate health care in a health facility that is a hospital to be defined by the hospital medical staff and approved by the governing body, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care.

11) States that #8), #9), and #10) above should not be construed to prohibit the governing body of a hospital from taking disciplinary actions against a physician and surgeon as authorized in the Medical Practice Act, as specified.

12) States that it is in public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through the abuse of the judicial process (this "abuse of judicial process" refers to lawsuits that are commonly called Strategic Lawsuit Against Public Participation or SLAPP suits. The law provides for a special motion which a defendant can file at the outset of a SLAPP lawsuit to strike a complaint where the complaint arises from conduct that falls within the rights of petition or free speech).

FISCAL EFFECT: Unknown

COMMENTS:

1) PURPOSE OF THIS BILL. According to the author, existing whistleblower protections in the Health and Safety Code grant protections from retaliation after a grievance is filed by hospital employees and patients but not physicians. By extending the protections to physicians and surgeons this bill would clarify an ambiguity in existing law. This bill also tailors the prohibited type of discrimination or discipline relevant to physicians and surgeons into this code section.

2) PATIENT SAFETY AND MEDICAL ERRORS. The landmark Institute of Medicine Study To Err is Human focused the nation's attention to errors in hospitals by revealing that at least between 44,000 and 98,000 individuals may die each year in United States hospitals as a result of medical errors. In California, between 1978 and 1999, there were more than 210,000 preventable patient deaths.

3) FRAUD AND FALSE CLAIMS. According to a United States Department of Justice 2006 press release, the United States recovered a record amount of more than $3.1 billion in settlements and judgments in cases involving allegations of fraud against the government. Seventy-two percent of the recoveries were in health care. Health care fraud accounted for $2.2 billion in settlements and judgments, including a $920 million settlement with Tenet Healthcare Corporation, the nation's second largest hospital chain. Although Medicare and Medicaid, under the jurisdiction of the federal Department of Health and Human Services, bear the brunt of health care fraud, other programs that were affected include the Federal Employees Health Benefits Program run by the Office of Personnel Management, the TRICARE military health insurance program run by the Department of Defense, and health care programs run by the Department of Veterans Affairs, the Department of Labor and the Railroad Retirement Board.

4) RETALIATION. According to this bill's sponsor, the California Medical Association (CMA), the issue of retaliation appears in several ways. One way is a direct retaliation for a statement made by a physician regarding concerns of quality of care. According to CMA, the most recent example occurred at Western Medical Center Santa Ana, when the new owners Integrated Healthcare Holdings Inc. (IHHI) sued Michael Fitzgibbons, M.D. a past chief of staff when Dr. Fitzgibbons expressed concerns about the financial viability of the hospital. Dr. Fitzgibbons expressed his concern that a hospital's survival (it was a trauma center) has direct implications on the ability of physicians to provide quality of care for their patients. IHHI sued Fitzgibbons, who ultimately won this SLAPP suit at the appellate level with the help of CMA and the American Medical Association. According to CMA, while this suit was going on, physicians on the medical staff at Western Medical Center Santa Ana, and the other three hospitals owned by IHHI were silenced for the fear of the hospital suing them.

CMA provided the committee with a list of methods hospitals can use to suppress whistleblowers. Some of the examples include:

1. Underwriting the salary and/or practice expense of a competing physician;
2. Recruiting competing physicians to the community in the absence of a community deficit for that specialty;
3. Establishing a medical care foundation and supporting its physicians with hospital funds;
4. Establishing a medical practice administrative service company for selected physicians and charging below market rates so that the doctor keeps a higher percentage of collections and gains a competitive advantage;
5. Buying the medical building with a physician's office and refusing to renew the physician's lease;
6. Inducing primary care physicians to refer patients to the hospital outpatient facility for tests bypassing specialists' office based testing (e.g. imaging and cardiac tests);
7. Providing special scheduling priorities for hospital facilities;
8. Underwriting certain physicians and empowering them with control or influence over the peer review process;
9. Developing investment partnerships with selected physicians (surgery center, MRI) that provide lucrative annual returns on investment (e.g. 50% return of investment or ROI annually); and,
10. Providing special equipment leasing arrangements for selected physicians with above market ROI.

3) SUPPORT. According to CMA, this bill clarifies existing law by extending hospital whistleblower protections to physicians and surgeons. Currently the law provides protections to employees and patients and "any other person" who makes complaints about a health facility. CMA states that some attorneys have used this same section to deny protections to a physician who raised concerns by claiming that the physician was not an employee or patient. CMA believes this bill will prevent the argument from happening again, since most physicians are not employees of a hospital. In addition, the California Alliance for Retired Americans believes it is important that physicians in hospital settings feel free to report conditions which may be unsafe for patient care. One physician who wrote in support of this bill, indicates that the Redding Medical Center (Tenet) disaster is a good example of what intimidation can do to patients because hundreds of patients were damaged or killed by doctors at the financial benefit of Tenet.

4) SUGGESTED AMENDMENTS.
   a) The definition of and reference to "affiliate" is vague and may not be necessary. The author may wish to consider deleting it.
   b) On page 3, line 11, before the comma add "to the health facility."

REGISTERED SUPPORT / OPPOSITION:

Support

California Medical Association (sponsor)
American Federation of State, County and Municipal Employees, AFL-CIO
California Academy of Ophthalmology
California Alliance for Retired Americans

California Society of Anesthesiologists
Citizens Commission on Human Rights
San Bernardino Public Employees Association
One physician

Opposition

None on file.

Analysis Prepared by: Teri Boughton / HEALTH / (916) 319-2097

HS

SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2007-2008 Regular Session

AB 632	A
Assemblymember Salas	B
As Amended June 6, 2007	
Hearing Date: July 10, 2007	6
Health and Safety Code	3
GMO:jd	2

SUBJECT

Health Care Facilities: Whistleblower Protection
for Doctors and Other Health Care Workers

DESCRIPTION

The bill would revise and recast portions of the whistleblower statute that protects patients and employees of a health facility from discrimination or retaliation for complaining about the health facility or cooperating in the investigation of the health facility by a government entity. These revisions would:

(1) expand coverage of the whistleblower protections to members of the medical staff (physicians) and other health care workers who are not employees of the health facility;
(2) extend the whistleblower protections to complaints or grievances made to an entity or agency responsible for accrediting or evaluating the health facility (in addition to those made to a government entity under existing law) or its medical staff;
(3) extend the whistleblower protections to participation or cooperation in an investigation or administrative proceeding carried out by an entity or agency responsible for accrediting or evaluating the health facility (in addition to those carried out by a governmental entity under existing law) or its medical staff; and
(4) extend the prohibition against discrimination or retaliation to any entity that owns or operates a health facility.

The bill would make conforming changes to provide appropriate whistleblower protections and remedies to physicians similar to those provided to employees of the health facility.

BACKGROUND

Physicians and surgeons are provided protection against retaliation when they advocate for medically appropriate health care for their patients. (Business & Professions Code § 2056.) The statute defines "to advocate for medically appropriate health care" as appealing a payor's decision to deny payment for a service pursuant to established rules, or protesting a decision, policy, or practice that the physician reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

To preserve the highest standards of medical practice in the state, the Legislature enacted the peer review process by which a committee comprised of licensed medical personnel at a hospital evaluates physicians applying for privileges, establishes standards and procedures for patient care, assesses the performance of physicians currently on staff, and reviews other matters critical to the hospital's functioning and duty to ensure quality care. (Business & Professions Code §§ 809, 809.5.)

Additionally, to protect patients and in order to assist those government entities charged with ensuring that health care is safe, patients and employees of a health facility are protected from discrimination or retaliation when they notify governmental entities of suspected unsafe patient care and conditions at the facility and when they cooperate in the investigation of the care, services, and conditions of the health facility by a governmental entity. (Health & Safety Code § 1278.5.) The legislative findings and declarations contained in the statute specify that these whistleblower protections are not intended to conflict with existing provisions in state and federal law relating to employer-employee relations.

According to the California Medical Association (CMA), sponsor of AB 632, because physicians are generally not "employees" of a health facility, they do not benefit from the whistleblower protections afforded by Health & Safety Code § 1278.5. Thus, when they see problems with patient care beyond their own patients they may actually do nothing about it, for fear of retaliation or discrimination.

AB 632 is intended to cure this gap in coverage for whistleblowing in the health care context, and would extend the whistleblower protection further by making an entity that owns or operates a health facility liable for the unlawful acts of the health facility.

CHANGES TO EXISTING LAW

Existing law prohibits an employer from preventing an employee from disclosing information to a government or law enforcement agency when that

employee has reasonable cause to believe that the information discloses employer's violation of or noncompliance with state or federal law. It also prohibits an employer from retaliating against an employee for that disclosure, or for refusing to participate in an activity that will result in a violation of or noncompliance with state or federal law. A violation subjects an employer to civil penalties of up to $10,000 in addition to actual damages. (Labor Code § 1102.5.)

Existing law, the federal Sarbanes-Oxley Act, protects whistleblowers from retaliatory action by employers and provides for both injunctive relief and damages for violations.

Existing law prohibits a health facility from discriminating or retaliating against a patient, employee, or any other person who presents a grievance or complaint, or who has initiated or cooperated with a government agency in an investigation or proceeding about the care, services, or conditions of the facility. (Health & Safety Code § 1278.5(b).) (All references are to the Health and Safety Code unless otherwise indicated.)

Existing law establishes a rebuttable presumption that the discriminatory action was taken in retaliation against an employee if the discriminatory action was taken within 120 days of the presentation of a complaint or grievance or cooperation with an investigation, if the health facility had knowledge of the employee's action. (§ 1278.5(d).)

This bill would extend the prohibition against discrimination or retaliation under § 1278.5(b) to an entity that owns or operates a health facility.

This bill would additionally protect members of the medical staff or any other health care worker of the health facility from discrimination or retaliation. This bill would also extend to the facility's medical staff and other health care workers the rebuttable presumption that a discriminatory act was in retaliation for an employee's whistleblowing action, when the discriminatory act occurs within 120 days of the employee's action.

This bill would expand the scope of activities for which the whistleblower protections would apply, to include (1) presentation of a complaint or grievance or report to an entity or agency responsible for accrediting or evaluating the facility or its medical staff, and (2) initiation, participation, or cooperation in an investigation or administrative proceeding related to the quality of care, services, or conditions that is carried out by an entity or agency accrediting or evaluating the facility or its medical staff.

This bill would define a "health facility" subject to the whistleblower prohibitions against discrimination or retaliation to include the facility's

administrative personnel, employees, boards and committees of the board, and medical staff.

COMMENT

1. Stated need for the bill

According to the CMA, sponsor of AB 632, "[Health & Safety Code § 1278.5] provides protections to employees and patients and the nebulous term 'or any other person.' Unfortunately, enterprising attorneys have used this section to deny protections for a physician who raised concerns of poor patient care by correctly stating that the physician was not an employee or patient. This bill will prevent that argument from happening again. ...Health and Safety Code § 1278.5 is the only section of law that grants protection to members of the medical staff when they see problems with patient care beyond their own patients. As such this section must be clarified and strengthened. ...Often physicians are faced with having to decide if they should report allegations of poor patient care or conditions knowing their practice and livelihood may be harmed. Unfortunately, too often the physician decides not to report sub-standard or questionable care. When a physician observes retaliation or discrimination against another physician who speaks out, it is less likely that any more will come forward."

The CMA claims that in the case of Integrated Health Care Holdings, Inc. v. Fitzgibbons (2006) 140 Cal.App.4th 515, the health facility owner (IHHI) of Western Medical Center in Santa Ana sued Dr. Fitzgibbons after he expressed concerns that the hospital's financial troubles threatened the ability of physicians to provide quality care for their patients. Dr. Fitzgibbons invoked and received the protection of the anti-SLAPP statute in that case. However, according to CMA, during the lawsuit, IHHI threatened to retaliate against the medical staff at Western Medical Center and the staff at three other IHHI-owned hospitals if they participated in the investigation. CMA also cites a similar case that occurred when Tenet, one of the largest for-profit hospital chains, silenced physicians at a Redding, California hospital who knew about unnecessary open-heart surgeries and Medicare billing fraud occurring at the hospital.

In response to CMA's arguments, however, the California Hospital Association (CHA) proposes to amend Business and Professions Code § 2056 instead, to clarify that among the activities of a physician that are protected against retaliation (outside of the peer review process) are the filing of a complaint or the initiation or participation in an investigation or proceeding. (See Comment 3.)

2. Extending whistleblower protection to medical staff and to other health care workers

The goal of Health & Safety Code § 1278.5 is to protect patients from unsafe care and conditions at a health facility. Thus, reports or grievances about the care, services, and conditions of the facility that are made by either patients or employees are protected. A rebuttable presumption arises if a retaliatory action occurs against a patient within 180 days of making a complaint or if a retaliatory action occurs against an employee within 120 days of making a complaint. The protection extends to initiation of or participation in an investigation or proceeding by a government entity.

A violation of this prohibition subjects a health facility to a civil penalty of not more than $25,000. A willful violation by a person is a misdemeanor punishable by a fine of $20,000. An employee who has been discriminated against is entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and legal costs associated with pursuing the case.

a. Physicians are not employees; who are "other health workers" covered by the bill?

SB 97 (Burton), Chapter 155, Statutes of 1999, extended the whistleblower protections then available to patients and employees of a long-term health care facility to patients and employees of health facilities (hospitals) for filing a grievance or providing information to a governmental entity regarding care, services, or conditions at the facility. That bill was introduced at the behest of nurses who complained that various forms of discrimination or retaliation were the normal response they received when they reported problems regarding quality of care at their places of employment.

The legislative findings and declarations contained in SB 97 referred to the state's policy of encouraging "patients, nurses, and other health care workers" to notify government entities of suspected unsafe patient care and conditions. However, the operative part of the statute that was enacted referred only to whistleblower protections for "any patient or employee of the health facility" when "the patient, employee, or any other person has presented a grievance" or complaint about the facility.

This bill would insert "members of the medical staff" into the legislative findings and declarations relating to state policy. It would then prohibit a health facility from discriminating or retaliating against "any patient, employee, member of the medical staff, or any other health care worker of the health facility," thus expanding the whistleblower protections of

§ 1278.5 to all health care workers at the facility, including physicians.

"Medical staff" as used in Business & Professions Code § 2282 refers to a group of five or more physicians permitted to practice in the hospital. Both CMA and the CHA agree that physicians are generally not employees of a hospital. Instead, they enjoy privileges at the hospital and have a relationship with the hospital that is governed by Medical Staff By-Laws, a peer review process, the protections of Business and Professions Code § 809, and other protective measures. (See Comment 3.)

According to the CMA, even though there is no definition of "other health care workers" used in the legislative findings, it could be interpreted to include persons such as blood, organ, and tissue transporters, emergency medical technicians or paramedics, and physical therapists. By adding the phrase "other health care workers" in the protected class, therefore, these persons would enjoy the whistleblower protections now enjoyed only by patients and employees of the health facility.

b. Retaliation: what conduct is prohibited vis a vis doctor whistleblowers? What remedies do they have?

All of the state's whistleblower statutes apply to employees who disclose information about their employer's activities or proposed activities that violate or will violate the law in some manner. Thus, these statutes provide for various remedies that only employees could be entitled to, that are ascertainable and easily enforced.

Current § 1278.5 in fact enumerates various remedies for an employee who has been discriminated or retaliated against: reinstatement, reimbursement for lost wages and work benefits caused by the employer's actions, and legal costs associated with pursuing the whistleblower's case under the statute. Because the physician and medical staff are most likely not employees of a hospital, the remedies available to them could be entirely different, depending on the retaliatory action that was taken.

According to the CMA, examples of actions a hospital can take to suppress physician-whistleblowers or to retaliate against them are: (1) underwriting the salary and/or practice expenses of a competing physician; (2) establishing a medical care foundation and supporting its physicians with hospital funds; (3) recruiting competing physicians to the community in the absence of a community deficit for that specialty; (4) establishing a medical practice administrative service company for selected physicians and charging below market rates so that the doctor keeps a higher percentage of the collections and gains a competitive advantage; (5) buying the medical building with the physician's office and

refusing to renew the physician's lease; (6) inducing primary care physicians to refer patients to the hospital outpatient facility for tests, bypassing the specialist's office-based testing (e.g., imaging and cardiac tests); (7) providing special scheduling priorities for hospital facilities; (8) underwriting certain physicians and empowering them with control or influence over the peer review process; (9) developing investment partnerships with selected physicians (surgery center, MRI center) that provide lucrative annual returns on investment (e.g., 50% return on investment (ROI) annually); and (10) providing special equipment leasing arrangements for selected physicians with above market ROI.

AB 632 however would provide only the following remedies to a physician who was discriminated or retaliated against: reinstatement (of privileges?), reimbursement for lost income resulting from any change in the terms of conditions of his or her privileges caused by the health facility's acts or acts of any other facility owned or operated by the entity, and the legal costs of pursuing the case.

It would seem that none of these remedies would give adequate redress to a physician who suffered any of the retaliatory acts named above.

SHOULD THERE BE A CATCH-ALL PROVISION FOR A COURT TO FASHION WHATEVER REMEDY WOULD FIT THE RETALIATORY ACT?

As to the "other health care workers" - the bill does not provide for any remedy that would be available to these workers, should they be the victims of the employer's discrimination or retaliation.

SHOULD THERE BE A LIST OF REMEDIES FOR THESE OTHER HEALTH CARE WORKERS TOO?

3. Whistleblower protection and the peer review process

Peer review is the process by which the medical staff evaluates physicians with respect to the patient care they provide in a hospital. (Bus. & Prof. C. §§ 809, 809.5.) The peer review process is given great deference as a means of ensuring safe health care in the state. Thus, various provisions, such as immunity from monetary liability and protection from discovery under Evidence Code §§ 1156 and 1157, were enacted to encourage participation by physicians in the peer review process and to ensure their freedom from fear of retribution for participating.

Opponent California Hospital Association (CHA) contends that one of the "unintended consequences" of extending Health & Safety Code § 1278.5 to

members of the medical staff is the "chilling effect it would have on peer review." The CHA claims that the bill could stop a peer review process in its tracks by the simple filing of a § 1278.5 action, or it could compel a peer review committee to not initiate a peer review process for fear that it could be considered a retaliatory action and subject the committee to the misdemeanor penalties of § 1278.5. The CHA also points out the lack of clarity as to when a § 1278.5 action would have to be filed. [Where there is no statute of limitations specified, an action upon a statute for a penalty or forfeiture must be commenced within one year of the date the event or the action that gave rise to the cause of action occurred. (C.C.P. § 340.)]

The critical question, according to the principal opponents of AB 632, is what would happen to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a § 1278.5 action? The hospital, CHA states, could very well be required to produce evidence in the § 1278.5 action even before that evidence has been fully developed and presented in a Medical Staff fair hearing under Bus. & Prof. C. § 809 et seq.

The interplay between the whistleblower protection offered to physicians by this bill and the peer review process is summarized thus by opponent United Hospital Association:

> ...AB 632 would also add burdens to, and perhaps have a chilling effect on, the critically important medical staff peer review function within hospitals. This process is an especially important and crucial element of a hospital's responsibility. Under existing California and federal law, hospital governing boards must work closely with their medical staff's elected leaders to review the quality of care provided by physicians who hold medical staff membership and privileges at the hospital. That process is already governed by a complex and well-developed body of law, including multiple substantial protections for the physicians who are subjected to discipline by their peers. The volunteer physicians who participate in peer review are already concerned about their potential liability and the other burdens associated with their involvement in that process. Adding whistleblower protections and penalties will further complicate the process and may tend to chill the frankness and candor necessary to allow the peer review process to function effectively.

SHOULD A § 1278.5 ACTION BE HELD IN ABEYANCE UNTIL A PEER REVIEW PROCESS, IF INITIATED, HAS BEEN COMPLETED?

4. Expansion of whistleblower statute in other ways

In addition to expanding the coverage of whistleblower protections to medical staff and other health care workers, this bill would extend liability for a violation to the owner or operator of a health facility. Further, the bill would define "health facility" to include the "medical staff" as well as administrative personnel. According to the opponents, under existing law a hospital medical staff is required to be a self-governing body and therefore its actions cannot and should not be imputed to the hospital.

To the proponents, however, these are simply clarifying amendments to existing law, and do not in any way increase the liability of a health facility for its discriminatory or retaliatory acts against a whistleblower.

5. Other opponents' concerns; supporters' contentions

To be sure, CHA is not the only hospital group opposing AB 632. The United Hospital Association, representing 114 investor-owned California hospitals, states that while its members support the ability of their employees to raise concerns regarding patient health and safety free of retaliation, the extension of these protections to non-employee medical staff ignores the existing relationship between the hospital on the one hand and the physicians and other health care practitioners who have privileges on the hospital's medical staff, on the other. They point to current state and federal laws that already provide protections for individuals, including physicians, who voice their concerns, and are free from retaliation by the hospital. They note Bus. & Prof. C. § 2056 (protecting physicians from retaliation for advocating for medically appropriate health care for their patients) and prohibitions against retaliation under the Stark and anti-kickback statutes (31 U.S.C. § 3730(h); Gov. C. § 12653(a)(b).)

Another opponent points to the intent behind passage of § 1278.5: "When this [statute] was added, it was not intended nor should it apply to physicians as there is no evidence that they have been subject to retaliation. ...The current statutory protections are clearly not inadequate nor is it necessary to extend them at this time."

Some supporters simply state that "[i]ndividuals should not be threatened into silence when they observe abusive practices. Failing to protect whistleblowers can result in costly lawsuits from the victims, as abusive practices are allowed to continue while those supposed to be responsible knowingly permit them." (Citizens Commission on Human Rights, Los Angeles/Hollywood Chapter letter dated 6/18/07.) Others state that if the opponents (hospital trade associations) really believe that existing law already covers physician members of a hospital medical staff, then AB 632

merely reiterates and clarifies the law so that no new burden is imposed by the bill. (California Society of Anesthesiologists, letter date 6/20/07.)

Finally, a supporter states that "[e]nactment of AB 632 would help provide job security and create a climate in which health care workers feel encouraged to report problems in the workplace, instead of feeling that raising concerns will result in a backlash." (San Bernardino Public Employees Association letter dated April 4, 2007.)

Support: California Society of Anesthesiologists (CSA); Citizens Commission on Human Rights Los Angeles/Hollywood; American Academy of Pediatrics - California; California Chapter of the American College of Emergency Physicians (CAL/ACEP); American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO; California Academy of Opthalmology; California Alliance for Retired Americans; San Bernardino Public Employees Association; California Teamsters Public Affairs Council; California Podiatric Medical Association; United Food and Commercial Workers Union, Western States Council; Engineers and Scientists of California, IFPTE Local 20

Opposition: United Hospital Association; Adventist Health; Loma Linda University Medical Center; Hospital Corporation of America; California Hospital Association

HISTORY

Source: California Medical Association (CMA)

Related Pending Legislation: None Known

Prior Legislation: SB 97 (Burton), Chapter 155, Statutes of 1999, established whistleblower protections for patients and employees of a health facility.

Prior Vote: Assembly Health Committee (Ayes 16, Noes 0)
Assembly Appropriations Committee (Ayes 15, Noes 0)
Assembly Floor (Ayes 70, Noes 0)
Senate Health Committee (Ayes 11, Noes 0)

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Substantive

AMENDMENTS TO ASSEMBLY BILL NO. 632
AS AMENDED IN SENATE JULY 17, 2007

Amendment 1
On page 2, line 8, after "those" insert:

accreditation and

Amendment 2
On page 3, line 14, strike out "who" and insert:

because that person

Amendment 3
On page 4, strike out lines 4 and 5, and insert:

suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee,

Amendment 4
On page 4, line 22, strike out "restitution" and insert:

reimbursement for lost income

Amendment 5
On page 4, line 36, after "on" insert:

a

Amendment 6
On page 4, line 37, strike out "matters" and insert:

hearing

Amendment 7
On page 4, line 37, strike out "complainant in" and insert:

member of the medical staff who has filed

Health / Judiciary Item # 151 Aanestad

Amendment 8
On page 4, line 40, after the period insert:

Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review ~~hearing~~ process to protect the person from irreparable harm.

Amendment 9
On page 5, line 16, after the period insert:

(*l*) Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code.

Amendment 10
On page 5, line 18, strike out "(*l*)" and insert:

(m)

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California Medical Association
1201 J Street, Suite 200, Sacramento, CA 95814-2906
Phone: (916) 444-5532 • Fax: (916) 444-5689
Physicians dedicated to the health of Californians

GOVERNMENT RELATIONS

To: Members of the State Assembly

Date: 9/11/2007

The California Medical Association is pleased to Sponsor Assembly Bill 632 which increases the quality of care provided to patients in California by clarifying that existing law extends whistleblower protection to members of a medical staff. The bill states that it is the public policy of California to encourage physicians and surgeons, among others, to notify responsible entities when they see problems with quality patient care and that as whistleblowers they will be protected from retaliation.

All too often, physicians and surgeons face retaliatory actions if they speak out about sub-standard care or conditions. This bill clearly gives protection to members of a medical staff and will be used as a tool to encourage reporting of potentially dangerous practices, conditions, or processes that can endanger patient safety.

This bill passed out of the Assembly with a 70-0 vote and off of the Senate Floor 38-1. It is now back for concurrence with Senate Amendments which further clarify that this bill is not to interfere with legitimate peer review activities.

AB 632 specifically includes members of the medical staff in Health and Safety Code 1278.5. Currently that code provides protections to employees and patients and the nebulous term "or any other person". Unfortunately, enterprising attorneys have used this section to deny protections to a physician who raised concerns by correctly stating that the physician was not an employee or patient. This bill will prevent that argument from occurring again. Since most physicians are not employees of the hospital, this code section is ambiguous and in need of clarification.

Retaliation and discrimination can come in many forms, such as economic pressure through removing a physician from a referral list, forcing a doctor out of a hospital owned office complex, or manipulating the surgery schedule. However, the most prevalent and most detrimental to quality patient care comes in the form of threats. Often physicians are faced with having to decide if they should report allegations of poor patient care or conditions knowing their practice and their livelihood may be harmed.

The CMA respectfully requests you AYE vote on the Assembly Floor. If you need further information, please contact Brett Michelin at (916) 444-5532.

PLEASE VOTE AYE ON AB 632

PROOF OF SERVICE

I, Melinda Less, declare that I am a resident of the State of California. I am over the age of 18 years and not a party to the within action; that my business address is Hanson Bridgett LLP, 425 Market Street, 26th Floor, San Francisco, California 94105. On September 24, 2012, I served a true and accurate copy of the document(s) entitled:

APPELLANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; SUPPORTING MEMORANDUM; SUPPORTING DECLARATION OF GLENDA M. ZARBOCK

on the party(ies) in this action as follows:

Stephen D. Schear, Esq. Law Office of Stephen Schear 2831 Telegraph Avenue Oakland, CA 94609	Counsel for Plaintiff Mark T. Fahlen, M.D.
Jenny C. Huang, Esq. Justice First, LLP 180 Grand Avenue, Suite 1300 Oakland, CA 94612	Counsel for Plaintiff Mark T. Fahlen, M.D.
Court of Appeal of the State of California Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy W. Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court

Terri Donna Keville, Esq. Davis Wright Tremaine 865 S. Figueroa Street, Suite 2400 Los Angeles, CA 90017	Counsel for California Hospital Association, Amicus Curiae for Appellant
Long Xuan Do, Esq. California Medical Association 1201 J Street, Suite 200 Sacramento, CA 95814	Counsel for California Medical Association, Amicus Curiae for Respondent

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by UPS and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery (next business day) at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 24, 2012, at San Francisco, California.

Melinda Less

Melinda Less