



Alliance for Patient Safety

*All that is necessary for the triumph of evil...
... is for good men to do nothing.*

Edmund Burke

Subject: VETO 655, as it Compromises our Patients' Safety by Promoting the "Code of Silence"

Date: September 24, 2011,

To the Honorable Governor of California, Jerry Brown Jr,

Allow me to introduce you to Dr Michael Fitzgibbons,

Dr. Fitzgibbons is a well known figure as the California Medical Association, CMA and the American Medical Association, AMA, filed jointly an amicus brief in his support, when he was sued by his hospital for frivolous reasons in a coercive action taken by the hospital administration to enforce the "Code of Silence", denying him his right to free speech protected under the First amendment of the Constitution and threatened him personally, as the hospital used mafia type tactics going as far as attempt on his life, and his family's life, see:

Attempt to injure and intimidate Michael Fitzgibbons, M.D.,
<http://www.ocweekly.com/2006-08-24/news/car-trouble/>

Following his personal experience, Dr Fitzgibbons was called upon to assist numerous physicians facing similar predicaments and represents them pro bono in their administrative proceedings at their hospitals.

As a consequence, Michael Fitzgibbons MD became a well known whistleblower and a foremost expert in peer review, see:

Retaliation Against Physicians - Michael Fitzgibbons, MD,
<http://www.allianceforpatientsafety.org/fitzgibbons.php>

- He was Chief of Staff of the Western Medical Center, Santa Ana, from 2002 to 2004.
- Member of the board of the Orange County Medical Association.
- Delegate to the CMA House of Delegates, HOD.
- Clinical instructor at the University of California Irvine, in internal medicine, from 1982 until 2011.

Attached, please find, letter from Michael Fitzgibbons, MD. requesting that you VETO AB 655.

Respectfully submitted,



Gil Mileikowsky MD

- President and Founder,
- Alliance For Patient Safety, AFPS, <http://allianceforpatientsafety.org/>
- <http://allianceforpatientsafety.org/socalphysgm.pdf>
- <http://allianceforpatientsafety.org/blackbox.pdf>

From: Michael Fitzgibbons, MD

Subject: Letter to Governor Brown to VETO 655

Date: September 24, 2011 11:02:31 AM PDT

To: Governor Jerry Brown

September 24, 2011

To: The Honorable Governor Jerry Brown:

Subject: VETO AB 655

Dear Governor Brown:

I appreciate your support for physicians and the California Medical Association.
I urge you to veto assembly Bill 655.

Please throw this baby out with the bathwater.

I am a physician and an expert in peer review.

I was Chief of Staff of my hospital at Western Medical Center, Santa Ana, 2002 to 2004.

I was recently on the board of the Orange County Medical Association.

I was a delegate to the CMA House of Delegates.

I was a clinical instructor at the University of California Irvine, in internal medicine, from 1982 until 2011.

Something is rotten in the Kingdom of Peer Review. Peer review is essential, but essentially flawed. Hospitals control peer review. Hospitals use peer review mechanisms to blackball, attain, and

destroy physician whistleblowers and patient advocates. This odious perversion spoils their 'bad apple plan' for 'bad apple doctors'. True quality improvement from Deming and industrial processes demands dismissing blame and sham(e). Unlike politics, blame 'medicine' is hog swill. Blame doesn't equal system change. System change is the healing medicine the body politic needs. Sorry to say, peer review bodies (read hospitals) passing information to one another about doctors may sound important, but what do hospitals have to do with doctors regulating the practices of doctors? The answer is hospitals control doctors who do the peer review. Some doctors, contracted with and paid by hospitals are biased.

Hospitals endorse and implement blame and sham(e) practices because they are cheaper than making system changes. Easier to blame one surgeon for infections than improve practices in the department, or screen from surgery patients who are very likely to get infected. Easier to blame an obstetrician for being late to deliveries than to pay a laborist to attend to the unattended precipitant deliveries of the poor and pregnant. Easier to harass a pulmonologist at 2 am than to pay an intensivist to cover ICU 24 hours. These are human errors but also system problems--both need fixing.

Of course doctors need to improve the practices of all doctors, but the idea that eliminating the bottom 1% will fix the problem only leads to another bottom 1%. Even the Feds have joined the blame and sham(e) bandwagon, targeting hospitals and refusing to pay for certain 'never' events, as if any human endeavor had assurance of perfection. When the Medicare's shoe pinches hospital's foot they squeal. I was and am a whistleblower. I was sued by my hospital's owning Corporation, Integrated Healthcare Holdings in 2005, because I complained about their 19% loan and how it impaired care. Integrated Healthcare Holding's CEO Bruce Mogel, then contracted to have a gun planted in my car and have me falsely arrested for brandishing a weapon. I was innocent, but went to jail. Mr. Mogel is guilty and walks freely.

Please see the attached files.

Regulatory oversight of hospitals is a failure, else how could Dr. Kali Chaudhuri be a controlling shareholder in a hospital corporation! Bruce Mogel the CEO of IHHI was an accused fraud, embezzler, forger, and abuser of Alta Healthcare's company funds. Alta sued Mogel and obtained a settlement of \$225,000 from him on their claims. Yet, Mogel was allowed to purchase four hospitals from Tenet, in 2004. The CEO of Western Medical Center Santa Ana, Dan Brothman said "all you have to do is sue one of them (doctors) and the rest of them back away... And the hospital always wins." In 2005, Brothman directly threatened three doctors, Dr. Brian Cross, Dr. Peter Wawro, and myself. So far he's gotten away with it. Physicians are controlled and manipulated by hospitals through carrot and stick.

Medical staffs lack independence and the ability to fund necessary operations. They are weak stepchildren of the hospitals. Afraid to report errors on health and safety matters, fearing retaliation by other hospital controlled physician stooges.

As such, peer review is a failure. The power pendulum has swung too far toward the hospital. The system stinks of blame and shame. Doctors review charts of their colleagues—friends or competitors--on an individual basis. Current peer review is post hoc, reactive, punitive, controversial, personal, and not systems oriented. It focuses on human error and punishes people who commit them. We need a new system that recognizes that error is human and seek systems and team approaches which trap and screen errors. This bill tinkers but does not reform. (But I am grateful Assemblywoman Hayashi has entered the pasture.)

Under the current system the patient whose care is being reviewed has already been discharged, thus there can be no impact on quality. Only a few charts are selected and generally these are selected by hospital employees. Usually the doctor disputes the facts, because the chart cannot contain all the facts.

There is no question that doctors make errors in the practice of medicine. There is also no question that hospitals are responsible for a similar number of errors -- should they be closed, censured, fined, hounded out of existence? Of course not, but there is no such system to investigate the hospital's errors. No hospital peer review system exists! And please do not refer to the joint commission, who focus on niggling details, and miss the forest for the trees.

Physicians whose practice is investigated under current peer review systems, are either investigated by their friends or the competitors. In both cases there is bias and the probability of a lack of fairness.

If you wish to know how to fix peer review read on.

In order for true peer review to work the system must be blinded, it must be voluntary, it must be non-punitive, concurrent, and educational.

Third graders can be asked to grade their papers objectively and will do so correctly if they know they are not to be punished.

Doctors on the other hand cannot objectively rate themselves because the consequences can be economically disastrous -- someone will find out their weakness and will persecute them.

Fixing the peer review system means moving it away from blame and sham(e) reporting, to system change, that would prevent abuse of the system as a tool to control physicians with "diverse" and divergent opinions. Diversity is protective. You can't address peer review by culling rotten apples.

It's the system that is rotten because the hospitals starve doctors' ability to educate and assist 'bad apple' colleagues. Hospitals starve doctors by underfunding their Medical staffs. Hospitals substitute a "blame and shame" bad Apple system, for true quality improvement. The problem is ALL the apples have flaws, in one way or another! We all know if you look hard enough at our practices, there will be someone who finds something to complain about. It's basic Deming. You can't solve the problem putting heads on poles. AB 655 focuses on the 'trial' aspect of peer review which is the least important aspect. Allowing hospitals to trade 'dirt on doctors' including allegations will only make it worse.

The problem is WE ALL MAKE MISTAKES EVERYDAY. We don't want our livelihoods taken away because we are human. We want the system to accept our humanity and help us...not punish us. The current system allows hospitals to use peer review as a retaliatory tool--and they almost always get away with it!

The law of error says: The best people make the worst mistakes. This produces a paradox. Churchill was Prime Minister when Singapore was lost.

He wasn't sacked. Why not? This demonstrates the law of error. Therefore, the system must work for the 'best people' too.

This whole controversy begins with the imbalance of power in hospitals. If Ford or General Motors produces defective cars, is it the employee's mistake alone? Toyota assembly lines can be stopped by any worker who finds a defect...that is a whistleblower. They aren't punished. Airlines have solved the problem...they don't punish near miss reporting. What happens to the doctor who self reports errors? Banishment.

Doctors cannot carry out their mission of monitoring quality because they have no resources allocated to do it.

The discretionary budget for quality improvement of most departments of medicine and surgery is exactly zero !

When was a hospital fined for giving too little money for quality improvement ? Never!

A medical staff actually empowered to regulate itself will scare the living you know what out of hospital administrations. They will actually find errors in the system and ask they be fixed.

The Medical Staff must be able to 'touch the money.' Medical staff's must have sufficient funds for peer review including funds to insure legal representation.

And while we're at it, governments and insurance companies begging doctors with economically substandard payments to balance their budget is the surest way to keep abuse in the system.

Real peer review should monitor concurrently, not be post hoc.

Peer review should be proactive, rarely reactive. Mentors should have the power to review practices of doctors AND the hospital. They should be PAID !

Peer review should be self directed and no fault, not punitive unless error is intentional or repeatedly negligent.

Peer review should remove bias and avoid clinical controversies where there is not good data. Unfortunately in medicine, despite the clamor for evidence based medicine, much is simply expert opinion. Peer review should be medical staff driven, not administration driven.

Peer review must not be retaliatory. Criminals have more rights than accused doctors. The accused doctor can't recuse biased jurors, can't recuse biased hearing officers. One such biased hearing officer flies in to California from Colorado, lies on her CV, hides biased articles she wrote about depriving doctors of due process and amice briefs to the California Supremes of similar ilk. Why fly her in from Colorado? You can guess, the hospitals get biased rulings. The hospitals won't use JAMS because they can't control the geri-judges.

For peer review to improve the medical staff must be empowered. Otherwise you perpetuate a system designed to hide the true cause of poor quality health care -- the system. Ever wonder why your loved one has to wait so long in the ER or hospital admitting office of a hospital, when you're spending thousands of dollars to get there, but if you buy a hamburger that costs five dollars somebody serves you right away? A different system.

Confidential physician self assessment is crucial to real peer review, because doctors will not be honest if this information becomes public. The doctor can and will grade himself.

He will review his own performance. And he will improve his performance -- because he is comparing himself with his own benchmark and peers. Extramural peers can also help review him. We've have got to bring error out of the closet, not drive it back in.

The doctor will decide if he is meeting his goals, with the help of 'peers' or mentors.

Departments would meet to discuss best practices. A high level of attendance would be mandatory. An institutional buddy system should develop where departments meet to discuss best practices. The buddy system would extend across hospitals and include like institutions. If there is an outlier doctor, the whole department has failed. In medicine, we ARE our brother's keeper.

Reaching the outlier doctor would rely on techniques similar to those used by drug companies. Representatives sent to the doctor's office to help review his practices and individually tutor him. Expensive? Yes. Less expensive than disaster? Yes.

Obviously a regional medical corporation would be very helpful and necessary in overseeing such a system and regulating it.

Imagine if airline pilots were treated the way doctors are ? Do you think that encouraging pilots to hide their shortcomings and cover-up mistakes would prevent crashes ?

Let's fix doctor peer review. This bill AB 655 doesn't do that. It focuses on the wrong thing. Please veto Bill 655. Empower Medical staffs. Let's have a bill that brings errors out of the closet not codifies them. Thank you for listening.

Respectfully,
/S/

Michael Fitzgibbons MD

