



# Alliance for Patient Safety

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

Edmund Burke

## **Opposition to AB 655, as it Compromises our Patients' Safety by Promoting the "Code of Silence"**

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Sent by Fax to: [916-319.33.06](tel:916-319-3306) and E-mail, on August 11, 2011.

**ATTENTION: California Assemblymember Mary HAYASHI, 18th Assembly District, Chair, [Assembly Committee on Business, Professions and Consumer Protections](#)**

Honorable Assemblymember Hayashi,

Kindly, include my letter into the legislative history of AB 655.

I, hereby, incorporate herein all the letters you received to date in opposition to AB 655 posted on our website, under:

Letters to Elected Officials in Opposition to A.B. 655  
(Hayashi), <http://allianceforpatientsafety.org/opposition-hb-655-hayashi.php>

On July 20, 2011, I had the privilege to speak with your Chief Consultant at the Assembly's B & P Committee, Mr Ross Warren, who said:

***" I am comfortable with the peer review system in California ", sic.***

See, Letter to Ross Warren, Chief Consultant, CA Assembly B & P Committee. SECOND REQUEST - URGENT CONFERENCE CALL REQUEST

Subject: OPPOSITION to AB 655 sent from Gil Mileikowsky, M.D. by E-mail and Fax to: [916-319.33.06](tel:916-319-3306), on July 20, 2011.

Unfortunately, I am sorry to inform you that your top advisor is living in an "Ivory Tower", as he is utterly out of touch with the tragic reality.

Attached and enclosed, please find, copy of a most recent article in the prestigious Daily Journal, [California's Largest Legal News Provider](#),

published, on July 25, 2011, entitled: "**Hospital privileges for doctors: a game of politics?**" by Barbara Hensleigh, J.D.,

Mrs. Hensleigh is a member of the esteemed California Academy of Attorneys for Health Care Professionals, CAAHACP.

The Academy is a professional association of approximately 100 California attorneys who are experienced in representing health care professionals (including physician, nurses, psychologists, marriage and family therapists, chiropractors, etc.) and who are nominated by their peers for membership in the Academy. Members of the Academy regularly represent physicians and surgeons in hospital medical staff peer review proceedings.

Ms Hensleigh is a Registered Nurse and an Attorney, dedicated advocate, champion of lost causes and never giving up, see her short profile:

Partner at the firm, [Andrews & Hensleigh, LLP](http://www.lawyers.com/California/Los-Angeles/Barbara-J-Hensleigh-137752-a.html), <http://www.lawyers.com/California/Los-Angeles/Barbara-J-Hensleigh-137752-a.html>

Did you ever read the book "**Critical Condition: How Health Care in America Became Big Business and Bad Medicine**" ?

by Donald L. Bartlett & James B. Steele

Following, please find, excerpts regarding number of deaths caused by preventable medical error, between 225,000 and 257,000 per year.

<http://allianceforpatientsafety.org/bigpicture.php>

I am sure that Mr Warren is highly qualified in some subjects, but he has no clue regarding what is actually happening in the "House of Medicine".

Furthermore, Mr Warren stated that he wanted to: " Protect the Consumer from bad physicians hopping from hospital to hospital."

Well, as the proverb says: " The Way to Hell is Paved with Good Intentions."

In fact, rather than protect the "Consumer", AB 655 will endanger our Patients and the dedicated physicians who care for them, because hospitals

put their dollar signs ahead of our patients' vital signs, as it is far more lucrative for a hospital administrator to encourage an environment that induces errors and complications.

Professor Lucian Leape observed that:

***"perversely... physicians and hospitals can bill for the additional services that are needed when patients are injured by their mistakes." ...***

see: Medical Errors Still Claiming Many Lives - USA Today 5/18/2005 Article quotes Harvard's Lucian Leape as saying,

"We have to turn the heat up on the hospitals." Summarizes 5/18/05 JAMA article by Professor Leape.

Read [USA Today](#) and [JAMA Articles](#), See also: [Why Pay for Mistakes](#) - Boston Globe - 8/23/2007,

[http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2007/08/23/why\\_pay\\_for\\_mistakes/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/08/23/why_pay_for_mistakes/)

Honorable Assemblymember Hayashi,

One day, you will be admitted to a hospital as a patient.

Accordingly, it is in your own best interest as a Consumer, to oppose AB 655, or significantly amend it.

Alternatively you could convert it into a two year bill.

Are you familiar with the complete thought of [Seneca the Younger](#) who said: "Errare humanum est, sed perseverare diabolicum." ?

**" To err is human, but to persist (in the mistake) is diabolical."**

[http://en.wikipedia.org/wiki/List\\_of\\_Latin\\_phrases\\_%28E%29](http://en.wikipedia.org/wiki/List_of_Latin_phrases_%28E%29)

I trust that your good judgement will prevail.

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>

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Hospital privileges for doctors: medical standards or bureaucratic politics?

By Barbara Hensleigh

<http://allianceforpatientsafety.org/hensleigh-daily-journal.php>

Physicians must have hospital privileges in order to provide care to their hospitalized patients. Issues arise in hospitals terminating otherwise capable physicians for improper bureaucratic reasons such as a doctor's clash with management, whistle-blowing or the desire to eliminate competition.

Hospital privileges are granted to physicians to provide medical care to their hospitalized patients. But the ability to provide medical care is not a "privilege." Rather, it is a property interest held by the physician. A hospital cannot indiscriminately decide which physicians provide medical care to patients in its facility.

In the 1970s and 1980s, California courts developed due process "fair procedure" requirements. To limit a physician's privileges, a hospital had to establish that medical care or conduct fell below acceptable standards and adversely affected patient care.

In the 1980s, the California Legislature codified these requirements. A medical "peer review" body at the hospital makes the initial decision of whether a physician is practicing within the standard of care. Peer review must be done on an ongoing basis "exclusively in the interest of maintaining and enhancing quality patient care." Business and Professions Code Section 809.05(d). The Legislature has given the hospital the ultimate decision over a physician's privileges, but requires it to give "great weight" to decisions of peer review bodies. Business and Professions Code Section 809.05(a).

If a medical staff recommends that a physician's privileges be limited or terminated, an administrative hearing body, comprised of physicians practicing at the hospital, hears evidence and makes a decision. A hospital board sits as an appellate body to determine whether the decision was supported by substantial evidence. Typically, the physician must exhaust the hospital's administrative procedures before filing a court action to challenge the action against him.

However, the statutes codifying fair procedure in California are not entirely "fair." For

example, the hospital's medical staff alone gets to choose the physicians who will be the "jurors" and the hearing officer at the administrative hearing. "Jurors" with a hospital-based practice such as a physician reliant on a hospital contract for his livelihood, may be vulnerable to pressure. The unhappy acronym applied to these jurors is "RAPE," which stands for Radiologist, Anesthesiologist, Pathologist and Emergency room physician.

The hearing officer also decides what material is admitted into evidence. The hearing officer can sit with the "jurors" in deliberation and often drafts their decision. Nonetheless, despite these issues, the process can work when hospitals act in good faith with the focus on patient care.

After the Legislature codified fair procedure requirements, courts generally deferred to hospitals in writ proceedings where doctors challenged final administrative decisions against them.

Some wrong-minded hospitals use these privileges to eliminate doctors who have competed against the hospital or to stifle those that oppose the administration. Whistle-blowers also could have their privileges curtailed under the guise of violating "medical standards."

The pendulum began to shift so much in favor of the hospitals that frustrated lawyers stopped representing physicians in these proceedings altogether.

Courts, however, are once again scrutinizing actions by hospitals. A physician alleging discrimination based on race was not required to exhaust administrative remedies before suing in court. *Payne v. Anaheim Memorial Med. Center* (2005) 130 Cal. App. 4<sup>th</sup> 729. The administrative remedies at the hospital are not designed to address discrimination. A hospital cannot use the anti-SLAPP statutes to get rid of a physician's lawsuit for the wrongful termination of his privileges if the hospital cannot show it followed the proper procedures. *Smith v. Adventist Health Systems/West* (2010) 190 Cal. App. 4<sup>th</sup> 40. Finally, a physician is not obligated to exhaust administrative remedies before filing suit where the case involves retaliation against the physician for whistle-blowing. *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal. App. 4<sup>th</sup> 987.

Two court decisions reviewed the qualifications and role of the hearing officer chosen by the medical staff/hospital. A hearing officer cannot serve if he has an expectation of additional retention by the hospital. *Yaqub v. Salinas Valley Memorial Healthcare System, Inc.* (2005) 122 Cal. App. 4<sup>th</sup> 474. The hearing officer also now clearly lacks authority to terminate fair hearing procedures, even as a discovery sanction. *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal. 4<sup>th</sup> 1259.

As to the administrative hearing itself, the physician is entitled to introduce evidence of the hospital's improper intentions in proposing to terminate the physician's privileges. *Smith v. Selma Community Hosp.* (2008) 164 Cal. App. 4<sup>th</sup> 1428. In a lawsuit alleging the failure by the hospital to provide an administrative hearing, a physician is entitled to emotional distress and

punitive damages. *Shahinian*, 194 Cal. App. 4<sup>th</sup> at 1002.

A recent case held that courts will not defer to a hospital's interpretation of its own bylaws where medical expertise is unneeded to interpret them. Instead, the bylaws must be interpreted by the body of law governing contract interpretation. *Smith v. Adventist Health Systems/West* (2010) 182 Cal. App. 729.

And finally, it is now clear that hospitals must pay physicians' attorney fees in a writ proceeding where the decision by the hospital to defend the writ proceeding is motivated by bad faith. *Smith v. Selma Community Hosp.* (2010) 188 Cal. App. 4<sup>th</sup> 1.

But there is more to be done. Some hospitals are still "piling on" charges against a physician before an administrative hearing; i.e., adding complaints about the conduct of a physician or his medical care as a basis for terminating his privileges when those complaints have never been brought to his attention. Then there is the issue of using physicians who are economically dependent on the hospital as jurors in the administrative process. But now, based on these recent court decisions, the public and physicians have at least a fighting chance against hospitals using the privileging system for reasons other than to promote quality patient care.

Barbara Hensleigh is a partner in Andrews & Hensleigh, LLP in Los Angeles. She is a former nurse and has practiced healthcare law since 1985.