Alliance for Patient Safety

All that is necessary for the triumph of evil…
… is for good men to do nothing.
Edmund Burke

Submitted September 11, 2010, at 12:18 AM, at http://gov.ca.gov/interact#email

Subject: VETO AB 1235 - Critical Analysis of California Bill AB 1235 - Medical Peer Review

To the Honorable Governor of California, Arnold Schwarzenegger,

Dear Governor Schwarzenegger,

If the Founding Fathers of California and the United States of America who wrote the US Constitution could read AB 1235, they would jump out of their graves, because every single fundamental, sacrosanct right is blatantly violated by AB 1235.

California Medical Association's original bill, AB 1235, morphed into a California Hospital Association, CHA, bill following all the devious amendments inserted by CHA's attorneys.

It is impossible here to cover all the misrepresentations of that amended bill. So, I shall just cover the most offensive parts:

1) It violates the right to Due Process protected under the 14th amendment.

This bill allows the hearing committee to recommend the denial the right of a physician to a hearing in certain circumstances that are left to the hospitals to determine individually through amendments of their own bylaws.

How come criminals in our country are entitled to Due Process, but physicians who face the capital punishment,

i.e. the utter destruction of their medical career, are not guaranteed their basic rights protected under our Constitution ?

Even when an alleged criminal is a fugitive and escapes to Mexico in the middle of his trial, as did Andrew Luster, the grandson of Max Factor, he does not lose his right to a fair trial, and his attorney continues to represent him in abstentia.

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***In absentia* under United States law:**

For more than 100 years, courts in the United States have held that, according to the United States Constitution, a criminal defendant's right to appear

in person at their trial, as a matter of due process is protected under the Fifth, Sixth, and Fourteenth Amendments.

However, the following exceptions are included in the Rule:

- the defendant waives his right to be present if he voluntarily leaves the trial after it has commenced,
- if he persists in disruptive conduct after being warned that such conduct will cause him to be removed from the courtroom,
- a corporation need not be present, but may be represented by counsel,
- in prosecutions for misdemeanors, the court may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence with his written consent, and
- the defendant need not be present at a conference or argument upon a question of law or at a reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure.

Indeed, several U.S. Supreme Court decisions have recognized that a defendant may forfeit the right to be present at trial through disruptive behavior,[1] or through his or her voluntary absence after trial has begun.[2]

http://en.wikipedia.org/wiki/In_absentia

2) AB 1235 violates Anti Discrimination laws.

AB 1235 creates a double standard by allowing physicians employees or contracted by the hospital to escape all scrutiny.

De facto, it guarantees the protection of mediocrity and irresponsible conduct under the corporate umbrella.

3) AB 1235 allows the hospital's medical staff to be represented by an attorney even if the physician has no more legal representation,

if, for instance, the physician can not afford one. Sounds fair and reasonable, doesn't it ?

4) There is no provision for the physician to exercise the equivalent of a demur, when the charges against the physician have no foundation.

5) There is no provision that would mandate the exhaustion of the administrative proceeding in less than 14 days.

The mandatory deadline for the hospital to submit an 805 report to the Medical Board of California is 14 days.

The deadline to submit a report to the National Practitioner Data Bank, NPDB, is 30 days from the suspension of the physician's clinical privileges.

The above is of outmost importance as justice delayed is justice denied. The damage inflicted to the physician's medical career is irreversible once these two reports are filed, see:

How to Get Rid of A "Disruptive" Physician, http://allianceforpatientsafety.org/howto.php

4) "Go for the Jugular"

Summarily suspend clinical privileges under false pretense of "imminent danger.

This triggers automatic reporting of physician to state medical boards, National Practitioner Data Bank, malpractice insurance carriers, medical insurance carriers, …

The association of a summary suspension with the required "exhaustion of administrative remedies," protracted over many years, assures the demise of the physician's

career, without any possible court's intervention. The hospital wins by attrition.

Read More, http://allianceforpatientsafety.org/howto-jugular.php

6) AB 1235 assumes that the physician is always the cause of protracted hearings that can last as long as 7 years or more.

This bill is not balanced at all, as it assumes that it is always the physician that is alleged to obstruct the discovery process, when in fact it is more often

the hospital that obstructs and procrastinate since they often use the administrative proceedings as part of their war of attrition, particularly if the physician's

clinical privileges were summarily suspended, see above # 5. Very few physicians can sustain such an ordeal for over 10 years and survive, let alone prevail.

7) There is no provision in this bill, in case a hospital withholds exculpatory evidence that would exonerate the physician.

8) There is absolutely NO reason to require that the hearing officer in a medical peer review hearing should be an expert in healthcare law.

At the present time, in CA, there are a very limited number of attorneys that qualify. So, attorneys representing hospitals' medical staff also serve as hearing officers at other hospitals where they do not represent their medical staff.

Some hearing officers are exclusively chosen by the same attorneys representing hospitals' medical staffs, wherever they represent their hospitals.

A number of attorneys representing physicians also represent hospitals and receive referrals from attorneys representing hospitals.

Last but not least, some law firms representing physicians also represent attorneys of hospitals when they are sued !

Basically, we have in CA what attorney Roger Diamond characterizes as an incestuous relationship between many hospital attorneys, hearing officers and some attorneys representing physicians, who refer clients to each other.

As long as we allow this small group of attorneys to benefit financially from this most lucrative activity and act as a " Star Chamber ", no law will ever provide us a good faith medical peer review.

The alleged requirement for a certain expertise and knowledge in healthcare law is commonly used by hospital attorneys all over the country.

In fact, this is nothing but a deception designed to assure the control of the outcome of medical peer review administrative hearings.

That argument was categorically rejected by the Supreme Court of Michigan in the case of Bruce B. Feyz, M.D. v. Mercy Memorial Hospital:

" We are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine.

This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from

hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. "

see 58. Retaliation Against Bruce B. Feyz, M.D.,

http://allianceforpatientsafety.org/retaliation-list.php

In 2002, the CA Supreme Court published its opinion in Haas v. San Bernardino County:

"The ad hoc procedures used by some counties in selecting temporary administrative hearing officers violates due process by giving some officers a financial interest in the outcome of cases they are to decide; appointments must be made in a manner that does not create the risk that favorable decisions will be rewarded with future work."

http://caselaw.findlaw.com/summary/opinion/ca-supreme-court/2002/05/06/109724.html

Accordingly**, in 2006, CMA's HOD approved Resolution 605-06 :**

"That the presiding officer may serve a peer review hearing only once in a lifetime "

That way, there is very little risk that the hearing officer shall have a financial conflict of interest based on an expectation of future work by that hospital, law firm,...

To the best of my knowledge, there are today over 10.000 unemployed attorneys in the state of CA, so we should have no difficulty finding an attorney to serve as a hearing officer in a medical peer review proceeding. See, LA Times article, March 27, 2010:

" Though small, the professional sector -- which includes lawyers, accountants, architects and economists -- has been pummeled by the recession, more than in any other recent downturn."

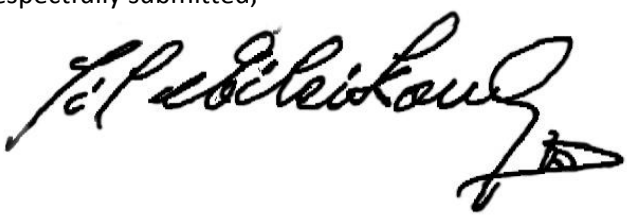
http://articles.latimes.com/2010/mar/27/business/la-fi-cal-jobs27-2010mar27/2

Is California the worst state for unemployedlawyers ?

http://abovethelaw.com/tag/is-california-the-worst-state-for-unemployed-lawyers/

In view of all the above, you MUST VETO AB 1235, forthwith.

Respectfully submitted,



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http://allianceforpatientsafety.org/socalphysgm.pdf

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