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Chapter 683: Extending Whistleblower Protections to Members of the Medical Staff of Health Facilities

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Code Section Affected
Health and Safety Code § 1278.5 (amended).
AB 632 (Salas); 2007 STAT. Ch. 683.

I. INTRODUCTION

In June of 2002, Father John Corapi, a Catholic priest, was told by the chief cardiologist at Redding Medical Center (RMC), Dr. Moon, "that he had a fatal heart condition" and that he needed coronary artery bypass surgery.[1] But when another cardiologist looked at his heart, he informed Father Corapi that there was not anything to bypass.[2] His heart was perfectly normal.[3] Stunned, the priest tried to contact the administrators at RMC, which was then owned by Tenet Healthcare.[4] Despite reports from seven other cardiac specialists who agreed that Corapi's heart was normal, the administrators refused to take action against Dr. Moon.[5] Finally, Father Corapi turned to the Federal Bureau of Investigation (FBI).[6]

On October 30, 2002, FBI agents raided RMC.[7] It turned out that Father Corapi was, indeed, not alone.[8] According to the FBI warrant affidavit, "many known and unknown patients [had] been victims of a scheme to cause patients to undergo unnecessary invasive coronary procedures."[9] The FBI obtained thousands of files, including the medical records "of at least 167 patients who died after surgery ordered by [Dr.] Moon"—surgeries and deaths that may have been unnecessary.[10] The four doctors responsible eventually settled with the

1. *60 Minutes: Unhealthy Diagnosis, Health Corp. Accused of Forcing Surgeries to Make Money* (CBS television broadcast July 27, 2003), *available at* http://www.cbsnews.com/stories/2003/07/17/60minutes/main563755.shtml [hereinafter *60 Minutes: Unhealthy Diagnosis*] (transcript on file with the *McGeorge Law Review*).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Reed Abelson, *Tenet Hospital in California is Searched by U.S. Agents*, N.Y. TIMES, Nov. 1, 2002, at C1.
8. *Id.*
9. *Id.*
10. *60 Minutes: Unhealthy Diagnosis*, *supra* note 1.

victims for over $32 million in exchange for avoiding criminal liability.[11] In addition, Tenet Healthcare paid a staggering $395 million to settle 750 other lawsuits connected to RMC.[12]

Although the saga at RMC ended with some measure of relief for the victims,[13] one cannot help but wonder what went wrong. How could anyone get away with performing so many medically unnecessary procedures at a respected hospital? Although many factors contributed to the corruption at Tenet,[14] it became evident after the scandal broke that the medical staff felt that they could not speak out against the unethical surgeons without fear of retribution.[15] According to the affidavit filed by the FBI in the raid of RMC, some physicians at RMC were concerned about the unnecessary surgeries, but Dr. Moon and the other doctors in charge of the cardiac program generated so much revenue for the hospital that they were "extremely powerful."[16] In a qui tam action filed by Dr. Patrick Campbell against RMC contemporaneously with Father Corapi's lawsuit, Dr. Campbell stated in a declaration that he "knew that such complaints about Dr. Moon would undoubtedly find their way back to him and lead to retribution against me."[17]

Concrete, substantiated evidence of retaliation against physicians can be difficult to find.[18] This could be due to a few reasons: retaliation or threats could

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11. Press Release, McGregor W. Scott, U.S. Attorney, Doctors Accused of Performing Unnecessary Heart Surgeries at Redding Medical Center Agree to Pay Millions to Settle Fraud Allegations and Accept Restrictions on Their Medical Practice (Nov. 15, 2005), http://mathiasconsulting.com/cases/2005/11/CA/redding (on file with the *McGeorge Law Review*).

12. Greg Lucas, *Settlement in Heart Surgery Fraud Case: Victims Could Get $32.5 Million from Doctors, Insurers*, S.F. CHRON., Nov. 16, 2005, at B3.

13. *Id.*

14. *See generally* Letter from Senator Charles Grassley, Chairman, U.S. Senate Comm. on Fin., to Trevor Fetter, Acting Chief Executive Officer & President, Tenet Healthcare Corp. (Sept. 5, 2003) (on file with the *McGeorge Law Review*) (citing the holdover of prior corrupt leadership, conflicts of interest, failure to acknowledge wrongdoing, and dozens of investigations showing that Tenet has been and continues to be a corrupt "morally bankrupt" organization).

15. *See 60 Minutes: Unhealthy Diagnosis*, *supra* note 1 (reporting on medical staff fearfully telling patients that their surgery was potentially unneeded).

16. Abelson, *supra* note 7.

17. Brief of Appellee United States of America at 9, United States *ex rel.* Campbell v. Redding Med. Ctr., 421 F.3d 817 (9th Cir. 2005) (No. 03-17082). Dr. Campbell's declaration is available online at http://allianceforpatientsafety.org/campbell/campdecl.pdf, although it is an unsigned version. Ironically, the government lashed out at Dr. Campbell for continuing to refer patients to Dr. Moon and neglecting to come forward, even though Dr. Campbell's declaration stated that he only did so when they were already "being treated for existing cardiac problems and insisted on seeing Moon." Maline Hazle, *'Whistle-blower' Accuses Feds*, RECORD SEARCHLIGHT (Redding, Cal.), Oct. 10, 2003, http://web.redding.com/specials/doctorsui/stories/Whistle-bloweraccusesfeds.shtml (on file with the *McGeorge Law Review*) ("Rather than a 'true whistle-blower' with 'the determination and courage to expose the defendants' fraud,' Campbell's 'conduct suggests greater interest in personal gain than public welfare . . . .'" (quoting Assistant U.S. Attorney Michael J. Hirst)).

18. *See* SENATE JUDICIARY COMMITTEE, BACKGROUND INFORMATION REQUEST FORM, at 2 (June 16, 2007) (on file with the *McGeorge Law Review*) (noting in response to the question, "Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will address the problem," the answer, "There are no reports highlighting this specific issue," was given); *see also* Letter from

be verbal and, therefore, go unsubstantiated; or retaliation could remain unreported for fear of further retribution. The evidence that does exist, however, is troubling. At RMC, the California Medical Association (CMA) says, Tenet "silenced" the physicians who tried to speak out about the surgeries.[19] The doctors were told that if they went public, the hospital would "destroy" their practice.[20] Some of the doctors tried to encourage other medical staff members to expose the problem by pointing to existing statutory protections to show that they could blow the whistle without fear.[21] However, the other doctors did not feel that the statute provided adequate protection and never came forward.[22] The atmosphere was such that after another patient of Dr. Moon's was admitted with what was supposedly a badly clogged artery, a nurse and a doctor both secretly came into the patient's room and implored him to leave because he did not need the surgery.[23]

The combination of fear of retribution from fellow physicians and upper management, along with murky statutory language and questionable protection in the law, laid the foundation for Chapter 683.[24] This bill's purpose is to clarify California law so that physicians will feel comfortable speaking out about quality of care issues without the fear that their livelihoods will be compromised.[25]

II. LEGAL BACKGROUND

A. Federal Law

Congress enacted the whistleblower provision of the Sarbanes-Oxley Act (SOX)[26] specifically to protect persons reporting instances of fraud that could

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David van der Griff, Legislative Advocate, Cal. Hosp. Ass'n, to Senator Ellen Corbett, Cal. State Senate (June 18, 2007) [hereinafter van der Griff Letter] (on file with the *McGeorge Law Review*) ("[T]here is no evidence that [members of the medical staff] have been subject to retaliation . . . ."). *But see* Alliance for Patient Safety.org, Retaliation Against Physicians, http://allianceforpatientsafety.org/retaliation.php (last visited Jan. 28, 2008) (on file with the *McGeorge Law Review*) (listing the names of 141 physicians who have allegedly been retaliated against and providing supporting materials); *see also* Posting of John Irvine to The Health Care Blog, http://www.thehealthcareblog.com/the_health_care_blog/2007/06/physicians-deat.html (June 21, 2007) (on file with the *McGeorge Law Review*) (discussing the background of the founder of the Alliance for Patient Safety).

19. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 6 (June 12, 2007).

20. Telephone Interview with Brett Michelin, Cal. Med. Ass'n, in Sacramento, Cal. (June 19, 2007) [hereinafter Michelin Interview] (notes on file with the *McGeorge Law Review*).

21. *Id.*

22. *Id.*

23. *60 Minutes: Unhealthy Diagnosis*, *supra* note 1.

24. *See* SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4 (June 12, 2007) ("[E]xisting law does not fully protect physicians and other health professionals from retaliation if they make a complaint or grievance about a health facility.").

25. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4-5 (July 12, 2007).

26. 18 U.S.C.A. § 1513(e) (West Supp. 2007). The section reads:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including

damage investors.[27] Although SOX primarily applies to publicly traded companies, the whistleblower provision applies to all companies, public or private.[28]

The California Legislature seemed to contemplate the application of SOX to physician whistleblowers in its committee analysis of Chapter 683, but it did not discuss SOX in detail.[29] It remains to be seen whether California courts will enforce the new whistleblower provision against health facilities engaging in retaliatory action against their employees. One California court confronted with an alleged retaliation action brought by hospital employees against their employer has held that section 1107 of SOX "'simply cannot be read to reach the reporting of ethnic remarks to a local hospital's governance board.'"[30]

B. *California Law*

Current law protects patients, employees, and "any other person" from discrimination or retaliation by a health facility for "present[ing] a grievance or complaint, or . . . initiat[ing] or cooperat[ing] in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility."[31] If a health facility engages in discriminatory treatment,[32] the law creates a rebuttable presumption that the facility took the action in retaliation for the patient or employee making the complaint.[33] A willful violation of the statute

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interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Id. SOX also allows a private cause of action under the civil Racketeer Influenced and Corrupt Organizations (RICO) statute. *See id.* § 1961(1)(b) (West 2000 & Supp. 2007) (defining "racketeering" as including those activities under section 1513(e)).

27. Jay P. Lechner & Paul M. Sisco, *Sarbanes-Oxley Criminal Whistleblower Provisions and the Workplace: More Than Just Securities Fraud*, FLA. B.J., June 2006, at 85, 85, *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/83e35f41f619308c85257178006f13fe?OpenDocument.

28. *Id.*

29. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 3 (June 12, 2007).

30. Lechner & Sisco, *supra* note 27, at 86 (citing MacArthur v. San Juan County, 416 F. Supp. 2d 1098, 1134 n.40 (D. Utah 2005)).

31. CAL. HEALTH & SAFETY CODE § 1278.5(b)(1) (West 2000).

> [I]t is the public policy of the State of California to encourage patients, nurses, *and other health care workers* to notify government entities of suspected unsafe patient care and conditions. . . . No health facility shall discriminate or retaliate 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.

Id. § 1278.5(a)-(b)(1) (emphasis added).

32. "'[D]iscriminatory treatment of an employee' [includes] discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions." *Id.* § 1278.5(d).

33. *Id.* § 1278.5(c).

constitutes a misdemeanor and up to a $20,000 fine,[34] and a health facility could be subjected to a civil penalty of up to $25,000.[35] This section does not apply to inmates or long-term care facilities.[36]

Because the language of the statute prior to Chapter 683 only applied to "patients," "employees," and "any other person," physicians had to argue that they fell under the ambiguous label of "any other person" in order to show that they had suffered discriminatory treatment.[37] Since California bans the corporate practice of medicine,[38] doctors usually cannot be directly employed by a health facility.[39]

III. CHAPTER 683

Chapter 683 extends existing whistleblower protections to medical staff members of hospitals and other healthcare facilities, including physicians and surgeons.[40] Specifically, the statute broadens the rebuttable presumption existing in section 1278.5 to medical staff members[41] and expands the scope of "discriminatory treatment" to encompass "any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions."[42] A medical staff member can be reinstated, receive reimbursement for any resulting lost income, and collect legal costs associated with pursuing his or her case.[43]

Chapter 683 also expands the list of persons and entities whose retaliatory actions against medical staff members can give rise to liability under the statute.[44] The definition of a "health facility" now includes, but is not limited to, "the facility's administrative personnel, employees, boards, and committees of the

34. *Id.* § 1278.5(f).

35. *Id.* § 1278.5(b)(2).

36. *Id.* § 1278.5(h), (i). Long-term care facilities are already covered by CAL. HEALTH & SAFETY CODE § 1432 (West 2000 & Supp. 2007).

37. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4 (June 12, 2007).

38. CAL. BUS. & PROF. CODE § 2400 (West 2003) ("Corporations and other artificial legal entities shall have no professional rights, privileges, or powers.").

39. Instead, they are given privileges to practice at a hospital and have a relationship with a hospital that is established by the self-governing medical staff, including medical staff bylaws, the peer review process, and other governance measures as set forth in the CAL. BUS. & PROF. CODE §§ 2282-2282.5 (West 2003 & Supp. 2007).

40. CAL. HEALTH & SAFETY CODE § 1278.5(b)(1) (amended by Chapter 683). Again, this section does not apply to long-term care facilities. *Id.* § 1278.5(k) (amended by Chapter 683).

41. *Id.* § 1278.5(d)(1) (amended by Chapter 683).

42. *Id.* § 1278.5(d)(2) (amended by Chapter 683) (emphasis added).

43. *Id.* § 1278.5(g) (amended by Chapter 683).

44. *Id.* § 1278.5(b)(2), (i) (amended by Chapter 683).

board, and medical staff."[45] Further, a parent company, like the health care facility it owns, is precluded from engaging in retaliatory behavior.[46]

Despite these expansions, Chapter 683 also provides some protection for hospitals.[47] When a medical staff member with a peer review hearing pending files an action against a health facility, Chapter 683 allows a facility's medical staff to petition the court for an injunction from complying with any evidentiary demands imposed by the action where the demands would impede the peer review process or put patient health and safety in danger.[48] In that case, Chapter 683 requires the court to conduct an in camera review of the evidence that is sought and to grant the injunction if it determines that discovery will impede the peer review hearing.[49]

IV. ANALYSIS OF CHAPTER 683

A. *Explicit Protection for Members of the Medical Staff of Health Facilities*

According to Chapter 683's sponsor, the CMA, Chapter 683 was introduced in response to CMA members reporting retaliation by health facilities against those physicians and other medical staff members who reported concerns.[50] In addition to the methods previously discussed, the CMA identified other modes of retaliation that could be used by a hospital: "removing a physician from a referral list, forcing a doctor out of a hospital-owned complex, or underwriting the salary or practice expense of a competing physician."[51] Chapter 683's amended definition of "discriminatory treatment" does not explicitly address these more subtle forms of retaliation, although it provides the statutory framework for enabling physicians to pursue redress for this discrimination.[52]

45. *Id.* § 1278.5(i) (amended by Chapter 683).

46. *Id.* § 1278.5(b)(2) (amended by Chapter 683).

47. *Id.* § 1278.5(h) (amended by Chapter 683).

48. *Id.* (amended by Chapter 683).

49. *Id.* (amended by Chapter 683).

50. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4-5 (July 12, 2007).

51. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 5 (June 12, 2007).

52. *See* CAL. HEALTH & SAFETY CODE § 1278.5(d)(2) (amended by Chapter 632) (leaving it unclear whether "discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions" could be interpreted as encompassing these other forms of retaliation); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 9 (July 12, 2007) ("It would seem that none of these remedies would give adequate redress to a physician who suffered any of the retaliatory acts named above.").

Reports of retaliation are not limited to the egregious example of RMC.[53] Recently, a major hospital corporation in Southern California filed a defamation lawsuit against a medical staff doctor that criticized the hospital's financial performance and questioned its impact on patient care.[54] According to the CMA, during the lawsuit, the hospital allegedly "threatened to retaliate against the medical staff [there and at other] hospitals if they participated in the investigation."[55] In its opening brief, the hospital corporation argued that the statute (as it existed before Chapter 683) did not apply to physicians, and in its argument did not acknowledge the language "and other health care workers" in the statute.[56] This argument was not pursued on the appellate level, but if it had been successful, it would have created an unfavorable precedent for physicians. Although health facility employees were protected under the prior law, the physicians, not being employed by the facility, could not utilize the whistleblower provision to bring an action against the facility.[57] By adding explicit protection for physicians and other medical staff members in the statute, Chapter 683 greatly reduced the prior ambiguity in the statute.[58]

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53. *See* Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517 (4th Dist. 2006) (granting physician's special motion to strike a lawsuit filed against him by hospital holding company for defamation and breach of contract, inter alia. The physician brought the motion under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute in the CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2008)). The statute reads, in pertinent part

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

CAL. CIV. PROC. CODE § 425.16(b)(1).

54. *Integrated Healthcare Holdings, Inc.*, 140 Cal. App. 4th at 520-21, 44 Cal. Rptr. 3d at 521-22.

55. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 6 (June 12, 2007).

56. CAL. HEALTH & SAFETY CODE § 1278.5(a) (West 2000); SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4 (June 12, 2007) ("The author states that some attorneys have interpreted this to deny protections to physicians and other members of the medical staff because they are not employees or patients of the health facility."); Michelin Interview, *supra* note 20; *see* Letter from Mark T. Kawa, Attorney, Tenet Counsel, to Kevin J. Mirch, Attorney (Feb. 15, 2002), http://www.allianceforpatientsafety.org/kawaletter.pdf (on file with the *McGeorge Law Review*) (arguing that Health and Safety Code section 1278.5 did not apply to physicians, and Business and Professions Code section 2056 was similarly irrelevant to the defendant's situation). Indeed, the bill's opponents explicitly argue that the statute currently excludes physicians from its purview. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 6 (June 12, 2007). CHA points out that the original section 1278.5 was not enacted with the intent to protect physicians, but only to protect employees (including nurses) and patients. *Id.* The Hospital Corporation of America makes the same argument in its opposition letter to Senator Kuehl. Letter from Terry M. McGann, Senior Legislative Advocate, & Alice D. Toler, Legislative Advocate, Hospital Corp. of Am., to Senator Sheila Kuehl, Cal. State Senate (June 8, 2007) (on file with the *McGeorge Law Review*). The California Nurses Association sponsored the original bill that became section 2056 in 1999, and the legislative history never expressly mentioned physicians or surgeons being included in the protection afforded by the bill. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 97, at 1-2 (June 22, 1999) (indicating the bill was intended to protect hospital employees and patients).

57. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 4-5 (June 12, 2007).

58. *Id.* at 4.

B. Application of Other Provisions of California Law

Opponents of Chapter 683[59] argued that California Business and Professions Code section 2056 and other state and federal laws protecting physicians for reporting "fraud, overbilling, and violations of Stark[60] and anti-kickback statutes" sufficiently protect physicians from retaliation.[61] Section 2056 states that physicians and surgeons shall not be discriminated against for advocating for medically appropriate care for their patients.[62] Although the statute primarily addresses the problem of managed care organizations, such as HMOs, interfering with physicians' communications with their patients,[63] California courts have applied the law to *any* situation in which a physician advocates for their patient.[64]

However, the plain language of the statute still expressly applies only to a doctor who "advocate[s] for medically appropriate health care *for his or her patients*."[65] Therefore, the scope of the statute excludes physicians and surgeons who report a problem not related to their own patients.[66] In addition, section 2056 applies only to physicians and surgeons, excluding the many other professional medical staff members.[67] In a letter opposing Chapter 683, the California Hospital

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59. The bill's registered opposition consists primarily of the California Hospital Association (CHA), as well as the United Hospital Association, Hospital Corporation of America (HCA), Adventist Health, and Loma Linda University Medical Center. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 13 (July 12, 2007).

60. "Stark" is a federal statute governing physician self-referral for Medicare and Medicaid patients. 42 U.S.C.A. § 1395nn (West Supp. 2007).

61. SENATE HEALTH COMMITTEE, COMMITTEE ANALYSIS OF AB 632, at 6-7 (June 12, 2007).

62. CAL. BUS. & PROF. CODE § 2056 (West 2003).

> The purpose of this section is to provide protection against retaliation for physicians who advocate for medically appropriate health care for their patients . . . . 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. For purposes of this section, "to advocate for medically appropriate health care" means . . . to protest 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 . . . . No person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy, nor shall any person prohibit, restrict, or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care.

Id. § 2056(a)-(c).

63. ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 1847, at 1 (June 26, 1996).

64. *See* Khajavi v. Feather River Anesthesia Med. Group, 84 Cal. App. 4th 32, 100 Cal. Rptr. 2d 627 (3d Dist. 2000) (holding that the trial court's determination that the statute did not apply because the dispute did not involve a third party payer was erroneous). "[T]he plain language of the statute demonstrates that it protects physicians and surgeons from termination or penalty 'for advocating for medically appropriate health care,' without limitation." *Id.* at 38, 100 Cal. Rptr. 2d at 632 (citation omitted). "Indeed, the 'person' who makes the decision to terminate or penalize a physician . . . extends beyond a third-party payor." *Id.* at 48, 100 Cal. Rptr. 2d at 638.

65. CAL. BUS. & PROF. CODE § 2056(b) (emphasis added).

66. *See id.* (excluding protection for doctors who advocate for patients other than their own).

67. *See id.* (protecting only "physician[s] and surgeon[s]").

Association (CHA) proposed amending section 2056,[68] but the Legislature amended the Health and Safety Code instead.[69]

C. Potential "Chilling Effect" of Statute on Hospital Peer Review

The CHA's primary concern was the "chilling effect" that the rebuttable presumption may have on the peer review process.[70] The CHA defines "[p]eer review [as] the process by which the self-governing Medical Staff, not hospital administrators, evaluates physicians and surgeons with respect to patient care they provide in a hospital."[71] The peer review process is an integral part of the way California health facilities deliver quality healthcare because physicians are considered the best persons to adjudge each other's conduct and consequences on patient care and safety.[72] The CHA pointed out that various provisions in California law, such as immunity from monetary liability and protection from discovery, exist to encourage participation in the peer review process and to be free from fear of retribution for doing so.[73] The CHA argues that Chapter 683 would make any peer review action a "retaliatory action," thereby criminalizing the very process intended to protect physicians' and hospitals' interests.[74] Chapter 683's sponsor countered that Chapter 683 only creates a rebuttable presumption, which means that the facility would only have to show actual evidence of wrongdoing, which they would presumably have anyway.[75] However, the CHA pointed out that the "hospital would be required to produce evidence of why the peer review action is being contemplated or conducted even before that evidence has been fully developed and presented in a Medical Staff fair hearing."[76]

Although it is not clear whether a peer review action would constitute "discriminatory treatment" for purposes of the statute,[77] the Legislature eventually included amendments to the bill that addressed opponents' concerns regarding the evidentiary burden on medical staff members.[78] As described

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68. van der Griff Letter, *supra* note 18.

69. *See* 2007 Cal. Stat. ch. 683 (amending section 1278.5 of the Health and Safety Code).

70. *Id.*

71. *Id.*; *see also* CAL. BUS. & PROF. CODE §§ 809-809.7 (West 2003 & Supp. 2007) (explaining the peer review process).

72. van der Griff Letter, *supra* note 18.

73. *Id.* (citing CAL. CIV. CODE §§ 43.7, 43.8, 43.97 (West 2007 & Supp. 2008); CAL. EVID. CODE §§ 1156, 1157 (West 1995 & Supp. 2008)).

74. *Id.*

75. Interview with Maria Garcia, Staff Member, Cal. State Assembly, in Sacramento, Cal. (June 20, 2007) (notes on file with the *McGeorge Law Review*).

76. van der Griff Letter, *supra* note 18.

77. Chapter 683 includes under the term "discriminatory treatment" "the threat of [changes in privileges]," which could be interpreted as including peer review, depending on the circumstances of each case. CAL. HEALTH & SAFETY CODE § 1278.5(d)(2) (amended by Chapter 683).

78. *See id.* § 1278.5(h) (amended by Chapter 683) (providing some protection for the peer review process).

earlier, these amendments include a preliminary in camera hearing before a judge to determine what effect, if any, the action taken by the medical staff member would have on a pending peer review hearing.[79] The amendments may not fully alleviate health facilities' concerns that a disruptive physician may "stop a peer review action in its tracks" by immediately filing a complaint,[80] rendering the peer review action a retaliatory action. Hopefully, this kind of conduct will be recognized in the in camera review and an injunction granted to allow a legitimate peer review action to continue unhindered.[81]

V. CONCLUSION

Physicians should be able to come forward with quality of care concerns without wondering if their practice will be "destroyed."[82] Chapter 683 provides explicit protection to those medical staff members who, like those at RMC, were outraged by their colleagues' actions but feared for their own livelihoods.[83] In the ongoing struggle to mend the healthcare system, the hope is that Chapter 683 will bring to light quality of care concerns as expediently as possible, potentially saving the lives of patients, preserving doctors' practices, and reducing the cost of delivering healthcare for health facilities.[84]

79. *Id.*

80. van der Griff Letter, *supra* note 18.

81. *See* CAL. HEALTH & SAFETY CODE § 1278.5(h) (amended by Chapter 683) (providing for in camera review of the evidence sought in a whistleblower protection action).

82. *See generally* van der Griff Letter, *supra* note 18 (including with its opposition letter suggestions for amending Business and Professions Code section 2056 to include protections for physicians).

83. *See* CAL. HEALTH & SAFETY CODE § 1278.5(b)(1), (d)(2), (g) (amended by Chapter 683).

84. *Id.* § 1278.5(a) (amended by Chapter 683).