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Key California Health Laws 2008

Presenters:

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Presenters

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Laws to be Covered

- A.B. 632: Medical staff "whistleblower" protection
- S.B. 916: Extension of temporary psychiatric holds
- A.B. 682: Relaxation of informed consent requirement for HIV/AIDS testing
- A.B. 1178: Amendment of CMIA to incorporate Tarasoff exception
- A.B. 1298: Expansion of CMIA to include additional entities

Laws to be Covered (cont'd)

- A.B. 1324: Prohibits plans from avoiding prior authorization obligations by rescinding or cancelling coverage
- A.B. 1296: Provides CalPERS with certain hospital information to assist in contracting
- A.B. 3: Eliminates barriers to efficient utilization of Physician Assistants
- S.B. 350: Addresses hospital charity care and discount policies
- S.B. 306: Modifies seismic safety deadlines based on financial need

A.B. 632: Medical Staff Whistleblower Protection

- Author: Salas (D)
- Proponents:
  - California Medical Association (Source)
  - American College of Emergency Physicians, California Chapter
  - American Federation of State, County and Municipal Employees
  - California Academy of Ophthalmology
  - California Alliance for Retired Americans
  - California Society of Anesthesiologists
  - Citizens' Commission on Human Rights
  - San Bernardino Public Employees Association
- Opposed by:
  - California Hospital Association

A.B. 632: Current Law

- California Health and Safety Code Section 1278.5 allows for whistleblower protection, "to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions"
  - Protects patients and workers who:
    - File complaints to accrediting or evaluating agencies
    - Initiate, participate, or cooperate with investigations or administrative proceedings related to the quality of care, services, or conditions at the facility

A.B. 632: Current Law (cont'd)

- Violation of Section 1278.5 is a misdemeanor, punishable by a fine of up to $20,000
- Actions taken by a health facility are presumed to be retaliatory against an employee if they occur:
  - Within 180 days of the filing of a complaint by or "on behalf of" a patient
  - Within 120 days of the filing of a complaint by an employee
    - This includes actions such as discharge, suspension, any unfavorable change in the terms of employment, or the threat of these actions

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A.B. 632: Interesting New Language

- Now covers accreditation, as well as government, entities
- "Health Facility" definition includes, but is not limited to, the facility's administrative personnel, employees, boards, committees of the board, and the medical staff
- Now applies to reports made to the facility, an entity responsible for accrediting or evaluating the facility, or the medical staff of the facility
- Now will apply to members of the medical staff or any other health care worker of the facility

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A.B. 632: Interesting New Language (cont'd)

- Now applies to administrative proceedings and investigations related to quality of care, services, or conditions carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity
- Now retaliation is covered not only if it is taken by the facility but also if it is taken by any entity that owns or operates that health facility or that owns or operates any other facility

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A.B. 632: Interesting New Language (cont'd)

- Amends California Health and Safety Code Section 1278.5 to include medical staff
- Presumed retaliatory action is expanded to include unfavorable changes, or the threat of unfavorable changes, in:
  - A contract, employment or
  - Privileges of the employee, member of the medical staff, or any other health care worker

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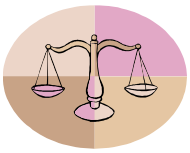
A.B. 632: Interesting New Language (cont'd)

- If retaliation is found, a member of the medical staff or other health care worker of the facility is entitled to:
  - Reinstatement
  - Reimbursement for lost income resulting from changes in the terms or conditions of privileges
  - Legal costs of pursuing his or her case
  - Any other remedy deemed warranted by a court pursuant to this chapter or other applicable provision of statutory or common law



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A.B. 632: Protections for the Medical Staff

- The medical staff may petition for an injunction to keep a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who filed a 1278.5 action
  - If the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process

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A.B. 632: Protections for the Medical Staff (cont'd)

- Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to determine if an 805/809 peer review hearing would be impeded
- If so, the injunction should be granted until the peer review hearing is concluded

A.B. 632: Protections for the Medical Staff (cont'd)

- Courts are permitted to issue injunctions for the duration of the peer review process to prevent irreparable harm to the "person"
  - Courts may take this action on their own or at the request of a party
  - Query who the legislation contemplates as a "person"

A.B. 632: Implications Hollow Reassurance

- 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 Business and Professions Code Sections 809-809.5

A.B. 632: Implications (cont'd)

- This legislation has the potential to be highly disruptive

- Physicians are already protected against retaliation by:
  - California Business and Professions Code Section 2056
    - Protects physicians who advocate for medically appropriate health care for their patients
  - 42 U.S.C. Sections 1128(b)(3)(F), 1395nn
    - Protects physicians who report Stark Law and Anti-Kickback violations

A.B. 632: Implications (cont'd)

- These changes could seriously upset the peer review process
  - Hospitals will have to fight to keep evidence from peer review hearings out of retaliation lawsuits

  - An aggrieved medical staff member can probably file a suit and proceed while the peer review hearing is ongoing and avoid the "exhaustion of administrative remedies" doctrine
  - While hospitals could still file an anti-SLAPP suit, this "battle of the suits" will be a distraction from peer review

A.B. 632: Implications (cont'd)

- These changes run counter to current California case law:
  - *Bollengier v. Doctors Medical Center*, 222 Cal.App.3d 1115 (1990): requires physicians to exhaust administrative remedies before filing claims in court
  - *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192 (2006): granted special protection against SLAPP suits to peer review proceedings as "official proceedings"

A.B. 632: Implications (cont'd)

- These changes could have a major chilling effect:
  - Medical staff committees may be asking before every case review: "Will I be dragged into court by the doctor whose care I am reviewing?"
  - Potential expense of lost income and legal fees of doctors who file retaliation suits
  - Adverse relationships among "factions" in the hospital

A.B. 632: Implications (cont'd)

- The fact that a violation of the law is a misdemeanor creates additional problems
  - Conviction of any crime, even a misdemeanor, may result in exclusion from federally funded programs
- California Hospital Association had wanted to require a medical staff member to "substantially prevail" in a peer review action before bringing a 1278.5 action

A.B. 632: The Future

- Will doctors with quality issues file a complaint every 120 days to "immunize" themselves?
- California Medical Association plans to continue to challenge aspects of peer review
- Next year, it will focus on:
  - A physician's right to have an attorney present during the process
  - Hearing officer payment by hospitals

A.B. 632: The Future (cont'd)

- Compare TJC accreditation requirement effective 1/1/08, which forbids retaliatory actions by accredited hospitals against those who report concerns about quality of care
  - No presumption of retaliation by TJC if corrective action is taken by a hospital or its medical staff
- How many of us think that "abusive" peer review is rampant?
- Who are the "other health care workers?"

Actions for Now

- Keep track of complaints filed by anyone, verbal or written
- Investigate the issue raised
- Document the investigation
- Respond to the complainant

Actions for Now (cont'd)

- Have a good relationship between the medical staff, administration, and governing body
- Take care in peer review evaluations/investigations
  - Document all evidence the peer review body considered
- Have a process for dealing with disruptive persons
  - Hospital-wide Code of Conduct
  - Early intervention
  - Wellness Committee

S.B. 916: Extension of Temporary Psychiatric Holds

- Author: Yee (D)
- Selected proponents:
  - California Hospital Association (Source)
  - Alvarado Parkway Institute
  - Association of California Healthcare Districts
  - California Chapter of the American College of Emergency Physicians
- Opposed by:
  - California Psychiatric Association

S.B. 916: Extension of Temporary Psychiatric Holds: Current Law

- California Health and Safety Code Section 1799.111:
  - Allows an acute general hospital without a psychiatric unit that provides emergency services to detain a patient without liability if the patient presents a danger to himself or herself, or others, or is gravely disabled as a result of a mental disorder
    - Gravely disabled: unable to provide for basic personal needs for food, clothing, or shelter

S.B. 916: Current Law (cont'd)

- If the patient is later detained under Welfare and Institutions Code Section 5150, the time detained is credited toward the 72 hour maximum
- Maximum time a patient may be detained is 8 hours

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S.B. 916: Extension of Temporary Psychiatric Holds: New Law

- Increases applicability from general acute care hospitals
  - To hospitals that are not county-designated under Welfare and Institutions Code Section 5150
  - To licensed acute psychiatric hospitals that are not 5150-designated
- Clarifies that the hold may be placed if a physician and surgeon is providing emergency services in any department of those hospitals(!)
- Must be a person subject to detention under Welfare and Institutions Code 5150

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S.B. 916: Extension of Temporary Psychiatric Holds: New Law

- Under S.B. 916 the maximum time a patient may be detained increases to 24 hours
- Probable cause must be shown for the detention
- If the hold is more than 8 hours:
  - The transfer must be delayed because of the need for continuous and ongoing care, observation, or treatment that the hospital is providing
  - The treating physician or clinical psychologist with medical staff privileges or "professional responsibilities" (pursuant to Health and Safety Code Section 1316.5) must show that the patient is still a danger to himself or herself, or others, or gravely disabled as a result of a mental disorder

S.B. 916: New Law (cont'd)

- Other issues in this bill
  - Exemption from liability for release of psychiatric patients
  - Psychologist's role in authorizing release
- Exempts hospitals (other than county-designated mental health facilities), professional staff, and doctors from civil or criminal liability for:
  - Detention of the patient or
  - Actions of the patient upon release

Exemption from Liability

- Exemption from liability applies if all are true:
  - Person is not admitted pursuant to W&I Section 5150
  - Release is authorized by a physician and surgeon or clinical psychologist with medical staff privileges or professional responsibilities who determines based on a face-to-face examination that the person does not present a danger to himself or herself or others and is not gravely disabled

Exemption from Liability (cont'd)

- Psychologist can only perform the above evaluation and authorize release if they have a collaborative treatment relationship with a physician and surgeon
  - Must consult with physician and surgeon
  - Prior to release
- In the event of disagreement between PhD and MD
  - Detention maintained
  - Unless medical director overrules the decision of the physician and surgeon who opposed the release
- Question: What if the PhD opposed the patient's release and the MD supported it?

S.B. 916: Implications and Questions

- This change to the law will allow hospitals some additional flexibility in dealing with the common problem of holding patients who need medical evaluation before they can be released to county-designated mental health facilities
- It also will enable hospitals that do not provide psychiatric services more time to place a patient who is subject to W&I Code Section 5150 detention

Limits of S.B. 916

- Amendments do not limit psychotherapists' duty to warn
- This section is not intended to expand the scope of licensure for clinical psychologists

A.B. 682: Informed Consent for HIV/AIDS Testing

- Author: Berg (D)
- Selected proponents:
  - AIDS Healthcare Foundation (Co-source)
  - California Medical Association (Co-source)
  - Health Officers Association of California (Co-source)
  - California Association of Family Physicians
  - California Hospitals Association
  - California Psychiatric Association
  - Cities of Los Angeles and West Hollywood
  - Kaiser Permanente Medical Care Program
- Selected opponents:
  - American Civil Liberties Union
  - Center for Health Justice
  - HIV/AIDS Legal Services Alliance
  - Protection and Advocacy, Inc.

A.B. 682: Informed Consent for HIV/AIDS Testing: Current Law (Part 1)

- Written consent, signed by the patient, or a conservator or guardian, must be obtained before testing for HIV, except under certain circumstances (California Health and Safety Code Section 120990)
- California Health and Safety Code Section 120990 is repealed and re-written to allow for simple verbal consent

A.B. 682: Informed Consent for HIV/AIDS Testing: New Law

- What is required for verbal consent?
  - Medical care provider must:
    - Inform the patient that an HIV test is planned;
    - Provide the patient with information about the test;
    - Inform the patient that there are numerous treatment options for HIV positivity and that a person who tests negative that they should continue to be routinely tested; and
    - Inform the patient that the patient has the right to decline the test

A.B. 682: Informed Consent for HIV/AIDS Testing: New Law (cont'd)

- If the patient declines an HIV test, this must be noted in the patient's file

- This bill does not permit disclosure of HIV status in violation of civil rights laws or the ADA or FEHA, which prohibit discrimination against persons with HIV, who test positive for HIV or who are presumed to be HIV positive

A.B. 682: Informed Consent for HIV/AIDS Testing: Current Law (Part 2)

- As part of routine testing for HIV during prenatal care or delivery informed consent is required, including the right to accept or refuse testing (California Health and Safety Code Section 125090)
  - Acceptance must be documented on a form developed by the Department of Health Services and the Office of AIDS (or a substantially equivalent form) signed by the patient.
  - A copy of the form must be maintained in the patient's medical record

- If a woman tests HIV positive, her provider is encouraged to consult with a specialist in the care of pregnant HIV positive women

A.B. 682: Informed Consent for HIV/AIDS Testing: New Law

- California Health and Safety Code Section 125090 is amended to allow for only information to the patient and notice of the right to decline the test
  - Eliminates the need to document acceptance with a form
- Providers are now encouraged to consult specialists in the care of pregnant and post-partum HIV-positive women and their infants

- Providers are not permitted to disclose HIV status in a way that violates California Civil Code Section 54 or the Americans With Disabilities Act

A.B. 682: Informed Consent for HIV/AIDS Testing: Implications

- A shift from an "opt in" model of HIV testing to an "opt out" model
  - Should make HIV testing more routine, in accordance with CDC recommendations
- Simplifies the process of testing for HIV by streamlining the documentation required

A.B. 1178: Disclosure of Medical Information

- Author: Hernandez (D)
- Proponents:
  - California Association of Marriage and Family Therapists (Source)
  - California Psychiatric Association
  - California Society for Clinical Social Work
  - California Psychological Association

A.B. 1178: Disclosure of Medical Information: Current Law

- As part of the Confidentiality of Medical Information Act (CMIA), California Civil Code Section 56.10 prohibits the disclosure of medical information without patient authorization, unless the disclosure meets an exception
- There are many exceptions
- It was unclear that psychotherapists could release medical information as part of their "duty to warn"

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A.B. 1178: Disclosure of Medical Information: New Law

- California Civil Code Section 56.10 is amended to allow psychotherapists to disclose medical information to protect third parties. Disclosure must be:
  - Consistent with applicable law and standards of ethical conduct
  - In good faith

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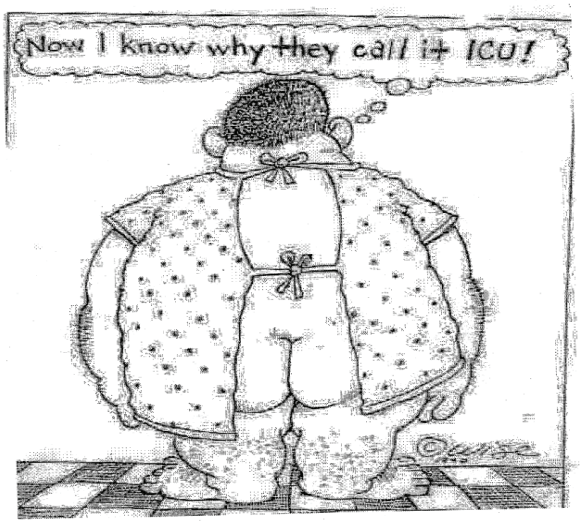
A.B. 1178: Disclosure of Medical Information: New Law (cont'd)

- Information may be disclosed if the psychotherapist believes it is necessary to prevent or lessen a serious and imminent threat to the health or safety of reasonably foreseeable victim(s)
- And the disclosure is made to person(s) reasonably able to prevent or lessen the threat, including the target of the threat

A.B. 1178: Disclosure of Medical Information: Implications

- This legislation clarifies the ability of psychotherapists to disclose medical information to protect threatened third parties
- Parallels and reinforces current law
  - California Evidence Code Section 1024: dangerous patient exemption to the provider-patient privilege
  - *Tarasoff v. Regents of the University of California*, 118 Cal. Rptr. 129 (1974) (Tarasoff I), 551 P.2d 334 (1976) (Tarasoff II)



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A.B. 1298: Breach Disclosure for Medical Information

- Author: Jones (D)
- Selected proponents:
  - Protection and Advocacy, Inc.
  - Southern California HIV Advocacy Coalition
  - California District Attorneys Association
  - California School Employees Association, AFL-CIO
  - Consumer Federation of California
  - Consumers Union
  - AARP
  - California Association of Health Underwriters
  - American Civil Liberties Union
  - Privacy Rights Clearinghouse

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A.B. 1298: Breach Disclosure for Medical Information: Current Law

- The CMIA at California Civil Code Section 56.06, deems corporations with the:
  - "primary purpose of maintaining medical information in order to make the information available to the patient or to a provider of health care....for purposes of diagnosis or treatment of the patient"

  to be "providers of health care" and thus subject to the same standards of confidentiality as health care providers and CMIA

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A.B. 1298: Breach Disclosure for Medical Information: New Law

- The CMIA is now expanded to include:
  - "*Any* business organized for the purpose of maintaining medical information," not just businesses with the primary purpose of maintaining medical information
  - "The purpose of allowing the individual to manage his or her information" in addition to the purpose of diagnosis and treatment

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A.B. 1298: Breach Disclosure for Medical Information: Implications

- The goal of the legislation is to:
  - Respond to the threat of medical identity theft
  - Maintain the right to keep medical information private
- The legislation is in response to concerns about online medical record storage services
  - Anyone that maintains electronic medical information should be vigilant about potential breaches

A.B. 1324: Health Plan Authorization

- Author: De la Torre (D)
- Proponents:
  - California Medical Association
  - California Hospital Association
  - AARP
  - Consumer Federation of California
  - Many other health and consumer associations
- Opponents:
  - America's Health Insurance Plans
  - Association of California Life and Health Insurance Companies
  - Blue Cross of California
  - California Association of Health Plans
  - Health Net
  - PacifiCare

A.B. 1324: Current Law

- HMOs and health insurers (plans) are prohibited from rescinding or modifying an authorization for treatment after the provider has rendered the treatment in good faith reliance on the authorization
- Providers and consumers disagree with plans on whether the authorization is binding if the plan retroactively rescinds or cancels the policy

A.B. 1324: Point of Disagreement

- Plans interpret current law as permitting them to deny payment, notwithstanding an authorization, if the policy is retroactively cancelled or rescinded based on:
  - Misinformation in the policy application;
  - Because the patient is retroactively disenrolled, e.g., due to change in employment;
- Providers and consumers see this as an "end-run" around the rule prohibiting cancellation of the authorization

A.B. 1324: Plugs the Hole

- Resolves the controversy, going forward, by preventing plans from denying payment for pre-authorized services following treatment for any reason, including, but not limited to, the plan's retroactive cancellation, rescission, or modification of the policy
- Even if the policy is retroactively rescinded or cancelled, the authorization is binding if treatment has been provided in reliance on it

A.B. 1324: Impact on Pending Cases

- Supporters believe this reflects and simply clarifies existing law, which would support their position in pending lawsuits
- Opponents contend it extends existing law
- The Legislature declined to take sides:
  - By enacting this legislation, the Legislature "does not intend to instruct the courts as to whether or not the amendments are existing law."

Draft DMHC and DOI Regulations

- DMHC and DOI recently issued draft regulations on "post-claims underwriting"
- While A.B. 1324 addresses the impact of policy cancellation on prior authorizations, the draft regulations address the broader issue of when plans can retroactively cancel a policy

Content of Draft Regulations

- Would prohibit plans from cancelling a policy for a misstatement or omission in the coverage application unless it was:
  - Due to a willful misrepresentation
  - Regarding material information that would have resulted in denial of the policy
- Beneficiaries would have the right to have the cancellation reviewed by the DMHC or the DOI
- No cancellations or coverage limitations allowed after 2 years of coverage, for any reason
- According to DMHC/DOI, these regulations would create the strongest protections in the country against improper policy cancellation

A.B. 1296: Disclosure of Health Plan Information to CalPERS

- Author: Torrico (D)
- Proponents:
  - Public Employees Retirement System (Sponsor)
  - American Federation of State, County and Municipal Employees
  - California Labor Federation
  - Long list of other public sector employee unions
- Opponent:
  - California Hospital Association

A.B. 1296: CalPERS

- Existing law sets forth the ground rules for CalPERS to negotiate health plan coverage for its members and retirees
- In 2007, CalPERS will spend approximately 5 billion dollars to cover its 1.2 million members
- Concern regarding escalating costs
  - Premiums for HMOs have increased by 101% and for PPOs have increased by 78% over the last 5 years

A.B. 1296: Adds Transparency

- Requires plans to disclose to CalPERS certain hospital-specific information, including
  - Rates negotiated by the plan with each hospital;
  - Utilization data;
  - Claims payment data
- Purpose: To provide CalPERS with more transparency and better information to assist it in negotiating with plans and designing benefit packages

A.B. 1296: Confidentiality Safeguards

- The data provided by plans may not include any patient-identifiable information and is subject to HIPAA
- CalPERS is prohibited from releasing the information to any other plans or plan-related entities or to the public, even in aggregated or summary form
- Creates exemption from California Public Records Act
- Hospitals have the annual right to review the data provided by plans to validate accuracy

A.B. 3: Physician Assistants (PAs)

- Author: Bass (D)
- Proponents:
  - California Academy of Physician Assistants (Sponsor)
  - Medical Board of California
  - American College of Emergency Physicians
  - Kaiser Permanente
  - Other health organizations
- Opponent:
  - Correctional Physicians Union

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A.B. 3: Current Law

- PAs have a scope of practice similar to Nurse Practitioners (NPs) but are covered by a different practice act with different supervision requirements
- PAs function as the agent of the supervising physician
  - Perform services which the supervising physician delegates to the PA
- The supervising physician need not be physically present while the PA performs services
- A physician may currently supervise up to 2 PAs at the same time, subject to certain limited exceptions

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A.B. 3: Removes Certain Impediments to Use of PAs

- Doubles the number of PAs that a single physician can supervise at any given time from 2 PAs per physician to 4 PAs
  - Puts PAs on the same footing with NPs
- Removes current requirement for PAs to obtain advance patient-specific authority prior to the issuance of a "drug order" (i.e., prescription) for a controlled substance
  - PA must have first completed a pharmacological education course meeting standards to be established by the Physician Assistant Committee of the MBC

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AB 3: Chart Review Requirement

- Under current law, when PA functions pursuant to protocols, the supervising physician must review a specified minimum percentage of charts for patients treated by the PA
- Reduces the number of charts the supervising physician must review from 10% to 5%

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A.B. 3: Expansion of Medi-Cal Coverage for PAs

- Current law limits Medi-Cal coverage of PA services to a limited, fairly restrictive list of CPT codes
- A.B. 3 will require Medi-Cal to cover any services performed by a PA within the PA scope of practice, to the same extent as if the service had been performed by a physician

S.B. 350: Hospital Charity Care and Discount Policies

- Author: Runner (R)
- Proponent:
  - California Association of Debt Collectors (Sponsor)
- Opponents:
  - None

S.B. 350: Current Law

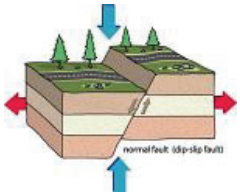
- A.B. 774, passed in 2006, requires hospitals to establish charity care and discount policies
- Requires certain financial accommodations to uninsured and underinsured patients with family income below 350% of the federal poverty level
  - Requires hospitals to limit their charges to such patients to the amount the hospital would receive from Medicare or other government programs for the same services
  - Requires that the patient be offered an extended payment plan without interest
  - Prevents hospitals from reporting adverse information to credit agencies, or commencing civil actions, for a specified period of time after initial billing
- Collection agencies encountered ambiguities in pursuing patients who defaulted on these obligations

S.B. 350: Cleanup Provisions

- Provides that the patient can be deemed to have defaulted, and the extended payment plan can be deemed inoperative, if no payment is made for 90 days
  - First, the patient must be given a notice and opportunity to renegotiate
- If the extended payment plan is not renegotiated, the provider or its assignee can charge interest on the account, pursue a lawsuit or other civil remedies, and report adverse information to a collection agency

S.B. 306: Seismic Safety

- Author: Ducheny (D)



- Proponents:
  - California Hospital Association
  - City of San Diego
  - Daughters of Charity Health System
  - SEIU and other unions
  - The American Institute of Architects, California Council University of California
- Opponent:
  - California Nurses Association

S.B. 306: Current Law

- Existing Hospital Facilities Seismic Safety Act establishes timelines for hospital compliance with seismic safety standards
  - By January 1, 2008, buildings posing a significant risk of collapse and a danger to the public must be rebuilt or retrofitted
  - By January 1, 2030, hospital buildings must be capable of remaining intact after an earthquake
- OSHPD may grant delays of up to five years past the 2008 deadline under certain circumstances, including a demonstration that compliance will result in loss of health care capacity in the community
- Authorizes an extension of up to an additional 2 years for hospitals that have already received extensions based on specified criteria

S.B. 306: Changes to Current Law

- Permits hospitals to comply with seismic safety deadlines by replacing all of its buildings subject to seismic safety retrofit by January 1st, 2020, rather than retrofitting by 2013 and then replacing them by 2030, if the hospital owner:
  - Has requested an extension of the 2008 and 2013 seismic safety deadlines
  - Demonstrates that it lacks the financial capacity to meet seismic safety standards by providing OSHPD with specified financial information
  - Takes certain other steps

Questions?

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