



New Laws and Updates 2019

Susan Penney  
UCSF Health



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Drugs, Sex and Other  
Bad Behavior

*(This Year's Theme)*



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Right of Minors, Women  
& the Homeless



WE ARE ALL WONDER WOMEN!



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### AB 2088: Minor's Right to Make an Addendum to Their Medical Record

- Old Law: allowed an adult patient to write a 250-word addendum to their record
- New Law: removes the word "adult" so as to logically broaden the right to minors
- However, the statute does not limit the minor's right to amend/addend to treatment for which the minor can consent — lack of clarity in the statute now (the analysis of the bill discusses limiting this right to the treatment for which the minor can consent)

» Amends H & S Code section 12311

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### AB 3189: Minor Consent for Treatment for Partner Violence

- This bill adds Family Code section 6930:
- Minor 12 years or older may consent to medical care for injury as a result of intimate partner violence, defined as:
  - “intentional or reckless infliction of bodily harm that is perpetrated by a person with whom the minor has or has had a sexual, dating or spousal relationship”

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### AB 3189: Minor Consent for Treatment for Partner Violence (cont.)

- Does not apply to minor who is an alleged victim of rape or sexual assault
- As appropriate, mandated reporter must file a report under Penal Code 11160 (physical injury) and inform the minor and attempt to contact parents of the report (and document same)
  - Does not apply if provider suspects the parents

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### AB 3189: Minor Consent for Treatment for Partner Violence (cont.)

- Rationale: Per the author, the fact that minors can consent for alleged sexual assault but not "intimate partner violence" "creates a dangerous loophole in existing law — minors won't get treatment because their parents will find out
- Problem: if the bill requires a mandated report and parental notification, isn't the purpose of the bill defeated?

» *Adds Family Code section 6930; CHA Manual Chapter 4*

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### SB 1287: Definition of "Medically Necessary" for Minors Covered by Medi-Cal

- Old Law: Medi-Cal defined "medically necessary" or "medical necessity" as care "reasonable and necessary to protect life, to prevent significant illness or significant disability or to alleviate severe pain"

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### SB 1287: Definition of "Medically Necessary" for Minors Covered by Medi-Cal (cont.)

- New law: conforms these definitions to the federal standard, which requires coverage
  - "of other necessary health care, diagnostic services, treatment and other measures to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services"

» *Amend Welfare & Institutions code sections 14059.5, 14133.3*

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**AB 1976: Lactation Room Accommodations**

- Old Law: Employers must provide a reasonable amount of break time to accommodate an employee desiring to express breast milk — unless the employer can show that it would seriously disrupt business operations

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**AB 1976: Lactation Room Accommodations (cont.)**

- New Law: requires employers to provide reasonable effort to provide a room or other location, other than a bathroom, in close proximity to the employee's work area
- Employer deemed to have complied if:
  - Unable to provide permanent location due to hardship
  - Temporary place is private and free from intrusion

» Amend Labor Code section 1031

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**SB 826: Women on Corporate Boards**

- Legislative history: only 12 % of 446 publicly traded companies have 3 or more female directors; Per author, ¼ of boards have no women
- Findings: boards with women make more money and other good things
- New rules for membership



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## SB 826: Women on Corporate Boards (cont.)

- Applicable to publicly traded domestic or foreign corporations whose principal executive offices are in California
- By December 31, 2019: Must have at least one woman (self-identified) on board
- By December 31, 2021:
  - 2 females if corporation has 5 directors, or
  - 3 females if the corporation as 6 or more

» Adds Corporations Code sections 301.3, 2115.5

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## Old Law: Discharge Planning

- Every hospital is required to have a discharge planning policy  
(Health and Safety Code section 1262.5; Joint Commission Standards LD 04.02.05, RC 02.01.01, 02.04.01, PC 04.01.01, 04.01.03)
- Generally broken down by simple, complex, multi-disciplinary
- May include procedures for "difficult" or "complex" cases
- Consider policy related to multi-disciplinary treatment planning for complex adult inpatients
- The record should reflect all efforts to find resources and referrals

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## Old Law: Discharge Planning (cont.)

- Discharge summary should include the medical status, stability for discharge and follow up plans
- But what if the patient's "baseline" is less than what anyone would want?
- What if the patient refuses discharge?
  - Policy example: "If medically stable, Security may be called to escort the patient from the premises after all other attempts to communicate have been exhausted"

With new law, what has changed?

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## SB 1152: Discharge of the Homeless

- Augments requirements for discharge planning to include specific planning and policy for homeless – including services, referrals and coordination of care:
  - Must inquire about the patient's housing status
  - Discharge plan must help patient return to the community — connection with services and informed of placement options

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## SB 1152: Discharge of the Homeless (cont.)

- Unless transferred to another facility, hospital must identify a post discharge destination: shelter with services should be a priority
  - However, can discharge to patient's "home" as stated by patient or alternative location identified by patient — document
- Discharge information must be provided in culturally competent manner and language

Penney - 17

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## SB 1152: Discharge of the Homeless (cont.)

- Some of the required documentation before discharge:
  - Stability for discharge per MD, including being alert and oriented x3
  - Hydration, meal, weather appropriate clothing
  - Discharge during daylight, good weather
  - Referral for follow up care and enrolling for insurance programs
  - Durable medical equipment
  - Medication
  - Disease screening and vaccinations
  - Offer transportation if within 30 min/miles
  - Referral for behavioral health

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**SB 1152: Discharge of the Homeless (cont.)**

- Applies to ED and does not preempt local ordinances related to homeless discharge process (e.g. LA County)
- By July 1, 2019 hospitals must:
  - Have written plan for coordinating services and referrals for
  - Behavioral health, social services to help with discharge planning
  - Maintain a log of homeless patients discharged, destinations where they were released and evidence of completion of discharge process

» Repeal and adds H & S code section 1262.5; CHA Manual Chapter 7

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**Employment Issues**






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**Last Year – SB 396: Sexual Harassment Training**



- Training:
  - Existing Law: the California Fair Employment and Housing Act (FEHA) requires employers with 50 or more employees to provide at least two hours of prescribed training and education regarding sexual harassment to all supervisory employees within 6 months of their assumption of a supervisory position and once every two years, as specified

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### This Year – SB 1343: Expands Sexual Harassment Training to Small Employers

- Reduces threshold for required training from 50 to employers with five or more employees
- Now, non-supervisory employees must have 1 hour of classroom or other effective training and education
- Must be provided by January 1, 2020 unless provided after January 1, 2019
- Training can be done in conjunction with other training

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### This Year – SB 1343: Expands Sexual Harassment Training to Small Employers (cont.)

- In 2020 training must include seasonal and temporary employees, including migrant and seasonal agricultural workers
- DFEH will develop training and certification
- Rationale: #MeToo Movement & change occurs from within and all employees need to know how to exercise their rights

» Amend Government Code section 12950, 12950.1

Penney - 23

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### Last Year – AB 168: Requesting Salary Information

- During employment application process, employers cannot:
  - Ask for salary history (including benefits)
  - Rely on salary history
- Employers must provide pay scale for position upon request
- Potential employees may volunteer such information or inform the potential employer of their salary requirements

» Labor Code section 432.3

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## AB 2282: Salary History Information

- This is a clean up bill to last year's legislation:
  - Clarifies that asking about an applicant's **salary expectations (OK)** is not the same thing as asking about the applicant's **prior salary (not OK)**
  - Cannot use prior salary as a basis for justifying disparity in pay based on sex, race, or ethnicity (law changes are geared to correct those disparities)

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## AB 2282: Salary History Information (cont.)

- Carve out for **current employees**: you can use prior salary so long as any wage differential is justified by the labor code section 1197.5 (can't be based on sex, race, ethnicity but can look at seniority and merit)
- Applicant can request pay scale after initial interview
  - » *Amend Labor Code section 432.3, 1197.5*

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## AB 1619: Statute of Limitations for Sexual Assault

- In any civil action for sexual assault, where the assault occurred on or after the plaintiff's 18th birthday, the time for commencement of the action shall be the later of the following:
  - (1) Within 10 years from the date of the last act, attempted act, or assault with the intent to commit an act, of sexual assault by the defendant against the plaintiff

» **OR.....**

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 **AB 1619: Statute of Limitations for Sexual Assault (cont.)**

- (2) Within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with the intent to commit an act, of sexual assault by the defendant against the plaintiff

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 **AB 1619: Statute of Limitations for Sexual Assault (cont.)**

- (b) As used in this section, "sexual assault" means any of the crimes described in Section 243.4, 261, 262, 264.1, 286, 288a, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.
- (c) This section applies to any action described in subdivision (a) that is commenced on or after January 1, 2019.

» Adds Code of Civil Procedure section 340.16

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 **SB 1300: Discrimination and Harassment Claim Standard**

- This bill addresses:
  - The "severe or pervasive" standard for sexual harassment claims, and
  - Disparagement agreements and releases of claims

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### SB 1300: Discrimination and Harassment Claim Standard (cont.)

- Standards to establish harassment:
  - The bill declares that harassment cases are rarely appropriate for summary judgment: a single incident of harassing conduct is sufficient to create a triable issue of fact regarding the existence of a hostile work environment
  - Plaintiff need only establish that harassment makes it more difficult to do the job

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### SB 1300: Discrimination and Harassment Claim Standard (cont.)

- Standards to establish harassment:
  - "The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine.""

Penney - 32

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### SB 1300: Discrimination and Harassment Claim Standard (cont.)

- Restrictions on releases of claims, cannot require an employee to sign:
  - A release of claim or right in exchange for a raise or bonus or as a condition of employment — unless negotiated in an appropriate forum

Penney - 33

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 **SB 1300: Discrimination and Harassment Claim Standard (cont.)**

- Restrictions on releases of claims, cannot require an employee to sign:
  - A non-disparagement agreement that denies the employee the right to talk about sexual harassment or other bad conduct — except if done in a negotiated settlement to resolve an underlying claim in court, admin hearing, ADR or internal complaint process (but see SB 820)

Penney - 34

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 **SB 1300: Discrimination and Harassment Claim Standard (cont.)**

- Defendant recovery of attorney fees:
  - Only if court finds the action was frivolous, unreasonable or groundless or the plaintiff continued to litigate after it clearly becomes so
- An employer **may** provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors

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 **SB 1300: Discrimination and Harassment Claim Standard (cont.)**

- Extends employer liability for acts of nonemployees for sexual harassment if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action
  - » Amends Government Code section 12940, 12965 and adds sections 12923, 12950.2 , 12964.5

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### SB 224: Sexual Harassment: Who Can Sue?

- Old law provided examples of business relationships that can be involved in a claim for sexual harassment, e.g. doctors, lawyers, landlords, teachers, etc.
- This bill adds as further examples:
  - Elected official
  - Lobbyist
  - Director or producer

Penney - 37

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### SB 224: Sexual Harassment: Who Can Sue? (cont.)

- In general the relationship is one where the defendant holds him or herself out "as being able to help the plaintiff establish a business, service or professional relationship with the defendant or third party" (a person of power)
- Plaintiff doesn't have to show that they could have easily terminated the relationship to avoid harassment
  - » Amends Civil Code section 51.9; Gov Code section 12930, 12948

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### SB 224: Sexual Harassment: Who Can Sue? (cont.)

- Rationale: The author discusses high profile cases
- The author believes that the added relationships are similar to those listed in the old law, so a court would likely allow a cause of action even before this amendment

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**SB 224: Sexual Harassment: Who Can Sue? (cont.)**

- Therefore, the analysis asserts that this bill is “declaratory of existing law”
- The bill will serve to highlight and give notice to certain people that they can be sued
- It may help to transform the “boys club” culture




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**AB 2770: Limitation of Defamation Actions Related to Sexual Harassment**

- Old Law: made a general statement about defamation, requiring malice
- New Law: adds protections if statements **are made without malice**:
  - For an employee who makes a claim of sexual harassment,
  - For an employer and interested people regarding a complaint of sexual harassment, AND

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**AB 2770: Limitation of Defamation Actions Related to Sexual Harassment (cont.)**

- For a current or former employer to a prospective employer in response to an inquiry as to whether the employer:
  - Would rehire a current or former employee, or
  - Whether decision not to rehire is based on determination that the individual engaged in sexual harassment

» Amends Civil Code section 47

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### SB 820: Limitations in Settlement Agreements Related to Sexual Harassment

- Old Law: provisions of settlement agreement preventing factual information related to felony sex offense, childhood sexual abuse or sexual exploitation or sexual assault, not allowed

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### SB 820: Limitations in Settlement Agreements Related to Sexual Harassment (cont.)

- New Law: expands this limitation. A settlement agreement cannot prevent disclosure of **factual** information related to:
  - Sexual assault (except those involving minors)
  - Sexual harassment
  - Workplace harassment or discrimination based on sex

Penney - 44

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### SB 820: Limitations in Settlement Agreements Related to Sexual Harassment (cont.)

- Any court supervised settlement agreement attempting to bypass this law entered into after January 1, 2019 is void
- An agreement that protects against disclosure of the claimant is ok (except if government agency or public official is a party)
- OK to preclude disclosure of the amount of the settlement paid

» Adds Code of Civil Procedure section 1001

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## SB 820: Limitations in Settlement Agreements Related to Sexual Harassment (cont.)

- *Rationale:* “These perpetrators should not be allowed to endanger others or evade justice simply because they have a fat wallet at their disposal. SB 820 will not prevent people from mutually agreeing to settle, but it will simply prevent the perpetrator from requiring the victim to remain silent about the harassment as a condition of settlement”

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## Last Year — AB 1008: Conviction Doesn't Mean No Job (“Ban the Box”)

- Legislative history: The author states that the intent of this bill is to give applicants with a criminal record the opportunity to be judged on their qualifications, not their criminal histories
- Employers with 5 or more employees cannot ask about an applicant's conviction history **prior to** making them a conditional job offer



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## Last Year — AB 1008: Conviction Doesn't Mean No Job (“Ban the Box”) (cont.)

- The potential employer is required to make an assessment of the conviction history; does it have a “direct and adverse relationship with the specific job duties” that justify denial?
- Applicants must be given notice of intent to withdraw job offer because of conviction (five days) and the withdrawal must be delayed an additional five days if the applicant is gathering evidence to refute the finding

» Amends Government Code section 12952

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## SB 1412: Criminal History

- Employers may only consider convictions relevant to the job for which they are applying when screening job applicants using a criminal background check
- Must be limited to "particular convictions that would legally prohibit the person from holding that job"
  - "particular convictions": a conviction for specified criminal conduct or a category of criminal offenses prescribed by any federal law, regulation or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses

» Amends Labor Code section 432.7

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## Last Year: AB 450: Immigration

- This bill adds sections to the Government and Labor Codes
- Unless federal law requires certain activity, both private and public employers cannot:
  - Voluntarily consent to an immigration enforcement agent entering non-public places of employment — the agent must have a judicial warrant. **See current status for private employers — preliminary injunction**

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## Last Year: AB 450: Immigration (cont.)

- Consent to agent's review, obtaining or accessing an employee's employment record —warrant needed
- Re-verify employment eligibility of a current employee. **See current status for private employers — preliminary injunction**

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 **AB 450: Immigration Worksite Enforcement**

- Notice requirements to employee and authorized reps:
  - Within 72 hours of receiving a notice from the feds of a I-9 form inspection
    - An employer must give written notice of the inspection and the results of the inspection in a form prepared by Labor Department
    - Must be in the language normally used with the employee

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 **AB 450: Immigration Worksite Enforcement (cont.)**

- Significant fines for failure to comply with these laws
  - » (Adds Government Code § 97285.1, 7285.2, and 7285.3; Adds Labor Code § 990.2 and 1019.2)

Penney - 53

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 **AB 450: Immigration Worksite Enforcement — Federal Lawsuit**

- Federal lawsuit to invalidate AB 450 filed late 2018:
- Partial preliminary injunction as to certain aspects of the law for private employers
- Law remains in effect for public employers
- Stay tuned

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**CONFIDENTIAL**

Confidentiality

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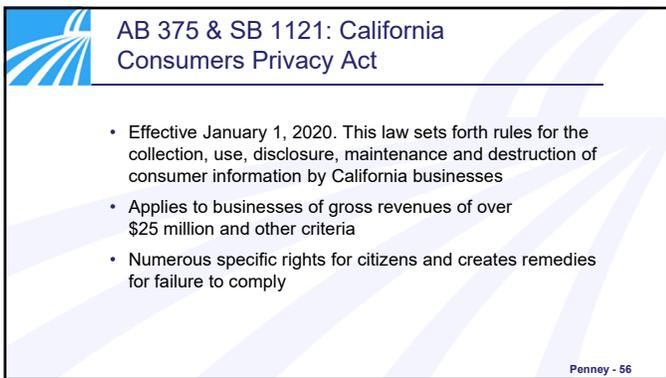
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**AB 375 & SB 1121: California Consumers Privacy Act**

- Effective January 1, 2020. This law sets forth rules for the collection, use, disclosure, maintenance and destruction of consumer information by California businesses
- Applies to businesses of gross revenues of over \$25 million and other criteria
- Numerous specific rights for citizens and creates remedies for failure to comply

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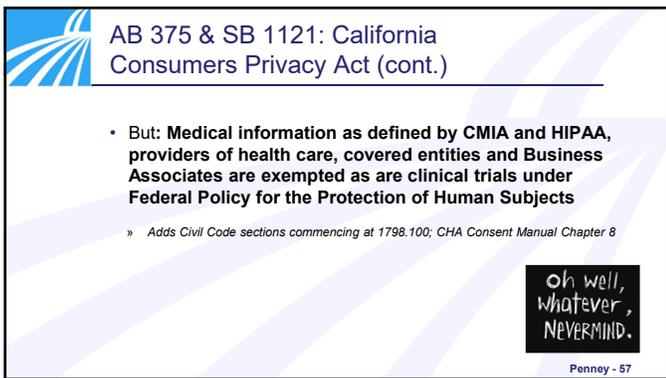
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**AB 375 & SB 1121: California Consumers Privacy Act (cont.)**

- **But: Medical information as defined by CMIA and HIPAA, providers of health care, covered entities and Business Associates are exempted as are clinical trials under Federal Policy for the Protection of Human Subjects**

» Adds Civil Code sections commencing at 1798.100; CHA Consent Manual Chapter 8



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## Physician Discipline, Education & Issues




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### SB 1448: Patient's Right to Know Act

- After years of attempting this type of legislation, this bill requires providers and their boards to provide information about licensees on probation — California is the first state to pass such a law

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### SB 1448: Patient's Right to Know Act (cont.)

- Effective July 1, 2019, the following boards must post probationary status information "in plain view" on the licensee's profile page:
  - Physicians, surgeons and osteopaths (see special carve out)
  - Podiatrists
  - Naturopathic doctors
  - Chiropractors and acupuncturists

» *Adds B & P codes sections 1007, 2228.1, 2228.5, 2459.4, 3663.5, 4962*

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### SB 1448: Patient's Right to Know Act (cont.)

- Board Posting:
  - Details of stipulated settlements — allegations and causes expressly admitted to and statement that acceptance of settlement is not an admission of guilt
  - For adjudicated decision for probation:
    - The causes by which the probationary status was imposed
    - Length of probation and end date
    - All practice restrictions

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### SB 1448: Patient's Right to Know Act (cont.)

- Licensees on Probation must inform patients (or surrogates) of various information BEFORE the patient's first visit (more limited for MD's and Osteopaths) as follows:
  - Probationary status
  - Length of probation and end date
  - All practice restrictions
  - Their Board's telephone number and how the patient can find further information on the probation
- Not retroactive: only probationary orders made AFTER July 1, 2019
- Licensee must obtain signed copy of disclosure notice from patient

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### SB 1448: Patient's Right to Know Act (cont.)

- Exceptions to this disclosure requirement:
  - Patient is unconscious or otherwise unable to comprehend disclosure and sign a copy of the disclosure
  - Visit is in ED, urgent care or is unscheduled
  - Treating licensee is not known to the patient until immediately prior to the start of the visit
  - Licensee does not have a direct treatment relationship with the patient (does this mean radiology?)

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### SB 1448: Patient's Right to Know Act (cont.)

- **But Wait!! Special Carve out for Physicians, Surgeons and Osteopaths**
- These specialties are required to disclose this information ONLY when a final adjudication or admitted findings or prima facie showing in a stipulated settlement establish any of the following:

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### SB 1448: Patient's Right to Know Act — Carve Out

- Commission of any act of sexual abuse, misconduct or relations with a patient
- Drug or alcohol abuse directly resulting in harm to patients or to the extent that such use impairs the ability to practice medicine safely
- Criminal conviction directly involving harm to patient health
- Inappropriate prescribing resulting in harm to patients and probationary period of 5 years or more

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### SB 1448: Patient's Right to Know Act — Carve Out

- Special Carve out for Physicians, Surgeons and Osteopaths cont.:
- In addition to the above, notification must occur for these specialties when
  - There is an accusation or statement of issues that the licensee committed any of the above acts and a stipulated settlement based on a nolo contendere or other similar compromise that does not include prima facie showing or guilt admission BUT does include:
    - "Express acknowledgement that the disclosure requirements would serve to protect the public interest"

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## SB 1448: Legislative History & Rationale

- Providers must provide all this information to their hospital, clinics and insurers, but patients are "left in the dark" and susceptible to future abuse
- The amendments to the bill for physicians requires disclosure for the most egregious probation cases and excludes the less serious offenders. The number of physicians affected by this bill is less than "1/2 of 1%"; only 124 of 140,000 physicians are placed on probation each year.

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## SB 1448: Legislative History & Rationale (cont.)

- Other boards have already required this disclosure
- Patients most likely to benefit from this information are least likely to have access to the internet (30% of patients older than 65, 20% African Americans, 18% Hispanics, 5% of English speaking Asians DO NOT use the Internet, compared to 14% whites)

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## SB 1448: Legislative History & Rationale (cont.)

- 2008 California Research Bureau study: Physicians who have received serious sanctions in the past are far more likely to receive additional sanctions in the future.
- Opposition to the Bill:
  - This will take time away of treatment
  - Fewer physicians will accept settlements and will seek administrative hearings
  - Violates due process

Penney - 69

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## SB 1448: Legislative History & Rationale (cont.)

- Example of Notification:

### Example of Patient Notification

Doctor: name

Probation Status: Placed on 5 years probation / probation end date.

Probation Terms: Completing a medical record keeping course, a professionalism program, obtaining a practice and billing monitor, and prohibited from engaging in the solo practice of medicine.

Website: [www2.mbc.ca.gov/BreezeEDU/default\\_licenseNumbers:75451](http://www2.mbc.ca.gov/BreezeEDU/default_licenseNumbers:75451)

Phone Number: Medical Board Consumer Information Unit 916-263-2382

Penney - 70

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## SB 1448: Legislative History & Rationale (cont.)

- Medical Board Data on Probation :

Probation	FY 15/16	FY 14/15	FY 13/14	FY 12/13	FY 11/12	FY 10/11	FY 09/10
Gross Negligence/Incompetence	38	41	43	47	69	36	48
Inappropriate Prescribing	25	20	12	21	8	12	15
Unlicensed Activity	5	5	2	7	2	1	1
Sexual Misconduct	8	5	14	6	4	5	6
Mental/Physical Illness	2	11	4	3	5	1	3
Self-Abuse Drugs/Alcohol	30	30	15	25	19	14	13
Fraud	1	3	2	2	11	0	2
Conviction of a Crime	5	3	25	14	2	15	9
Unprofessional Conduct	15	18	20	8	6	9	4
Misc. Violations	0	0	0	5	4	4	5
<b>Totals by Discipline Type</b>	<b>129</b>	<b>136</b>	<b>137</b>	<b>138</b>	<b>130</b>	<b>97</b>	<b>106</b>

Penney - 71

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## AB 505: Expert Witness Exchange in Medical Board Actions

- Old Law: parties must exchange expert witness information by 30 days before the originally scheduled hearing date
- New Law: Administrative Law Judge, upon motion showing good cause, can extend the time for exchange for a period not to exceed 100 days, but no less than 30 days before the ACTUAL hearing date, whichever comes first.

» B & P code section 2334

Penney - 72

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### AB 505: Expert Witness Exchange in Medical Board Actions (cont.)

- Rationale:
- The author asserts that current law doesn't allow for amendments to be made to the testimony, or for summary exchange, nor does it allow for a flexible timeline for exchange when the hearing date has changed.

Penney - 73

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### AB 282: End of Life Option Act: No Criminal Prosecution Participation

- Existing Law: The End of Life Option Act provides immunity from civil or criminal liability related to participation in the Act
- New Law: Persons who are compliant with the provisions of the Act shall not be prosecuted for deliberately aiding, advising or encouraging another to commit suicide
  - » *Amends Penal Code section 401*
- Rationale: Clean up legislation: at the time of the passage of The End of Life Option Act, the Penal Code was not amended to reflect the change

Penney - 74

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### AB 2138: Limitations on Licensing Denial, Revocation or Suspension

- Old Law: allowed licensing boards to deny, revoke or suspend licenses because of criminal convictions, unless certain conditions were met related to rehabilitation
- New Law: limits those actions to convictions within seven years of the date of application and the conviction "substantially relates to the qualifications, functions or duties of the profession"

Penney - 75

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**AB 2138: Limitations on Licensing Denial, Revocation or Suspension (cont.)**

- Does not apply to serious felony convictions or certain financial crimes that directly relate to the profession
- Each Board must develop criteria for “substantially relates”
- Boards cannot deny, revoke or suspend if applicant fails to disclose a fact that would **not** have caused a denial
  - » Repeals and adds B & P codes sections 7.5, 480, 481, 488, 493, 11345.2, 480.2

Penney - 76

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**AB 2138: Limitations on Licensing Denial, Revocation or Suspension (cont.)**

- Rationale: Nearly 30% of California jobs require licensure — 1,773 occupations
- Too many qualified people have been denied a job based on prior convictions
- Alleviating barriers to occupational licensing is one way California can reduce recidivism — California has the highest rate in the nation
- Because of the unique nature of each board, they will be required to develop standards

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**Drugs & Pain Management**



CALIFORNIA HOSPITAL ASSOCIATION

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### AB 2487: Physician Continuing Education on Opioids Versus Pain Management



Pendulum Swing

- History: In 2001, in response to litigation against a physician for under-management of pain, the Legislature passed CME requirements for physicians for either Pain Management or End of Life Care.
- Fast forward: we have an Opioid Crisis
- Now: This bill allows physicians to substitute a one time CME course on "opiate-dependent patient treatment and management", for the previously required CME

» Adds B & P section 2190.6

Penney - 79

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### AB 2861: Telehealth Payment for Alcohol and Drug Disorders Counseling

- This bill is part of a series of laws this year to assist with the drug and alcohol addiction crisis
- To the extent there is federal financial participation, a drug Medi-Cal certified provider will receive reimbursement for telehealth "substance use disorder" counseling when "medically necessary"

Penney - 80

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### AB 2861: Telehealth Payment for Alcohol and Drug Disorders Counseling (cont.)

- Rationale: patients in rural areas have two to three times higher overdose rates but do not have local access to treatment
- There is a shortage of behavioral health providers in rural communities

» Adds Welfare & Institutions Code section 14132.731

Penney - 81

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### AB 1753: Security Printer Company Reduction

- This bill allows the Department of Justice to limit the number of approved Security Prescription form printers
- Now capped at three:
  - Why? Waiting for e-prescribing to become mandatory: until then, tighter restrictions will help reduce theft and fraud
  - There are 43 approved Printers and it is challenging for law enforcement to track fraudulent prescriptions
  - Unique serialized prescription numbers will be linked to prescription data in CURES

» Amends H & S code sections 11161.5, 11162.1, 11165

Penney - 82

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### AB 2789: Mandatory e-prescribing by 2022

- With some exception, by 2022:
  - Health care practitioners authorized to prescribe must be capable of transmitting e-prescriptions
  - Pharmacies must be capable of accepting them and must electronically forward them to another pharmacy at the request of the patient
  - Pharmacies must tell prescriber of known non-received prescriptions

Penney - 83

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### AB 2789: Mandatory e-prescribing by 2022 (cont.)

- Pharmacies do not have to investigate whether use of an exception to e-prescribing is valid
- Providers and pharmacist who fail to follow this law shall be referred to their board for appropriate "administrative sanctions"
- No private cause of action

» Adds B & P section 688

Penney - 84

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### AB 2789: Mandatory e-prescribing by 2022 (cont.)

- Exceptions:
  - Prescription for terminally ill patients (H & S 11159.2)
  - Impossibility due to technical or electronic failure
  - Prescription dispensed outside California
  - Veterinarian prescriptions
  - Eye glasses or contact lenses
  - Prescriber and dispenser are the same entity
  - Prescriber reasonably determines that it would be impractical for the patient to receive prescription in a timely manner and delay would adversely impact the patient's medical condition

Penney - 85

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### AB 2789: Mandatory e-prescribing by 2022 (cont.)

- Exceptions:
  - ED or urgent care clinic issued prescriptions and:
    - Patient lives outside California or geographical area of the hospital
    - Patient is homeless or indigent and does not have a preferred pharmacy
    - Prescription is issued at a time when pharmacy is closed

Penney - 86

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### AB 2789: Mandatory e-prescribing by 2022 (cont.)

- For non-e-prescriptions for controlled substances, prescriber must document reason for non e-prescribing within 72 hours of the end of the electronic or technological failure
- Rationale:
  - Health care getting more complex
  - John Hopkins study reported that 89% of handwritten prescriptions do not meet best practice guidelines or were missing information

Penney - 87

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### AB 2789: Mandatory e-prescribing by 2022 (cont.)

- Rationale:
  - Links issue to Opioid Crisis
  - e-prescribing will limit prescription fraud
  - As of 2008, only 1.2% of prescriptions were sent electronically in California
  - Six other states have successfully mandated
  - Opposition: this will harm the small and solo practitioners who do not have technological capability or EHRs

Penney - 88

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### AB 1751: CURES — Access to Data

- Department of Justice must adopt regulations by July 1, 2020 regarding access and use of CURES data
  - Must consult with "stakeholders" and regulations must comply with California law and patient privacy, audit and data security standards that apply to CURES now
  - DOJ can contract with entity to manage data sharing hub or agency operating a prescription drug monitoring program in another state

Penney - 89

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### AB 1751: CURES — Access to Data (cont.)

- Why: Opioid crisis: must identify ways to further "empower data driven solutions to preventing prescription drug abuse and diversion
- Current CURES system only contains information about prescriptions dispensed in California — encourages doctor shopping between states
  - » *Amends Civil Code section 1798.23; H & S code section 11165*

Penney - 90

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### AB 2086: CURES: Patient List

- This law allows prescribers to access CURES and obtain a list of patients for whom that provider is listed as the prescriber
- Why? DOJ stated that it did not think it had the statutory authority to allow prescribers to request their own physician activity for purposes of reviewing patients affiliated with them in CURES
- This access is desirable because it would enable them to identify unknown patients alleging that they had received a prescription from the practitioner's office

» Adds Health & Safety Code section 11165.6

Penney - 91

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### AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH)

- Old Law: pharmacists could furnish NH in accordance with standardized procedures developed by Pharmacy Board
- New Law: Prescribers are now required to offer NH or another FDA approved drug to treat opioid depression and educate about its use when the patient presents with certain conditions (see later slide)

Penney - 92

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### AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH) (cont.)

- Prescribers are also required to provide education on overdose prevention
- Administrative sanctions for violating these provisions; no private right of action but the law does not limit the prescriber's liability for negligent failure to diagnose or treat a patient

» Adds B & P section 740 et. seq.; CHA Consent Manual Chapter 5

Penney - 93

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AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH) (cont.)

- Prescription must be offered if patient presents with **one** or more of the following conditions:
  - The patient's dosage is 90 or more morphine milligram equivalents of opioid medication per day
  - Opioid and benzodiazepine are being prescribed concurrently

Penney - 94

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AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH) (cont.)

- Patient presents with increased risk of overdose, including:
  - History of overdose
  - History of substance abuse disorder
  - Patient at risk for returning to a high dose of opioid to which the patient is no longer tolerant
- Law does not apply to inmates or youths in the Juvenile justice system

Penney - 95

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AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH) (cont.)

- Rationale: NH can save a life in the event of an overdose
- Per Author: Narcan:
  - An opioid antagonist that blocks the effects of opioids on the central nervous system, prevents respiratory arrest
  - Can be given IV, IM or via a nasal spray
  - Simple to administer and does not pose a significant risk to the patient

Penney - 96

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 **AB 2760: Prescribing for Reversal of Opioid Depression: "Narcan" Naloxone Hydrochloride (NH) (cont.)**

- Concept supported by AMA Opioid Task Force
- Bill opposed by CMA, California Academy of Family Physicians and others: physicians should develop treatment plan and medicine should not be legislated

Penney - 97

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 **AB 2256: Providing Narcan (NH) to Law Enforcement**

- Old Law: pharmacists can provide NH to school districts, county offices of education and charter schools
- New Law: allows furnishing of NH to law enforcement if:
  - NH is used exclusively by law enforcement employees who have completed training, provided by law enforcement, in administering NH and other opioid antagonists

Penney - 98

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 **AB 2256: Providing Narcan (NH) to Law Enforcement (cont.)**

- Law enforcement maintains NH acquisition and disposition records for 3 years
- Law enforcement ensures the destruction of expired antagonists
- Background: law enforcement has NH programs in 41 states; Since 2015, LA County Sheriff have used NH 13 times and saved 11 lives
  - » Adds B & P section 4119.9

Penney - 99

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### SB 1254: Medication Profiles for High Risk Patients

- Applies to hospitals with over 100 beds
- Requires pharmacists to obtain an accurate medication profile or list for each high risk patient upon admission:
  - During hospital pharmacy's hours of operation
  - May be done by a pharmacy tech or intern pharmacist if the hospital has a quality assurance program and training policies and procedures

Penney - 100

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### SB 1254: Medication Profiles for High Risk Patients (cont.)

- Hospital must establish criteria defining "high risk patient" and shall determine time frame for completion of the list based on the patient populations served by the hospital
- Pharmacy Board may adopt rules and regulations
  - » Adds B & P section 4118.5
- Rationale per Bill author:
  - 70% of patients have errors on their medication lists upon admission; 59% of these errors have the potential to cause moderate to severe harm

Penney - 101

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### SB 1254: Medication Profiles for High Risk Patients (cont.)

- Rationale, cont.
  - Lack of oversight of medication list — bill supporters believe that use of technicians will help with this issue
  - Mistakes costs "billions" of dollars in medication-related readmissions and adverse drug events
  - Author suggests "high risk patients" include:
    - Elderly patients (5.3% of patients 65 years or older have 5 or more medications)
    - Patients with multiple chronic diseases

Penney - 102

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### AB 2863: Of Interest to Us All: Drug Cost Sharing

- Pharmacies are required to tell customers if the retail price of the drug is lower than their co-pay, unless pharmacy automatically charges the lower price
- Retail price will apply to the deductible and out-of-pocket max
- Max insured can pay is the lesser of the sharing amount or retail

» Adds B & P code section 4079; H & S code section 1367.47; Insurance Code section 10123.65

Penney - 103

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### AB 2863: Of Interest to Us All: Drug Cost Sharing (cont.)

- Rationale: to avoid overpayments ("clawbacks" — where the insurer keeps the profit from the overpayment) and to assist patients with ever increasing drug costs

Penney - 104

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### AB 710: Cannabidiol

- This law declares that this drug is "effectively" used to treat epilepsy
- Bill provides that if the federal law Schedule I status is repealed, or CBD becomes FDA approved and not Schedule I, patients should have rapid access — providers may prescribe
- FDA is currently reviewing such a drug and it is being fast tracked (just got approved since this legislation was passed)

Penney - 105

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**AB 710: Cannabidiol (cont.)**

- NIH isolates this drug from cannabis because it does not create psychoactive activity and has pain relieving, anti-inflammatory, anti-psychotic and tumor-inhibiting properties
- Bill sponsored by the Epilepsy Foundation of Greater Los Angeles
  - » Adds B & P code section 26002; H & S code section 11150.2

Penney - 106

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**New Mandates for Providers**

CALIFORNIA HOSPITAL ASSOCIATION

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**AB 2968: Psychotherapist Abuse: Modernization of Informational Brochure for Victims**

- Old Law: required the provision of a brochure for sexual contact with patient by a former psychotherapist.
- New Law: expands the existing requirements by removing obsolete language and adding currently recognized forms of sexual exploitation and modern modes of communication.

Penney - 108

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### AB 2968: Psychotherapist Abuse: Modernization of Informational Brochure for Victims (cont.)

- Uses the word “sexual behavior” defined as inappropriate contact or communication of a sexual nature. Sexual behavior does not include the provision of appropriate therapeutic interventions relating to sexual issues
- Expands the list of mental health professionals included in the definition of “psychotherapist”

» Amends B & P code sections 337 and 728

Penney - 109

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### AB 1973: Expanded List of Mandated Reporters for Wounds from Firearm or Assaultive Conduct

- Old Law: long list of mandated reporters for such injuries
- New Law: expands the list to include such person employed by local governments, agencies, EMT's and paramedics
- Rationale: the newly added reporters are often at the scene right after an injury has occurred

» Amends Penal Code section 11160; CHA Consent Manual Chapter 17

Penney - 110

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### AB 1934: Expanded Definition of “Dependent Adult”

- The definition of “dependent adult” for purposes of mandated reporting for dependent adult abuse and neglect has been expanded
- It now includes persons who meet the former definition (65 or older or over the age of 18 and in an acute care hospital) but also includes persons who live independently

» Amends Penal Code sections 288, 368, Evidence Code section 177 and W & I Code section 15610.23; CHA Consent Manual Chapter 17

Penney - 111

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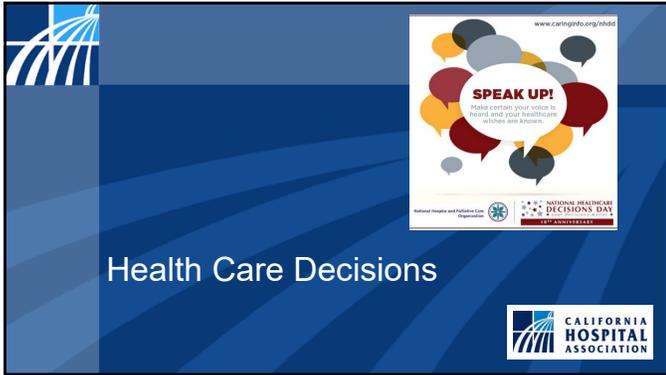
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### AB 3211: Statutory Advance Directive Language Change

- This bill provides more detail on the scope of authority for Agents related to organ donation:
  - "I authorize my agent to consent to any temporary medical procedure necessary solely to evaluate and/or maintain my organs, tissues, and/or parts for purposes of donation"
    - » Amends Probate Code section 4701; CHA Consent Manual Form 3-1

Penney - 113

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### AB 3211: Statutory Advance Directive Language Change (cont.)

- It also clarifies that by leaving the section blank as to organ donation, it does not mean that the individual has declined donation unless the person specifically so states:
  - "If I leave this part blank, it is not a refusal to make a donation. My state-authorized donor registration should be followed, or, if none, my agent may make a donation upon my death. If no agent is named above, I acknowledge that California law permits an authorized individual to make such a decision on my behalf. (To make any limitations, preference, or instruction regarding a donation known, please state in the lines above or in Section 1.5 of this form)."
  - » Amends Probate Code section 4701

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# Miscellaneous



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## SB 1138: Plant-Based Hospital Meals

- This bill requires licensed health facilities to make available "wholesome, plant-based meals in accordance with their physicians' orders"
- Plant-based means no "animal products, or byproducts including meat, poultry, fish, dairy or eggs"
- Not a crime to violate
- Applies to penal institutions too



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## SB 1138: Plant-Based Hospital Meals (cont.)

- Rationale: prior regulations too lax and new law will require more attention to patient needs and preferences and the overall cultural and religious make-up of the facility's population
  - » Adds Health and Safety Code section 1265.10; Amend Penal Code section 2084

Penney - 117

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 **AB 2679: Infection Control Standard for Linen Processing**

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- Effective January 1, 2020, acute care hospitals and psych facilities must have policies for linen laundering in accordance with infection control guidelines developed by Center for Disease Control and CMS
- Standard must be met by medical laundry providers retained by the hospital

Penney - 118

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 **AB 2679: Infection Control Standard for Linen Processing (cont.)**

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- Rationale:
  - Energy efficient advances have been made but the Department of Public Health has not updated its standards, resulting in waste of time, money and energy
  - Prior All Facilities Letter not enough to relieve hospitals from burden for asking for exception to prior rules
    - » Adds Health & Safety Code section 1275.8

Penney - 119

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 **AB 2798: CDPH Deadline for Application Processing (CHA sponsored bill)**

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- Old Law: unlike legal and regulatory deadlines for providers and hospitals, while CDPH has duties to process applications and other activities, it appeared to have no deadlines
- New Law: CDPH must evaluate, and approve or deny acute care hospitals and psych hospital new or expanded license applications within 100 days

Penney - 120

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### AB 2798: CDPH Deadline for Application Processing (CHA sponsored bill) (cont.)

- Once approved, additional review, including onsite visit must be done within 30 days and license issued on 31<sup>st</sup> day
- For applications to "expand a service," must approve within 30 days: no onsite visit necessary and it is good for no more than 18 months
- CDPH must set up an advice line and by 12-31-19 must have an automated application system

» Adds H & S code section 1272

Penney - 121

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### AB 2798: CDPH deadline for Application Processing

*it's about Time*



- Rationale per Author:
  - It can take over 10 months for applications to be assigned an analyst and an additional four to five months to approve and complete onsite inspection
  - Current system creates patient safety issues
  - Even expansion of cardiac cath lab took over six months, resulting in patient access issues
  - Adding a new MRI took six months for a Northern California hospital

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## A Bit of Case Law




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## Overview

- Hearsay rules and the impact on frequency of provider depositions
- Standards for expert witness declarations and testimony
- Mailing of Notice of Intent to Sue
- Timing of 998 Offers to Settle
- Criteria for Elder Abuse Cases
- Immunity for declining to provide "Medically Ineffective Care"
- Physician medical staff privileges
- Limits on Medical Board subpoenas of medical records

Penney - 124

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## Expert Reliance on Medical Records — Hearsay Rules

- Have you noticed an increase in requests for depositions?
- In litigation cases, we are used to having the plaintiff's medical records admitted into evidence as a "business record." This saves time and money
- Experts rely on medical records all the time
- The *Sanchez* case has thrown a wrench into that process, resulting in a dramatic increase in subpoenas for medical providers' depositions

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## Expert Reliance on Medical Records — Hearsay Rules (cont.)

- New rule: if an expert testifies to "case-specific" out of court statements to explain the basis for her opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay — there must be an exception, admitted thru the appropriate witness
- Arguably: if an expert relies on a medical record — an opinion, it will be necessary to depose that physician to get it in

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### Expert Reliance on Medical Records — Hearsay Rules (cont.)

- So the record will come in and statements by patients may be considered as a hearsay exception based on state of mind or admission
- But as far as a physician's opinion, the physician's deposition is necessary so that it is no longer hearsay
- Makes it harder for MSJ's and trial
- Some jurisdictions are more lenient
- Stipulations may be possible

» *People v. Sanchez* (2016) 63 Cal 4th 665

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### Sanchez

- Sanchez is a criminal case involving gang activity
- The expert attempted to base opinion on the police report to discuss the defendant's gang involvement
- The court argued that the jury will review that as the "truth of the matter"
- The allowance of the expert's reliance on records will violate the defendant's 6<sup>th</sup> amendment right to confront and cross examine witnesses
- Aren't the interests of civil litigation different?

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### Expert Witness Declarations/Testimony

- A couple of cases that emphasize the importance of detail in expert witness declarations in Motions for Summary Judgment and deposition testimony
- Declaration of nurse in psychiatric case devoid of meaningful information and conclusory — even though plaintiff did not file a declaration, court denied MSJ

» *Doe v. Good Samaritan* (2018) 23 Cal App 5th 653

- Testimony of plaintiff's orthopedic expert not specific, lacked foundation and was cumulative

» *Fernandez v. Alexander* (2019) 32 Cal App 5th 770

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## Mailing of Notice of Intent to Sue

- Mr. Selvidge died of a heart attack on November 4, 2013
- His widow mailed the Notice of Intent to Dr. Tang on October 24, 2014 (extending the statute of limitations by 90 days to February 2, 2015)
- Dr. Tang did not receive the notice
- Complaint filed on January 28, 2015 (85 days after the 1 year statute of limitations)

Penney - 130

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## Mailing on Notice of Intent to Sue (cont.)

- Dr. Tang's attorney moved for summary judgment to dismiss the case based on statute of limitations
- Plaintiff's had sent the Notice to the address listed by the physician with the Medical Board
- The Court said that is good enough — actual notice isn't required — the plaintiff took adequate steps to achieve actual notice; the MSJ was denied

» *Selvidge v. Tang (2018) 20 Cal App 5th 1279*

Penney - 131

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## Timing for Filing 998 — When is it Valid?

- Medical malpractice action arising out of gallbladder surgery — vein was nicked
- January 15, 2013: lawsuit filed on Cedars and MD — very vague allegations
- May 23, 2013: lawsuit served
- June 6, 2013: Cedars filed answer
- June 11, 2013: 998 for \$249,999
- June 27, 2013: Cedars filed objection — too soon, not enough information to respond

Penney - 132

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### Timing for Filing 998 — When is it Valid? (cont.)

- Big jury verdict — new trial, 2<sup>nd</sup> trial even bigger: \$7.5 million
- Plaintiff moved from pre-judgment interest of over \$2.3 million; Court rejected validity of 998 citing 3 factors:
  - How far into litigation was 998 offer made?
  - What was the information available to the offeree?
  - Did the offeree let the offerer know that it lacked sufficient information?

» *Licudine v Cedars-Sinai Medical Center (2019) 30 Cal App 5<sup>th</sup> 918*

Penney - 133

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### Elder Abuse: Standard

- Harvey Cohoon was diagnosed with treatable stage 2 colon cancer and needed to be in SNF during treatment
- For 19 days he was doing great
- On the 20<sup>th</sup> day, they noted that he was having difficulty swallowing thin liquids — his diet was changed
- Communication issues with the kitchen — new diet not given; found unresponsive 20 minutes after dinner served

Penney - 134

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### Elder Abuse: Standard (cont.)

- Paramedics found large pieces of chicken in his throat
- Patient transferred to hospital, but died due to oxygen deprivation
- Patient's niece (Cochrum) sued for Elder Abuse and negligence
- Jury awarded over \$1.2 million plus \$350k in attorneys fees due to finding of elder abuse — the jury found "recklessness"

Penney - 135

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### Elder Abuse: Standard (cont.)

- Defendants filed Judgment notwithstanding verdict (JNOV) and the court granted it, stating that there was insufficient evidence of recklessness, therefore, MICRA limit applied with no extra damages, no attorneys fees
- Court of Appeal affirmed — damages reduced to \$250K each; no attorney fees

Penney - 136

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### Elder Abuse: Standard (cont.)

- Court reviewed the care given:
  - Bedside swallow test by speech therapist — other assessments
  - Diet change card was submitted (inconsistent evidence on what happened to it and why nutrition didn't get the message — problems with report from one shift to another)
  - Box for "difficulty swallowing" was checked "NA"
  - Dinner served at 5:12; nurse observed patient at 5:30

Penney - 137

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### Elder Abuse: Ruling

- Something more than failure to comply with a care plan is required to show recklessness
- Entire episode at issue occurred over just a 12 hour period
- No prior complaints about care in prior 19 days
- No clear and convincing evidence of recklessness — no "deliberate disregard ... conscious choice of a course of action with knowledge of serious danger"
  - *Cochrum v Costa Victoria Healthcare (2018) 25 Cal app 5th 1034*
    - » BUT: lets try to have better communication to avoid negligence

Penney - 138

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### Medically Ineffective Health Care Not Required

- 70 year old patient Elizabeth Alexander suffered from end-stage terminal pancreatic cancer
- The patient had an advance directive that stated she wanted “all means taken to prolong her life”
- Son issued POLST — wanted everything done
- Her family wanted everything done, did not want DNR; physicians placed DNR and had many conversations with family
- But team placed a feeding tube

Penney - 139

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### Medically Ineffective Health Care Not Required (cont.)

- Treatment plan was to ease suffering and comfort care
- The hospital's Appropriate Care Committee agreed with the treatment plan
- The patient's son, Christopher, maintained that his mother's AD should be followed and he would not endorse anything to the contrary
- Transfer arranged back to SNF (they originally declined to take her unless she was DNR)
- Patient died 1.5 hours before transfer

Penney - 140

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### Medically Ineffective Health Care Not Required (cont.)

- Family sued naming hospital, nine MDs and a nurse (some of whom did not treat the patient but were on the Appropriate Care Committee)
- Defendants moved for Summary Judgment and won — plaintiff's expert's declaration insufficient
- Many great rulings

Penney - 141

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### Medically Ineffective Health Care Not Required — Rulings

- Disagreement between physicians and the patient or surrogate about the type of care being provided does not give rise to an elder abuse cause of action
- There are exceptions to a patient's right to control his or her health care — no medically ineffective care
- Immunity from liability — defendants acted in good faith and in compliance with generally accepted health care standards

Penney - 142

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### Medically Ineffective Health Care Not Required — Rulings (cont.)

- The Appropriate Care Team (ACC) members do not have a physician patient relationship
  - "Committees such as the ACC serve a valuable role in patient care. They act as an independent review of what constitutes medically ineffective care and the patient's best interest when a treating physician declines to comply with a patient's health care instruction. Imposition of liability under these circumstances would be counterproductive to a valuable health care resource and would discourage physicians from participating in volunteer committees that serve an important and difficult role" ... in these circumstances"

» *Alexander v. Scripps Memorial Hospital (2018) 23 Cal App 5th 206*

Penney - 143

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### Physician Staff Privilege Issues — Case 1

- Dr. Powers, a general surgeon, sued Bear Valley Community Hospital because they denied his advancement from provisional to active staff membership and reappointment
- Dr. Powers appears to have some difficulty with the concept of truth
- He practiced medicine in both Texas and California
- He did not tell the whole Texas history to Bear Valley Community Hospital

Penney - 144

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### Privilege's Case 1: What Happened in Texas?

- Dr. Powers had a complication during hernia surgery — he did not tell the family of the severed vas deferens or the implications
- The Texas hospital Medical Executive Committee found that on at least two occasions Dr. P falsely represented that he fully disclosed to the parents
- His medical staff privileges were terminated — NPDB reporting stating "unprofessional conduct"
- Texas Medical Board investigated — closed
- Dr. P's lawsuit against the Texas hospital was dismissed

Penney - 145

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### Privilege's Case 1: What Happened in California?

- Dr. Powers applied to Eisenhower Medical Center but withdrew pending a decision
- He applied to Bear Valley and said his privileges were terminated because:
  - Hospital management disagreed with his use of advanced and/or costly surgical procedures
  - He did not get along with some parents and that the patient suffered no bad clinical outcome

Penney - 146

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### Privilege's Case 1: What Happened in California? (cont.)

- After lengthy process of extending provisional privileges and recommendations for appointment, Bear Valley's General Counsel found the Texas Court opinion — that discussed all the details and falsities
- Dr. P did not submit the requested documentation
- Dr. P's application for active privileges was denied. He sued stating he was denied a fair hearing
- Ruling: Dr. P not entitled to a fair hearing as he did not comply with the application process

» *Powell v. Bear Valley Community Hospital (2018) 22 Cal App 5th 263*

Penney - 147

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### Staff Privileges: Case 2 — Fair Hearing Rights or Not?

- Dr. Economy was an anesthesiologist with the East Bay Anesthesiology Group (Group) working in a closed anesthesia department for Alta Bates Hospital
- The hospital's contract with the Group required the Group to remove a provider from the surgery schedule if the provider "performs an act or omission that jeopardizes the quality of care provided to hospital's patients"
- During a survey, hospital received an "immediate jeopardy" based in part on Dr. E's care/documentation

Penney - 148

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### Staff Privileges: Case 2 — Fair Hearing Rights or Not? (cont.)

- At the hospital's request, the Group removed Dr. E from the surgery schedule and required that he go thru PACE — he did and he was put back on the schedule
- His cases were audited and the hospital remained unhappy and again asked that he be removed from the schedule
- The Group asked that he resign; Dr. E declined and he was terminated from the Group
- He sued Sutter stating that this was a "defacto" summary suspension and he was denied a fair hearing

Penney - 149

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### Staff Privileges: Case 2 — Fair Hearing Rights or Not? (cont.)

- Sutter agreed that if the medical staff had directly revoked suspended or limited his privileges, Dr. E would have been entitled to a fair hearing — BUT
- They didn't do that — the Group terminated him and no fair hearing rights were triggered and no report to the Medical Board required
- The Court rejected this argument — the hospital's action was the functional equivalent of suspending and revoking privileges

Penney - 150

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### Staff Privileges: Case 2 — Fair Hearing Rights or Not? (cont.)

- The Court stated that under the hospital's approach, it could "effectively avoid complying with the notice and hearing requirements of B & P sections 805 and 809 by simply relying on its contracts with third party employers as a way to terminate the services of physicians whenever a hospital administrator determines that there is a medical disciplinary reason"

» *Economy v. Sutter East Bay Hospitals (2019) 31 Cal App 5th 1147*

Penney - 151

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### Scope of Medical Board's Right to Subpoena Patient Records

- Dr. Cohansohet is a pain management and palliative care specialist
- The Medical Board received an anonymous complaint that Dr. C "prescribes huge quantities of narcotics to patients without giving exams, tests, x-rays or even bloodwork"
- One of the Medical Board medical Consultant's, Dr. N, obtained Dr. C's CURES report and identified five patients who might have received too many opioids

Penney - 152

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### Scope of Medical Board's Right to Subpoena Patient Records (cont.)

- Why did he think that? Dr. N based this on the "Morphine Equivalent Dosing" (MED) — anything over an MED of 100 was bad — very simplistic approach
- The Board requested authorization from the five patients — they refused and objected to subpoena as did Dr. C
- Dr. N said good cause existed
- The Court disagreed based on patient privacy and failure to demonstrate good cause

Penney - 153

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## Scope of Medical Board's Right to Subpoena Patient Records (cont.)

- As to privacy the court cited case law: "The state of a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP"
- As to a lack of good cause: "good cause requires something more than the mere fact that a specialist in pain medication prescribed doses slightly greater than the 100 MED to three patients and two others received prescriptions for drugs which, used in combination, resulted in increased sedative effects"

» *Graffio vs. Cohanshohet* (2019) 32 Cal App 5th 428

Penney - 154

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## Questions?

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Thank You

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