



June 19, 2017

The Honorable Hannah-Beth Jackson
Chairwoman, Senate Judiciary Committee
State Capitol, Room 2032
Sacramento, CA 95814

RE: **AB 859 – OPPOSE UNLESS AMENDED**

Dear Senator Jackson,

The organizations listed are Opposed Unless Amended to AB 859 (Eggman). While we appreciate the author’s June 15 amendments, we are still opposed to any premise that takes away discretion from the judge in dealing with these various motions. AB 859 automatically lowers, without any judge’s discretion, the current evidentiary standard for obtaining enhanced remedies available under California’s Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) from “clear and convincing” to a lower “preponderance of the evidence” standard. This would have a devastating impact on the health care community.

AB 859’s direct litigation impact applies to residential care facilities for the elderly, assisted living facilities and skilled nursing facilities. Within these settings, there are a variety of certified and licensed direct care staff such as nursing assistants, nurses, physicians and therapists who care for a wide range of residents. **As litigation increases (e.g. number of claims, more litigation costs, larger settlements, larger jury verdicts), the cost of these services will inevitably be higher for consumers and have a direct fiscal impact on the strained State of California, and the Medi-Cal program.**

Virtually every personal injury lawsuit involving a health care professional and/or a health facility to an elder includes a filing under professional negligence/medical malpractice and under EADACPA – it is uncommon not to have a filing under EADACPA because of tactical purposes by the plaintiff attorney. By filing a claim for relief under the Act, plaintiff’s attorneys attempt to circumvent the limits on non-economic damages and attorney’s fees under the Medical Injury Compensation Reform Act (MICRA). This bill would add new incentives and tactics for attorneys to include claims of elder abuse in every complaint and pursue numerous spoliation motions in order to skirt MICRA, and secure attorney fees, costs and uncapped punitive damages. Even though the sponsor and author carved out two of the numerous associations who are affected by MICRA, this bill remains a MICRA issue, as it has been since introduction. Associations and companies opposed to this bill understand the important protections and directly feel the impact on any end run around MICRA.

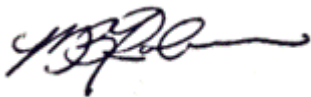
The Elder Abuse Act defines neglect as “The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” Only where such neglect is proven by clear and convincing evidence, and the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the neglect, the plaintiff may recover attorney’s fees and costs, and other heightened remedies like unlimited punitive damages. Other civil causes of actions that have the same clear and convincing evidentiary standard of proof include claims of fraud, cases of wills and inheritances, and cases involving certain family matters. If the standard is lowered as suggested by AB 859, acts of mere negligence would qualify for enhanced remedies, fees and unlimited punitive damages; thereby increasing the risk of litigation, dodging existing rules governing medical professional liability disputes and exacerbating the shortage of homes, health facilities, doctors, nurses and other medical professionals willing to treat this growing elderly population.

Under current law, our coalition members readily experience plaintiff attorneys who characterize alleged professional negligence among healthcare providers treating elderly or dependent adults as "neglect" under EADACPA in order to qualify for the enhanced remedies available under this statute. Lowering the evidence standard as suggested in AB 859 will further encourage this practice, thereby weakening the MICRA protections and other caps for healthcare providers and assisted living facilities serving this population. AB 859 will lead to higher litigation costs and increased liability insurance, at the expense of the Medi-Cal program and residents, only to put more money in plaintiff attorneys’ pockets.

This coalition does not condone elder abuse, nor does it condone intentional destruction of evidence or unjust discovery practices. Under current state and federal law, there already exists an abundance of balanced remedies for the aggrieved party including CCP 2023.030 and CAJI 204. The judge already has enormous discretion and latitude on how to deal with any type of motion for spoliation (minor or major) that ranges from a warning, monetary fine, all the way to issue preclusion, terminating sanctions and a directed verdict. **While this coalition can further provide options and explore proper remedies for the aggrieved party and justified penalties against the plaintiff or defendant who destroyed or tampered with the evidence, it is imperative that the judge has discretion on a motion-by-motion, case-by-case basis.**

If you have any questions, you may contact Matt Robinson at the California Association of Health Facilities (CAHF) at 916.432.5205, or Shane LaVigne at Capitol Advocacy at 916.444.0400.

Sincerely,

A handwritten signature in black ink, appearing to read 'MR', with a long horizontal flourish extending to the right.

Matt Robinson
Director of Legislative Affairs, CAHF

cc: The Honorable Susan Eggman, Author; Members of the Senate Judiciary Committee