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FIVE DOLLARS

THE INDEPENDENT HEALTHCARE INDUSTRY NEWSMAGAZINE

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Doctors can **run**, but is there anyplace left to **hide**?



ONLINE DISCLOSURE

Online

As a result of what the state legislature has done, doctors will soon find it more difficult to hide their professional sins. Where, exactly, did the political will come from?

Among those who have sought to legislate healthcare policy in California, Governor Pete Wilson never seemed much like a political ally. And that perception could only have been reinforced by what happened on October 10th of this year when he vetoed not one but eight managed care reform bills—measures that would have forced HMOs to offer bone marrow transplants to breast cancer patients, cover minimum stays for mastectomy patients, provide new screening methods for the treatment of diabetes, and pay for new screening methods for prostate cancer, among other things. One Wilson critic called the serial vetoes a “Columbus Day massacre.”

Still, for all that wasn't done, 1997 can't exactly be considered a total bust by reformers. Not with the passage of AB 103—the so-called Doctor Disclosure Act—which promised to give consumers an unprecedented ability to scrutinize their physicians via the Internet.

After a spirited debate—and, yes, a certain amount of watering down—it passed through both the Assembly and the Senate, and was signed by the governor last summer.

Disclosure

By Sigrid Bathen / Photo by Tom Keller

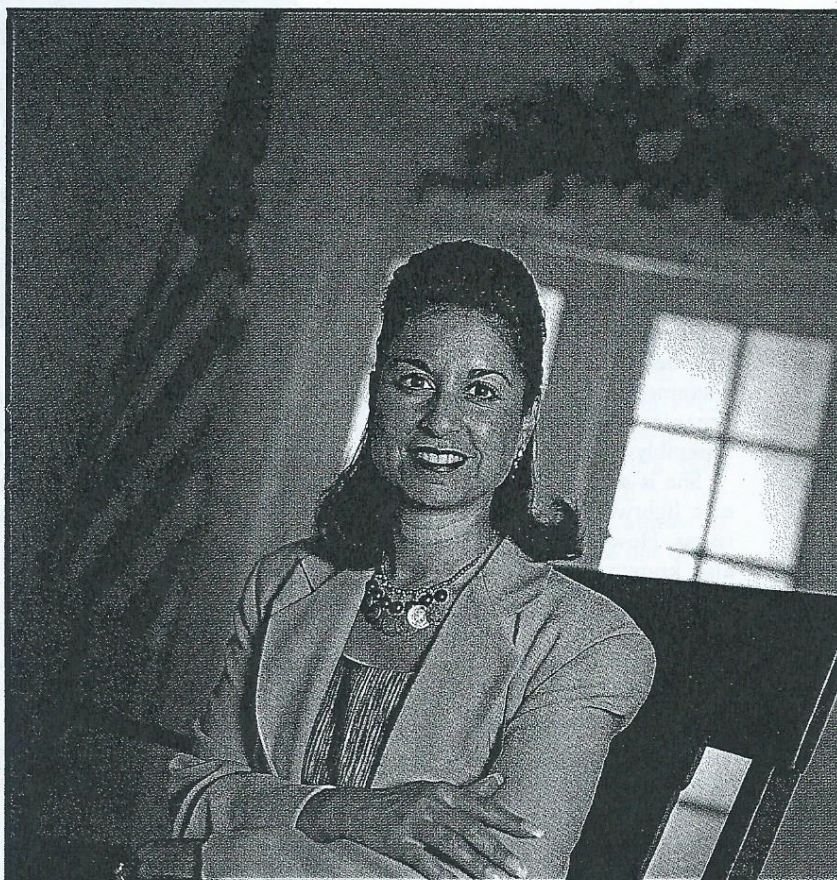
How exactly did it survive the pitfalls of the legislative process?

To be sure, the way in which a bill becomes law is often a very messy business—one that doesn't necessarily inspire a lot of confidence. But then it can be quite interesting, as well.

Last January, this magazine asked Sigrid Bathen, a seasoned political reporter for the California Journal, to pick a healthcare bill for us, then follow it along as it travelled through the legislature.

Of course, we had no way to know for sure whether the bill she chose would get very far. And the fact that this one actually will become law on January 1st serves as a testament to Bathen's prescience.

So, what is the moral to be drawn from all that she observed? "After years of sitting through endless hearings, it's easy to become cynical," she says, "to wonder how anything of substance ever gets done. But every once in a while the system will work almost in spite of itself. And while it may not be a perfect bill that's what essentially happened with AB 103."



Some of her colleagues say she doesn't always do her homework on complex issues. But Liz Figueroa (D-Fremont) is also known for her tenacity, as well as her ability to craft attention-grabbing soundbites.

Here is her report:

April 22, 1997

Spring hits with a vengeance this time of year in Sacramento. And it's particularly striking around Capitol Park, which breaks out in an explosion of floral colors.

However, within the bowels of the state Capitol, the air on the fourth floor is considerably less fragrant. For here is where the Assembly Health Committee calls itself to order early this afternoon, drawing a crowd of dark-suited, cellular phone-wielding lobbyists in the process.

To be sure, this legislative session has gotten off to a terribly slow start, with more than an average number of leadership quarrels and internecine feuds to iron out. And then too a large number of freshman legislators have been elected, which doesn't exactly help the cause of efficient government. They, of course, were able to seize upon the vacancies created by term limits. But now they are fighting an uphill battle to understand the arcane rules of the place, not to mention its murky culture.

Consequently, the Committee's backlog has built up, and there are bills that touch upon a range of issues as diverse as acupuncture, tobacco advertising, and AIDS treatment—which in turn insures a long day for just about everyone in the room.

However, of all the bills that are on the Committee's agenda today, none promises to generate more cellular

phone conversations than AB 103—the Doctor Disclosure bill. Patterned after a similar piece of legislation that was passed last year in Massachusetts, AB 103, as originally drafted, would provide information on malpractice settlements, judgments, and arbitration awards on every licensed doctor in the state through the Internet.

Which can't exactly thrill the California Medical Association, the state's largest doctors' organization.

But the bill has its strong supporters, too—among them the state's Medical Board, which over the last several years has become much more aggressive in policing the medical profession.

The turning point was *Arnett v. Dal Cielo*. This was the case that pitted the then-executive director of the Medical Board, Dixon Arnett, against the chief executive officer of Alameda Hospital, William Dal Cielo. At issue: whether or not the Medical Board has the right to examine a hospital's confidential peer review records. The case went all the way up to the California State Supreme Court, which in October of 1996 ruled against the hospital.

Now, as the Medical Board's current executive director, it's Ron Joseph who would be responsible for implementing whatever doctor disclosure bill comes out of the Legislature—a role that he apparently looks for-

ward to. "We have access to the technology and want to get the information out," he declares.

Another strong supporter of AB 103 is the Center for Public Interest Law (CPIL), which, back in 1989, actually had a hand in transforming the Medical Board by issuing a scathing report entitled: *Physician Discipline in California— A Code Blue Emergency*. Since then, CPIL has become something of a player in Sacramento. And among those who look to the organization for advice and guidance, there's state Assemblywoman Liz Figueroa, the author of AB 103.

She is seen by some of her colleagues as something of a lightweight when it comes to mastering complex issues. However, the 46-year-old, Fremont Democrat is also known for her tenacity as well as her ability to craft attention-grabbing soundbites. And this seemed to make all the difference in the world when, earlier this year, she successfully pushed through legislation that prohibited HMOs from requiring new mothers to be discharged from hospitals less than 48 hours after giving birth— also known as the "Drive Through Delivery" bill.

As far as legislative battles go, this one may have seemed like a slam dunk. After all, it was quite literally a "motherhood" bill. Still, when Figueroa first introduced it, it got bogged down in a very nasty and a very public fight with Republican legislators who accused her of negotiating in bad faith. But she persevered. And by 1997, she not only secured the Governor's signature, but also generated enough national interest in

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the subject that a federal version of the bill was also enacted.

Such then are the talents that Figueroa brings to this current battle over doctor disclosure.

As she would repeatedly tell reporters: "When it is a life-and-death situation, people should have access. I can get more information about my car mechanic than I can about my doctor."

But now, as an unusually officious sergeant-at-arms orders onlookers to find a seat or vacate the hearing room, it's Figueroa's chief of staff Liz Fenton who hurriedly briefs the press. "It's very difficult to get a fix on what this committee will do," she says, complaining about the CMA's "disapprove with amendments" position on the bill. "I've never seen that before."

Meanwhile, across the hearing room, lobbyists from various medical and healthcare groups, including the CMA, are intensively studying the proceedings on video monitors which are strategically located throughout the room. (It is, it seems, the only way to hear what's going on above the constant din of the crowd.) One is Scott Syphax, a former nightclub owner and legislative staffer who helped write earlier legislation to toughen physician discipline. Another is Steve Thompson, the CMA's director of government affairs.

Their mission at first blush seems like a straightforward one. It's to keep AB 103 as unmenacing to CMA members as possible. But it's not quite as simple as that. For in making their case, the CMA does not want to be perceived as an organization that's trying to protect

The Legislator

Assemblywoman Liz Figueroa (D-Fremont) represents the 20th Assembly District, which includes the cities of Fremont, Newark, Milpitas and San Jose suburbs in northern Santa Clara and Alameda counties. In 1994, she won the seat held for eight years by Delaine Eastin, who was elected state Superintendent of Public Instruction. Her first election was not easy. She won the Democratic primary over Milpitas City Councilman Bob Livengood— who turned around and endorsed the Republican candidate, Scott Haggerty, a moderate with a much smaller campaign war chest. Then things got a little rough when Haggerty accused Figueroa of not

paying \$250,000 in state and federal taxes. Still, in the end Figueroa prevailed, although she won barely 50 percent of the vote in a district that had a 16 per cent Democratic registration edge.

A businesswoman with a background in vocational rehabilitation, and the owner of an employment consulting firm, Figueroa has championed some especially high-profile healthcare legislation during her time in office— most notable of which was her so-called "drive-through delivery" bills that she first introduced in 1994 to stop health maintenance organizations from requiring new mothers to be discharged from hospitals as soon as eight hours after giving birth. And while she ultimately succeeded in getting the bill through,

in 1994 the legislation bogged down in what the Political Almanac of the California Journal called "ugly and very public fights" in which the Assemblywoman accused Republicans of being in bed with the insurance industry.

Since then, both lobbyists and legislators alike have complained that Figueroa is difficult to work with, that she is opportunistic and publicity-hungry, and that she often fails to do her homework. But as one prominent healthcare lobbyist put it: What Figueroa lacks in research and trust-building skills she makes up for in an uncanny instinct for "packaging issues that are tasty to the press."

In 1996, Figueroa was easily re-elected to the Assembly for a second term. —S.B.

its own bad apples to the detriment of consumers. And then too, the organization has what it considers to be a more important battle on its hands. This is the fight to stave off any and all proposed changes to the Medical Injury Compensation Reform Act (MICRA) of 1975, which set limits on the amount of money that can be awarded to plaintiffs in malpractice cases. Thompson describes MICRA as a "fall on the sword" issue for doctors. By contrast, he characterizes the CMA's position on AB 103 as one of "gentle opposition."

"We are not opposed to any and all appropriate information regarding physician activity being disclosed," he says. "The only time there is a squabble is over the appropriate language. You want as much information as possible, but you don't want to unfairly indict physicians. We believe all judgments regardless of size should be made available to the public." Still, Thompson does decide to draw a hard line over the inclusion of malpractice-related settlements, which, he says, would insure the CMA's opposition.

Syphax echoes this sentiment. "One of the problems that physicians face is that they enjoy a great deal of prestige because they are healers," he says. "But the double-edge on that sword is that they are also expected to be infallible. The place where the CMA and the Medical Board get into debate is when an individual makes an

In Sacramento, there's sometimes an inverse relationship that exists between how loud and how well-informed a legislator is.

honest mistake that was nonmalicious and out of character on an otherwise sterling record. What is the appropriate level of remediation for that individual? How do you make that decision? How do you draw that line?"

Of course, one possible answer is to look at what Massachusetts has done. There, following up on the heels of a scathing series of articles on incompetent physicians published in the

Boston Globe, a doctor disclosure bill was passed by the Massachusetts state Legislature in 1995, but then vetoed by Governor William Weld after physician groups protested loudly. The following year, though, Weld bowed to the pressure exerted by consumer groups, and signed a bill that was almost as tough. In fact, the only concession that came out of the negotiations that led up to the signing was that in addition to settlements, a disclaimer would be posted explaining why such data does not necessarily connote either bad behavior or incompetence.

However, says Syphax, this is not something that the CMA could live with. His argument boils down to this: If settlements are disclosed, as well as judgments, doctors will be less likely to settle at all, and that in turn will bump up costs for consumers, as well. "Doctors will choose to fight," Syphax warns.

It's not an unreasonable point. And when it comes

The Lobbyist

As the associate governmental affairs director for the California Medical Association, Scott Syphax served as the principal point man for the CMA on AB 103. And as such, he carried out the organization's policy of "gentle opposition," as articulated by his boss, Steve Thompson.

Syphax came to healthcare lobbying in a rather unconventional way. A former Sacramento nightclub owner, his car was broadsided by a drunk driver one night, killing his friend who sat in the passenger's seat, and severely injuring him. Syphax's recuperation was long, and he had a lot of time to ponder his future. He also had the opportunity to view the American legal and healthcare systems at close range, and didn't like much of what he saw. And so, when he finally did get back on his feet, he

decided to look for a job where he could make a difference.

He returned to college and earned a prestigious Coro Foundation fellowship. Then, he approached a friend who happened to be a prominent newspaper columnist, and asked him to name the most honest politician in the Legislature. The columnist named three: then-Assemblyman Lloyd Connelly (D-Sacramento), now a Superior Court judge; Sen. Ken Maddy (R-Fresno); and then-Sen. Robert Presley (D-Riverside), a former Riverside County undersheriff who had been credited with major legislative changes in prison administration and lawyer discipline. Syphax contacted all three and offered his services free of charge for one year to each of them if they would teach him about the political system. He ended up working for Presley, who, as it happened, got involved in trying to put some muscle in California's notoriously lax system

of physician discipline.

This was back in 1989, when the relationship between the Medical Board and the profession it monitored was a congenial, if not downright cozy one. But public pressure, critical media reports, and a scathing critique of physician discipline by the Center for Public Interest Law helped propel Presley's SB 2375 (1990) and SB 916 (1993) through the Legislature. Commonly referred to as "Presley I and II," the bills revamped the Medical Board, giving it some enforcement teeth, as well as additional staff and funding.

"There was a major sea change," Syphax reflects. "The mandate was to go after the rascals, get the bad actors off the street."

Syphax spent nearly three years with Presley, rising to the position of senior consultant. Then in 1994, he joined the CMA where he now works under Steve Thompson. —S.B.



As associate governmental affairs director for the California Medical Association, Scott Syphax served as the point man for the organization on the AB 103 battle, carrying out what was described as a policy of "gentle opposition."

SIBYLIA HERRICH

time to present her bill, Figueroa's limited command of the subject tends to magnify whatever doubts there are in the room. This is most apparent when questions come her way from the dais— questions that frequently prompt her to stop and confer with Kathryn Dresslar, a former journalist who is now a CPIL lobbyist.

Indeed, Figueroa betrays such a shaky grasp of her own bill that several observers are moved to marvel at the contrast between her lack of sure-footedness with the encyclopedic knowledge exhibited by Assemblywoman Carole Migden (D-San Francisco)— who, just before Figueroa went on, made a well-researched, highly polished presentation on an AIDS-related bill.

"Presenting a bill in committee is the one opportunity for people to see what the presenter is made of," reflects one well-placed source close to the AB 103 negotiations. "Everybody is naked up there. Obviously, Carole Migden was better prepared on her bill than Figueroa. But Figueroa's skill lies in her ability to package a bill so that it's tasty to the press."

It's a characterization that Figueroa seems at least partially willing to confirm. "The whole healthcare policy arena is challenging, and extraordinarily complicated," she says. "Yes, I'm a legislator. Yes, I'm getting myself educated. But healthcare is a very central issue . . . And I want to leave my mark on bringing

quality healthcare to the families and to simplify the process."

It's a long and exhausting session. But by the time the Health Committee adjourns on that evening of April 22nd, it appears that a deal is but a "couple of whiskers away" from being cut, as Thompson puts it. Indeed, it seems so close to happening that after the hearing, the interested parties, including Thompson, retreat to Brannan's— a favorite Capitol watering hole— to toast each other.

Then the next morning all hell breaks loose when the administrative director of the CPIL, Julianne D'Angelo Fellmeth, sends a letter to both Figueroa and the press blasting the CMA for taking a stand against the inclusion of malpractice settlements.

"Under the [Medical] Board's current policy," she writes, "no consumer will ever know whether his/her physician has settled one case for \$75 or five or ten or twenty malpractice actions for millions of dollars— clearly a pattern of negligence which is relevant to patient care, which has been addressed by the courts which are financed by taxpayers and during which the physician has had the opportunity to be fully represented by counsel to protect his/her interests."

Thompson hits the roof. He accuses the CPIL of reneging. He also suspects that the real reason for this maneuver is to make the CMA's upcoming battle over MICRA more difficult. "If we are shown not to be reasonable on AB 103," Thompson fears, "then that will be seen as an additional reason why MICRA should be changed."

Of course, this very quickly gets back to D'Angelo Fellmeth who in no uncertain terms denies having an ulterior motive. Her letter, she explains, was simply meant as a response to the missive written by the CMA on April 17th in which their organization's "gentle opposition" to AB 103 was articulated.

The back and forth goes on for a while. But in the end, when the dust settles, AB 103 is still alive and kicking on the Assembly floor without any further mention of malpractice settlements to muddy the waters.

For all the attention that's paid to those settlements, though, there's another facet of the bill that's at least as important. This is the part that has to do with the sanctity of the "peer review" process. Long conducted in secret, this closed door would, under AB 103, be pried open a crack by requiring public disclosure of reports that result in the termination of a doctor's hospital privileges.

And while the significance of this provision was largely ignored in the Health Committee hearing, it certainly

The Regulator

When Ron Joseph was appointed by the California Medical Board to serve as its executive director in November 1995, he inherited an agency that was just starting to improve its tarnished image as a lax enforcer of discipline within the profession. These improvements were due in large part to Joseph's predecessor, Dixon Arnett, who was hired in 1993, and began almost immediately to institute a series of reforms that were well underway when Joseph took over.

Still, Joseph himself has won no small amount of praise for his firm but

quiet management style, which was evident in the months of negotiations and hearings on Assembly Bill 103. And, although the Board's staff is often at odds with both physicians and hospitals over the course of their investigations, Joseph maintains cordial if not close relationships with physician groups.

"The Medical Board is very sensitive to the pressure placed on individual physicians in a managed care environment," says Joseph. "But first and foremost the Board's responsibility is to the patient, and we must keep that responsibility paramount."

These days, in addition to his other duties, Joseph is presiding over the effort to get the information online

that's called for in the Doctor Disclosure Act. Which is a duty he more than welcomes. "I am interested in getting more information out there," he says.

Joseph came to the Medical Board after a 22-year career in state government—one that included a stint as chief deputy director of the California Department of Health Services, where he oversaw programs such as Medi-Cal, public health services, licensing, and certification. He holds a degree in government and is a member of several professional groups, including the Association of State and Territorial Health Officers and the Board of Directors of the Sacramento Children's Home. —S.B.

doesn't escape the attention of the CMA's Council on Legislation when it reviews AB 103 the following month. In fact, these proceedings get rather tense when the topic comes up. And it has everything to do with the extreme reluctance many doctors still feel over the idea of giving up the long protected status of hospital disciplinary reports, which in serious cases were supposed to be forwarded to the Medical Board, but very often were not.

This was most vividly demonstrated in the *Dal Cielo* case in which Alameda Hospital refused to surrender to the Medical Board peer review records on a certain Dr. "A" who, according to hospital nurses, had administered anesthesia to several patients while clearly under the influence of drugs. However, sometime after the state Supreme Court came out with its ruling against Alameda, hospital officials made a rather startling admission: that they had in fact violated state law when they failed to file what are called 805 reports, named after the section of the Business and Professions Code that requires them. In a nine-page agreement with the Medical Board, the hospital also offered new information that hadn't been available when the state's highest court made its decision.

It was to some a dangerous precedent—one that would have a chilling effect on the peer review process. But when the time comes for the CMA Legislative Council to decide where it stood on this issue, advisors reportedly warned that the political fallout could be substantial if they decide to oppose it. And this in the end is the advice that carries the day.

"There are some things you can get up and oppose, but some things don't pass the straight-face test," one observer would later say. "Are you on the side of the protecting bad docs or are you on the side of protecting patients? This was one time you had to make a choice."

Following its emergence out of Assembly Health, AB 103 faces largely smooth sailing through the full Assembly, and on June 3rd is approved by a vote of 52 to 16, with bipartisan support.

Then, on July 17th, the process once again bogs down during a rather bizarre Senate hearing which demonstrates the sometimes inverse relationship that exists in Sacramento between how well-informed and how loud a legislator is.

As Sen. Hilda Solis (El Monte) presents the bill to the Senate for Figueroa, Sen. Ray Haynes, a Riverside Republican, best known in recent months for his much publicized support for spanking children—he had opined that he preferred to hit his own with a shoe—rises to object to the malpractice settlement provision, which, of course, is no longer in the bill.

Exasperated, Solis waits patiently for several minutes as Haynes drones on, then tries to set him straight, although in the end Haynes votes against the measure, anyway. (As an aide to Haynes later explains, it was because the bill included malpractice arbitration awards under \$30,000, which was a concession made early on to the pro-disclosure forces.)

The final vote is 25 to 10 in favor of the bill—a substantial margin of victory. But Haynes' remarks do set off something of a chain reaction in Figueroa's office, which starts to get calls from alarmed Republicans who fear a double-cross. As Figueroa's chief of staff would later recall, "We had to get all of the legislators who had previously opposed the bill to call members of the Republican caucus to reassure them settlements were not in the bill. The whole thing was unnecessary, not to mention time-consuming."

On August 26th, Gov. Pete Wilson signs the bill. And now the Medical Board must gear up to get all of

the stipulated information on the Internet by January 1st. It will by no means be a trivial undertaking. In fact, according to one estimate, it will cost as much as \$1 million to pull off, although that's probably something of an exaggeration. Ron Joseph, for one, believes that the cost will largely be absorbed within the Board's budget, which comes principally from physician license fees, as well as a \$21,000 startup appropriation, which was added to the bill in the final weeks before its passage through the Legislature.

Joseph, a long-time state health administrator, also has some thoughts about the process itself that turned this bill into law. "What is seemingly straightforward," he reflects, "really has a lot of sub-issues contained within it, malpractice settlements being the most obvious. And though settlements do seem to be an indicator of physician quality, a very cogent argument was made during the hearings that the information can be misleading.

"I'm not taking a position on it," he adds, "but it's a very good example of why things are not as they always seem. People want immediate action, and it takes a lot of time to reach consensus."

For consumer groups backing even stronger disclosure, though, AB 103 is at best just one more step in a long and still incomplete process that will make doctors truly accountable to the public.

"At the very least," insists D'Angelo-Fellmeth of the Center for Public Interest Law, "when a physician has more than two settlements in excess of \$30,000, those should be disclosed to inquiring consumers." And while she concedes that one settlement over the course of a long career probably doesn't mean much, "a line must be drawn between that one incident and a real pattern of settlements. And the Medical Board must draw that line."

She continues: "We have so little choice in our healthcare marketplace with managed care. We're not talking about planting our gardens or taking out the trash. We're talking about our lives and our children's lives. We should be given as much information as possible."

Such then is the rhetoric that suggests more fights ahead. ■

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