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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 1671                      **Hearing Date:** June 28, 2016  
**Author:** Gomez  
**Version:** May 18, 2016  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Confidential Communications: Disclosure*

### HISTORY

**Source:** Planned Parenthood Affiliates of California

**Prior Legislation:** None known

**Support:** American Congress of Obstetricians and Gynecologists, District IX California; California Family Health Council; California Health Advocates; California Medical Association; California Women's Law Center; California Religious Coalition for Reproductive Choice; Citizens for Choice; Community Action Fund of Planned Parenthood of Orange and San Bernardino Counties; National Abortion Federation; Planned Parenthood Action Fund of the Pacific Southwest; Planned Parenthood Action Fund of Santa Barbara, Ventura & San Luis Obispo; Planned Parenthood Advocates Pasadena and San Gabriel Valley; Planned Parenthood Advocacy Project of Los Angeles County; Planned Parenthood Mar Monte; Planned Parenthood Northern California Action Fund; The Women's Foundation of California

**Opposition:** American Civil Liberties Union; Animal Legal Defense Fund; California Broadcasters Association; California Catholic Conference; California Newspaper Publishers Association; Electronic Frontier Foundation; Media Coalition, Inc.; Motion Picture Association of America, Inc.; Radio Television Digital News Association; Screen Actors Guild-American Federation of Television and Radio Artists

**Assembly Floor Vote:** 52 - 26

### PURPOSE

*The purpose of this bill is to make it a wobbler to intentionally distribute, or aid and abet the distribution of, a confidential communication with a health care provider that was obtained unlawfully.*

*Existing law* makes it a crime to intentionally and without the consent of all parties to a confidential communication eavesdrop or record that confidential communication. (Penal Code §632(a).)

*Existing law* punishes eavesdropping or recording confidential communications as an a fine of up to \$2,500, or imprisonment in the county jail for up to one year, or by a felony punishable by imprisonment in the county jail for 16 months, 2 or 3 years, or both fine and imprisonment. A subsequent conviction can result in a fine of up to \$10,000 and imprisonment in county jail or a felony punished by imprisonment in the county jail for 16 months, 2 or 3 years or both fine and imprisonment. (Penal Code §632(a).)

*Existing law* defines "confidential communication" as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Penal Code §632 (c).)

*This bill* clarifies the prohibition on recording a confidential communication applies to each violation.

*This bill* provides that a person who violates Penal Code 632 shall be punished by a wobbler pursuant to this section if the person intentionally discloses, or distributes in any manner, in any forum, including but not limited to, Internet Web Sites and social media, for any purpose, the contents of a confidential communication with a health care provider that is obtained by that person in violation of Penal 632 (a).

*This bill* provides that for purposes of this subdivision, "social media" means an electronic service or account or electronic content including but not limited to, videos or still photographs, blogs video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web Site profiles or locations.

*This bill* provides that a person who aids or abets the commission of disclosing, distributing, etc. the unauthorized recording of a confidential communication when another party to the confidential communication is a health care provider is subject to a wobbler.

*This bill* provides that for these purposes a person "aids or abets the commission of an offense" when he or she, with knowledge of the unlawful purpose of the perpetrator and with the intent to purpose of committing, facilitating, or encouraging the commission of the offense, by act or advice, aids, promotes, encourages, or instigates the commission of the offense.

*This bill* provides that a violation of this section shall be punished by a fine not exceeding \$2,500 per violation or imprisonment in the county jail for one year or as a felony punishable in county jail for 16 months, 2 and 3 years if the person has a previous conviction then the fine is increased to \$10,000.

*This bill* provides that for purposes of this section "health care provider" means any of the following:

- A person licensed or certified under the Business and Professions Code.
- A person licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Ac.
- A clinic, health dispensary or health facility licensed or exempt from licensure under the Health and Safety Code.

- A person certified under the Health and Safety Code.
- An employee, volunteer, or contracted agent of any group practice prepayment health care service plan regulated pursuant to the Health and Safety Code.
- An employee, volunteer, independent contractor or professional student of a clinic, health dispensary, or health care facility or health care provider.
- A professional organization that represents any other the other health care providers covered in this section.

*This bill* provides that it does not apply to the disclosure of distribution of a confidential communication pursuant to other Penal Code sections that specifically allow the recording of confidential communications.

*This bill* provides that it does not affect the admissibility of any evidence that would otherwise be admissible.

*Existing law* provides that nothing prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping bribery any felony involving violence or a violation of using a phone call to annoy another and the recording is not made inadmissible by other sections. (Penal Code § 633.5)

*This bill* adds human trafficking to the offenses exempted in Penal Code § 633.5.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014

Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted.)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

Existing law authorizes civil and criminal penalties when confidential communications are taped, eavesdropped or recorded intentionally and without the consent of all parties. It was designed to protect the constitutional right of privacy for the people of California. The law was enacted before the Internet and prior to the proliferation of new devices and eavesdropping techniques that create a serious threat to the free exercise of personal liberties. Existing law creates an exception for the use of listening devices and techniques by law enforcement to investigate criminal conduct.

In addition, it does not prohibit one party to a confidential communication from recording the communication to obtain evidence of commission of certain serious, enumerated crimes.

Assembly Bill (AB) 1671, authored by Assemblymember Jimmy Gomez, closes a loophole in current law to prohibit the intentional disclosure of the contents of any wire, oral or electronic communication obtained without the consent of all parties by the party who taped the confidential communication without consent.

Specifically, AB 1671 updates the law to account for the harm created by broad dissemination over the internet. It aligns the law on unauthorized recording of confidential communications with a health care provider with the law on misappropriation of trade secrets.

This bill criminalizes the distribution of an illegally recorded confidential communication with a health care provider by the person who made the illegal recording.

Existing law also imposes civil and criminal penalties on individuals who willfully disclose the contents of a telegraphic or telephone message without the consent of the participants.

## **2. Each Violation**

Existing law generally prohibits the recording of confidential communications without the consent of all the parties.

This bill clarifies that the penalties will be applied for each violation of the offense.

## **3. Distribution of Illegally Obtained Recording**

This bill creates a new wobbler for a person who intentionally discloses or distributes in any manner through any forum the contents of a confidential communication with a health care provider that is obtained in violation of the prohibitions on recording a confidential communication. The penalty is the same as it is for illegally recording a confidential communication: for a first offense a fine up to \$2,5000 and/or up to one year in county jail or, as a felony, 16 months, 2 or 3years in county jail; for a repeat offense a fine up to \$10,000 and/or up to one year in county jail or, as a felony, 16 months, 2 or 3years in county jail.

One of the elements of the new offense is that the recording was obtained “in violation of subdivision (a) of Section 632.” Thus, a person could not be punished for both the recording and the distributing.

## **4. Aiding or Abetting**

In general person aids and abets a crime where he or she intends that the direct perpetrator commit the crime and does any act that assists the direct perpetrator in doing so. An aider and abettor is guilty of the same crime as the direct perpetrator and any crime that is a natural and probable consequence of the crime he or she specifically aided and abetted.

This bill also provides that a person who “aids or abets” the commission of the offense of distributing an illegally obtained confidential recording when another party to the confidential communication is a health care provider is also guilty of the new wobbler.

This bill should be amended to state aiding *and* abetting instead of aiding *or* abetting since aiding and abetting is a term of art and any change will just cause confusion.

This provision is not really necessary because a person can always be charged with aiding and abetting when appropriate and they are subject to the same penalty as that of the underlying crime.

## 5. Distributes

This bill prohibits the distribution of the illegally obtained confidential recording in any manner. This would apply to putting the video up on Youtube or giving it to a media outlet but also could apply to a person giving the video to a regulatory agency, a lawyer, his or her supervisor. Under this bill, a person who records his or her employer because he or she believes that they are in a hostile work environment could not give the recording to his or her attorney the Department of Fair Employment and Housing without breaking the law. A person who believes that their employer is breaking some sort of state or federal law or regulation could not bring the recording to the regulatory agency. And if the Department of Fair Employment and Housing or the regulatory agency used the information and showed it to another agency or person would they be subject to the aiding or abetting provision? Is this bill potentially further criminalizing whistleblower activity that the state would like to promote?

A situation where an illegally obtained recording was edited to mislead the true content and another party obtains the full recording and releases it to set the record straight, could also be a violation of the distribution of this bill.

## 6. First Amendment Issues

The First Amendment gives the free press the protection it must have to fulfill its essential role in democracy. (*New York Times Co. v. United States* (1971) 403 U.S. 713, 717.) Accordingly, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559.) "The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." (*Ibid.*)

In *Bartnicki v. Vopper* (2001) 532 U.S. 514, the United States Supreme Court held that the First Amendment provides protection to speech that discloses the contents of an illegally intercepted communication by parties who did not participate in the illegal interception.

In *Bartnicki*, an unknown person illegally recorded a phone call between two union leaders about a teachers' strike. Some journalists obtained the recording and then published the contents of the conversation. The labor leaders sued the journalists under federal and state eavesdropping statutes. (*Id.* at pp. 518-519.) The Supreme Court relieved the journalists of liability. The Court noted that the parties who made the disclosure to the public were not involved in the illegal interception. Additionally, the media defendants lawfully obtained the tapes even though they knew the information was itself illegally intercepted. (*Id.* at pp. 524- 525.) The Court also emphasized that the defendants published truthful information about a matter of public importance. (*Id.* at p. 525.) The Court concluded, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. (*Id.* at p. 535.)

This bill appears as if it would apply to a media organization that receives a recording that was obtained in violation of Penal Code Section 632 and would therefore face Constitutional challenges under *Bartnicki*.

## 7. Limited to Health Care Practitioners

The Assembly Appropriations Committee narrowed this bill to apply only to recorded conversations where a health care practitioner was one of the parties. This limitation raises a number of issues.

First, singling out only this one area of speech could be found to be on a content-based regulation of speech which is unconstitutional as the ACLU notes in their opposition:

Nor do we believe it is appropriate to enact statutory penalties focused on a specific status or occupation, such as the healthcare providers covered by this bill. As many courts have noted, such laws are often simply proxies for unconstitutional content-based regulation of speech. We note that the bill also has content-based exemptions in subdivision (e), which make it even more suspect. Even when distribution of an unlawful recording is unprotected, the government may not make content-based distinctions within that category of unprotected speech, unless “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). The content-based discrimination in this bill does not consist entirely of the reason the entire class of speech is proscribed because the bill exempts recordings of certain topics precisely to encourage disclosure of those recordings. *See id.*, at 391 (even if ordinance applies only to unprotected “fighting words,” it was unconstitutional because it was limited to fighting words “on the basis of race, color, creed, religion or gender” and thus limited to “specified disfavored topics.”)

We know of no legitimate governmental reason for singling-out disclosure of all health care provider communications for special criminal sanctions, making the bill vulnerable not only on first amendment grounds but also on equal protection grounds. The same rationale for punishing communications of some preferred professions/industries could as easily be applied to other communications – e.g., by law enforcement, animal testing labs, gun makers, lethal injection drug producers, the petroleum industry, religious sects.

On the other hand, if the bill is to be limited to conversations with health care providers, should the conversations be limited to conversations that actually have to do with health care services? This bill even includes a professional organization that represents health care providers, which means it could include conversations that have to do with health care policy, or even legislation that has nothing to do with a specific individual’s health care needs.

## 9. Support

The various Planned Parenthood organizations support this bill stating:

This bill grew out of our unfortunate experience last summer when the Center for Medical Progress published on the internet a series of video recordings it had made surreptitiously at confidential conferences or in private conversations with medical providers. These recordings were manipulated heavily to create a narrative entirely different than the full tapes revealed. They suggested Planned Parenthood had broken the law, although a federal judge and two dozen state investigations have concluded that Planned Parenthood broke no law.

Planned Parenthood has been targeted unjustly as a result of these illegal, heavily edited videotapes, which then served as a catalyst for a malicious smear campaign.

Because California's Invasion of Privacy law only prohibits the taping, but not the distribution or disclosure, CMP was able to publish manipulated snippets of the tapes on the internet and widely disseminate them to legislatures and the press. The harm from these disclosures, as we all experienced, was cataclysmic. Medical providers received death threats; health centers experienced nine times the number of security threats than the previous year; and the resulting vitriol culminated in a shooting in Colorado that left three dead.

The bill is modeled after similar statutes in other states that extend penalties to use and disclosure as well as taping without consent. In addition, it follows the way penalties work for misappropriation of trade secrets, another statutory scheme that penalizes unauthorized disclosure of confidential information. This bill would strengthen the existing law and align California's law with other states. It would create further deterrents to protect the privacy rights of California citizens and allow those damaged by the disclosures greater recourse for the harm caused.

The American Congress of Obstetricians and Gynecologists also support this bill stating:

This bill grew out of the unfortunate experience last summer when the Center for Medical Progress published on the internet a series of video recordings it had made surreptitiously at confidential conferences or in private conversations with medical providers. These recordings were manipulated heavily to create a narrative entirely different than the full tapes revealed.

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## **10. Opposition**

The California Newspaper Publishers Association opposes this bill stating:

First Amendment scholars and lawyers agree across the board that this bill is presumptively unconstitutional — a content based restriction subject to strict scrutiny. Because of this, the bill is subject to a facial challenge on the day of enactment.

Recently, a broadcast station in the East Bay reported on "inhumane" conditions in an Alameda psychiatric emergency room. The reporting was based on leaked video recorded by a hidden camera. This footage substantiated the claims made by the information's source, and was used in the news report with appropriate steps to protect patient privacy. But use and distribution of this video would likely be unlawful under AB 1671.

Newspapers are not in the business of conspiring with others to commit crimes, but they are in the business of reporting facts. As framed, this bill would subject a



journalist or publisher involved in the distribution of content to criminal liability for aiding and abetting a person who makes an illegal recording. This is inconsistent with Supreme Court case law, and establishes a public policy that goes against long-standing principles of free speech that this Legislature has protected vigorously.

As framed, this legislation will substantially impair a newspaper's ability to report facts, and overwhelmingly chill readers' ability to understand the basics about newsworthy events that occur in their communities.

The Motion Picture Association of America, Inc. also opposes this bill stating:

By singling out some type of speech for punishment (confidential communications with a health care provider) and exempting other types of speech from prosecution (confidential communications about domestic violence or human trafficking), the bill would likely be found to be a content based regulation of speech and subject to a strict scrutiny analysis by the Courts. The Supreme Court has long held that laws that target speech based on its communicative content are presumptively unconstitutional, *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd*, 502 U.S. 105 (1991).

Government need not prefer one viewpoint over an opposing perspective in order for a law to be found to be an impermissible content-based restriction of speech. “[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within the subject matter.” *Reed v. Town of Gilbert*, Slip Opinion No. 13-502, at 12.

As a practical matter, the bill poses challenges for the work of news organizations, as well as filmmakers. A reporter pursuing a story about child abuse may want to rely on a source that has a recorded confidential communication involving a health care institution or provider. A filmmaker working on a film about one of the exempt subjects, such as human trafficking, may come across a confidential communication involving a health care provider that would be relevant to the story. In both cases the news reporter and filmmaker are at risk of prosecution if they proceed with their work and disseminate a recorded confidential communication. In addition, the bill will chill any reporting about matters that may involve health care institutions or provider, such as elder abuse, medical malpractice or hospital irregularities, where the reporting relies on a source who may have an illegally recorded confidential communication.

In its attempt to criminalize the distribution or disclosure of confidential communication, the bill also contravenes a Supreme Court case involving an illegally recorded conversation. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court found that the disclosure of an illegally intercepted conversation regarding a public issue was protected by the First Amendment.