

SENATE BILL REPORT

SB 5352

As Reported By Senate Committee On:
Judiciary, February 23, 2007

Title: An act relating to disciplinary actions involving health professionals.

Brief Description: Revising provisions affecting disciplinary actions involving health professionals.

Sponsors: Senators Kline, Keiser, Fairley, Kohl-Welles and Franklin.

Brief History:

Committee Activity: Judiciary: 1/24/07, 2/23/07 [DPS, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5352 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Hargrove, Murray and Weinstein.

Minority Report: Do not pass.

Signed by Senators Carrell and Roach.

Staff: Dawn Noel (786-7472)

Background: Recent decisions of the Washington State Supreme Court in *Ongom v. State*, as well as its earlier decision in *Nguyen v. Department of Health*, held that the standard of proof in professional license disciplinary hearings under the Uniform Disciplinary Act (UDA) is that of clear, cogent, and convincing evidence rather than the preponderance standard. However, the dissents in both *Ongom* and *Nguyen* strongly opined that skewing procedural due process protections in favor of private interests harms the government's ability to protect the public from incompetent health care workers. The dissent in these cases further state that while medical professionals have a right to due process before their professional license may be taken away, the people have an equally significant need to protect themselves against incompetent and dishonest professionals. The dissents concluded that the preponderance of the evidence standard does not violate one's due process rights, but merely creates a fundamental fairness for all involved. Proponents of this legislation believe that the Legislature's original intent was to use the preponderance standard of proof.

SUMMARY OF BILL (Recommended Substitute): With respect to the use of expert testimony in a hearing on charges, each party may designate no more than one expert witness

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on any issue presented. No expert testimony is permitted unless the following written information is exchanged with counsel for the other party:

- the expert's qualifications;
- a brief statement of the testimony's general substance that the expert is expected to give;
- a representation that the expert has agreed to testify;
- a statement of the expert's fee for testimony and consultation.

This information must be exchanged at least seven calendar days before the scheduled pre-hearing conference. If no pre-hearing conference has been scheduled, the exchange must be completed at least 30 calendar days before the hearing's scheduled start date.

Additional regulations governing the required exchange of similar information are authorized.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Substitute): The title of the bill is changed to "Disciplinary Actions Involving Health Professionals." All references to the standard of proof in disciplinary proceedings are removed. Clear procedures are established with regard to the use of expert witnesses in disciplinary hearings.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: There are many long-term care residents who have suffered at the hands of health care professionals who have failed to provide proper care. Often, health care providers have willfully harmed these vulnerable adults. These cases are frequently based upon "he said, she said" circumstances; usually not enough to lead to criminal charges. It is easier for these so called "bad apples" to slip by when the clear, cogent and convincing standard of proof is applied in disciplinary actions. Patients have a right to life, liberty and the pursuit of happiness. This right is taken away by the Supreme Court's poor decision requiring a higher standard of proof.

The Supreme Court's decision in *Ongom* makes it much more difficult to establish unprofessional conduct. This is especially devastating with regard to sexual misconduct cases. Citizens must be protected and the clear, cogent, and convincing standard of proof makes protecting the people more difficult. Because the Supreme Court based its decision on the Constitution, it becomes impossible to tell the Court, in future cases, that this legislation trumps the Constitution. It is clear that legislative findings cannot overcome federal Constitutional issues. We want to protect the preponderance standard, and one way we are attacking the Washington State Supreme Court decision is by appealing to the U.S. Supreme Court.

CON: If this bill is directed towards special-needs patients, then we should consider addressing the evidentiary standard for those particular patients without globally modifying the burden of proof. This might be possible by allowing hearsay during administrative hearings. The Supreme Court recognized both a liberty and property interest in the license of a

health care provider. It is a serious decision to take away one's livelihood. It is not a burden to require the higher clear and convincing standard of proof. There exist 21 acts of unprofessional conduct in the UDA which would allow for the suspension or revocation of one's license. There are other factors to consider, such as racial or religious animosity, which could lead to fictitious complaints that would only have to be proved by the preponderance standard, if this bill passed. The preponderance standard is only 51 percent and that is not a high enough burden of proof.

This is not an issue of competing interests, but rather a balance of interests. The clear and convincing standard is the proper standard. It protects the provider as well as the individual citizen. Erroneously revoking a license does not protect the public. The current clear and convincing standard protects the public from bad practitioners and it protects the interests of health practitioners.

This legislation is anti-nurse and anti-doctor. It is an attempt to bypass the Constitution. The Supreme Court decided that a license is a property right. To take away a property right, one should have to prove, with clear and convincing evidence, that a violation has occurred.

A large concern with this bill is that many health care providers who have licenses make a minimal amount of money. These persons may not have the resources available to seek outside assistance when disciplinary actions begin. While the quality of healthcare is a critical concern, it will not be resolved by lowering the burden of proof.

Persons Testifying: PRO: Laurie Jinkins, Washington State Department of Health; Louise Ryan, Washington State Long Term Care Omnibusman.

CON: Martin Ziontz, Washington State Podiatric Medical Association; Anne Tan Piazza, Washington State Nurse's Association; Ellie Menzies, Service Employees International Union; Sarah Volpone, Service Employees International Union 775; Larry Shannon, Washington State Trial Lawyers Association.