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June 16, 2011

VIA FACSIMILE AND FIRST CLASS MAIL

The Honorable Mike Feuer
Chair, Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, California 95814

Re: **SB 558 (Simitian): Oppose**

Dear Assembly Member Feuer:

We are writing to express our strong opposition to SB 558 (Simitian), which proposes to lower the evidentiary standard for obtaining enhanced remedies available under California's Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) from "clear and convincing" to "preponderance of the evidence."

As attorneys whose practice focuses on civil claims brought under the EADACPA, we are well versed in issues implicated by SB 558. After reviewing the information provided by the proponents of this bill, Consumer Attorneys of California, we are compelled to address misrepresentations of fact and law and inaccurate inferences made to both this Committee and the Senate Committee who considered the bill and to provide additional insight into the grave consequences inherent in SB 558.

SB 588 is aimed at the long term care industry. The bill's proponents, primarily plaintiff attorneys who look to financially benefit from the bill, would have this Committee believe that skilled nursing and assisted living facilities are fraught with neglect and abuse. This is simply not the case. The bill's proponents would further have this Committee believe that the only way to combat such alleged abuse is to knock down the constitutional protections of due process to these unpopular defendants and allow heightened remedies for what are essentially negligence causes of action.

Standard of Proof in Financial Abuse Cases

Proponents of SB 558 have represented that *Welfare and Institutions Code* Section 15657.5 ("§15657.5"), which applies to financial abuse, was amended in 2004 to change the standard of proof from clear and convincing to preponderance of the evidence. Their representation is misleading. The 2004 Amendment to §15657.5 lowered the evidentiary standard in financial abuse cases to a preponderance only for traditional damages and attorney fees. The clear and convincing standard remains in financial abuse cases as it relates to the heightened remedy of pre-death pain and suffering.

As the chart below shows, proponents' representations are blatantly false as SB 558 proposes to eliminate the clear and convincing standard in its entirety and implement a preponderance of the evidence standard across the board.

| Welfare & Institutions Code | Damages, Attorneys Fees & Costs | Heightened Remedies for Pre-Death Pain and Suffering |
|---------------------------------------------|--------------------------------------------|-------------------------------------------------------------|
| §15657.5 current – Financial Abuse | Preponderance of the Evidence | Clear and Convincing |
| §15657.5 current – Neglect / Physical Abuse | Clear and Convincing | Clear and Convincing |
| SB 558 Neglect / Physical Abuse | Preponderance of the Evidence | Preponderance of the Evidence |

Preponderance of the Evidence vs. Clear and Convincing Evidence

While proponents of SB 558 offer their own definitions of "preponderance" and "clear and convincing" evidence, the more relevant definitions are found in the civil jury instructions used in California's courtrooms:

Preponderance of the evidence: A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. CACI No. 200.

Clear and convincing evidence: Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. CACI No. 201.

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Proponents' definition of clear and convincing evidence¹ exaggerates the level of proof currently required and inaccurately suggests that a jury is explicitly instructed that clear and convincing is just below that of "beyond a reasonable doubt." More importantly, eliminating the only legal provision that distinguishes the character of conduct required before mandating heightened remedies is simply unfair. Due process requires the maintenance of a definable distinction between acts qualifying as negligence and those subject to the heightened and more punishing remedies imposed by the EADACPA. Passage of SB 558 effectively eliminates that distinction inside every California courtroom.

Elder Abuse Statistics

Consumer Attorneys of California estimate that 132,000 elderly Californians are abused each year. They further suggest that for every suspected abuse reported, five go unreported. They create the offensive inference that all of these cases occur in the skilled nursing facility setting by stating "[s]tudies also show that neglect and abuse of nursing home residents have reached epidemic proportions." We all agree even one reported or unreported instance of abuse in California is too many; however, irresponsible statements by the Consumer Attorneys of California disparaging all skilled nursing facilities and the dedicated workers in those facilities do nothing to aid the elderly. Re-defining abuse to include acts of simple negligence also serves no justifiable cause.

Deficiencies Do Not Equal Elder Abuse

Consumer Attorneys of California cite a Centers for Medicare and Medicaid Services report that suggests 91% of skilled nursing facilities had been cited for health and safety deficiencies. Again, an inaccurate inference is made by preceding this report with the statement: "[s]tudies also show that neglect and abuse of nursing home residents have reached epidemic proportions." Proponents of SB 588 infer, and want this Committee to conclude, that deficiencies are synonymous with neglect and abuse and therefore 91% of all skilled nursing facilities are committing neglect and abuse. To suggest and/or lead this Committee to conclude that deficiencies are evidence of neglect and abuse grossly distorts the survey / citation process entrusted to the California Department of Public Health. In reality, an overwhelming percentage of these deficiencies are unrelated to quality of care.² Proponents' deception is further

¹ "A standard of proof where the quantum of evidence establishes that the fact alleged is highly probable to be true. This is a higher standard than a preponderance, but just below that of beyond a reasonable doubt."

² For example, a facility will be cited for a deficiency if a lid is inadvertently left off of a pitcher of water. Clearly, this deficiency is not an example of neglect and abuse. Deficiencies represent the failure of a facility to be perfect in its totality which is not an appropriate comparison to neglect and abuse.

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highlighted by the inconsistent statements: if 91% of homes are cited for health and safety deficiencies and these deficiencies are synonymous with neglect and abuse, how can the previous assertion that for every abuse reported, five go unreported be true? The math simply doesn't add up.

Consumer Attorneys of California state that licensing agencies have issued few citations and fines for abuse, suggesting that resources are diminishing. This is in direct contradiction with the report by the Centers for Medicare and Medicaid Services which found that at least 91% of skilled nursing facilities are cited for health and safety deficiencies. The fact remains that this industry is more heavily regulated than nearly any other industry and lowering the evidentiary burden will not afford any additional protections to our seniors.

Comparison to Other Civil Causes of Action

Proponents of this bill suggest that lowering the burden of proof to preponderance of the evidence will bring these actions in line with other types of serious injury suits such as medical malpractice and wrongful death cases which require only a showing of preponderance of the evidence. This attempt to compare elder abuse actions to other types of serious injury suits, in an effort to lower the evidentiary standard for elder neglect and abuse cases, is misguided and akin to comparing apples and oranges. The distinctions involve the remedies and protections available for each cause of action.

Medical malpractice and wrongful death causes of action do not allow for the recovery of heightened remedies which is why the evidentiary standard is lower than that of elder neglect and abuse cases. Claims made under the EADACPA carry the devastating potential for punishment in the form of attorneys fees, damages for pre-death pain and suffering and punitive damages. By lowering the evidentiary burden to that of medical malpractice or wrongful death cases, the heightened remedies would become available under the same standard used to prove negligence cases. SB 558 does not bring elder neglect and abuse cases in line with other causes of action. SB 558 creates the proverbial low hanging fruit for plaintiff attorneys and violates long held principles of due process.

The availability of heightened remedies under the EADACPA is not the only distinction between these civil cases. The protections afforded healthcare providers in each cause of action are distinct as well. While healthcare providers are protected by the Medical Injury Compensation Reform Act (MICRA) for cases alleging medical malpractice or wrongful death, MICRA does not apply to elder neglect and abuse cases. SB 558 would strip away the last shred of protection healthcare providers have against heightened remedies sought in connection with these cases. Essentially, SB 558 would allow heightened remedies to apply against healthcare providers for alleged neglect or abuse under the lower burden of proof while at the same time not allowing any

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of the MICRA protections afforded healthcare providers in other comparable causes of action.
In each instance using virtually identical language to define the misconduct.

Elder neglect and abuse claims have become so watered down since the enactment of the EADACPA that they are essentially causes of action for negligence. The only remaining safeguard preventing the recovery of heightened remedies under the EADACPA for a cause of action for negligence is the clear and convincing evidentiary standard. Should this be diluted to a preponderance of the evidence standard, it will be "open season" for unpopular defendants such as skilled nursing facilities with plaintiff attorneys hunting them down to acquire attorney's fees and pre-death pain and suffering upon the mere showing of negligence. Rather than providing protection to our seniors, SB 558 instead results in discrimination against the long term care provider by treating them differently than other healthcare providers despite the similarity of claims.

Plaintiffs Representation in Elder Neglect and Abuse Cases is Soaring

Despite the Consumer Attorneys of California's representation that clear and convincing evidence is a nearly impossible burden to meet, plaintiff attorneys are flocking to California courthouses to file cases under the EADACPA. The current "clear and convincing" evidentiary standard is no deterrent. A simple internet search for "California elder abuse attorney" shows a thriving community of attorneys across the state whose sole practice is devoted to these cases. Evidently, the clear and convincing evidence standard does not deter attorneys from taking these cases and it is a misrepresentation to suggest otherwise.

The legislature intended the clear and convincing standard to be a barrier to all cases except those containing such egregious facts that heightened remedies would be warranted. This is working exactly as it was designed. In 2010 alone there were several multi-million dollar verdicts (\$3.2M, \$1.1M, \$29M, etc.) where the facts, as determined by the jury, were egregious enough to warrant the finding of elder neglect and abuse by clear and convincing evidence. As the EADACPA is currently written, plaintiff attorneys have a powerful and effective weapon in fighting elder neglect and abuse as demonstrated by the size of numerous verdicts under the EADACPA. Should SB 558 become law, plaintiff attorneys will have an unstoppable weapon that will result in substantial harm to the long term care industry. Heightened remedies in conjunction with a low burden of proof create the perfect storm which will only benefit plaintiff attorneys and not the elderly individuals the EADACPA is intended to protect.

Should SB 558 become law, the resulting backlash of increased litigation will inevitably lead to increased insurance rates which may force many long term care providers out of the industry. The net result will be a decreased number of caregivers to provide for our expanding elderly population which could figuratively and literally pave the streets of California with our seniors. This defeats the legislative intent behind the EADACPA of protecting our elderly. It also

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represents an enormous leap backward in the area of tort reform and will create an unsustainable fiscal strain on our judiciary which, in turn, will negatively effect the California budget crisis as a whole. Passage of SB 558 will result in the stripping of constitutional rights of long term care defendants, create an onslaught of litigation from which only attorneys will benefit, and is fiscally irresponsible.

We strongly urge you to "**Vote No**" on SB 558 when it is heard in the Assembly Judiciary Committee.

Very truly yours,

WROTEN & ASSOCIATES, INC.
Attorneys at Law

KIPPY L. WROTEN, Founder and Shareholder

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cc: Members of the Assembly Judiciary Committee
Alan Gordon, Consultant to Senator Simitian