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## SENATE COMMITTEE ON APPROPRIATIONS

Senator Ricardo Lara, Chair  
2015 - 2016 Regular Session

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### AB 1671 (Gomez) - Confidential communications: disclosure

**Version:** August 2, 2016

**Policy Vote:** PUB. S. 5 - 2

**Urgency:** No

**Mandate:** Yes

**Hearing Date:** August 8, 2016

**Consultant:** Jolie Onodera

**This bill meets the criteria for referral to the Suspense File.**

**Bill Summary:** AB 1671 would make it an alternate felony-misdemeanor offense to intentionally distribute, or to aid and abet the distribution of, a confidential communication with a health care provider that was obtained unlawfully. This bill would additionally require the fines specified under the new crime established and the existing offense of unlawfully eavesdropping or recording a confidential communication to be imposed on a per-violation basis.

#### **Fiscal Impact:**

- **State prisons:** Potential minor increase in state costs (General Fund) to the extent the provisions of this bill result in additional commitments to state prison. CDCR data indicates only five commitments to prison over the past two years related to this offense. To the extent even two felony convictions occur in any one year, annual costs would increase by \$58,000, based on the estimated contract bed rate of \$29,000 per inmate per year.
- **County jails:** Potential increase in local incarceration costs (Local Funds), offset to a degree by fine revenue, for additional commitments to county jail. While the number of new convictions resulting from this measure is unknown, for context, for every 25 additional convictions impacted by this measure, costs for a six-month jail sentences could increase local costs by \$550,000 annually.
- **Potential litigation:** Unknown, potentially significant future costs for litigation (General Fund) to the extent the provisions of this measure face constitutional challenges under the First Amendment.

**Background:** Existing law makes it a crime for a person to intentionally eavesdrop upon or record a confidential communication with a recording device without the consent of all parties, unless the recording is made for the purpose of obtaining evidence reasonably believed to relate to the commission by another party of certain crimes including any felony involving violence against the person making the recording. (Penal Code §§ 632(a), 633.5.)

Under existing law, a violation of the above is an alternate felony-misdemeanor, punishable by a fine not exceeding \$2,500, or imprisonment in a county jail not exceeding one year, or in the state prison for 16 months, two years or three years, or by both that fine and imprisonment. If the person has previously been convicted of a violation of PC § 632 or other specified provisions of law, the person shall be punished by a fine not exceeding \$10,000, by imprisonment in a county jail not exceeding one year, or in the state prison for 16 months, two years or three years, or by both that fine and imprisonment.

**Proposed Law:** This bill would provide that a person who intentionally and without consent of all parties eavesdrops upon or records a confidential communication with a recording device shall be subject to an alternate felony-misdemeanor if the person intentionally discloses or distributes in any manner, in any forum, including but not limited to, internet websites and social media, or for any purpose, the contents of a confidential communication with a health care provider that is obtained by that person in violation of PC § 632(a). Additionally, this bill:

- Clarifies the prohibition on recording a confidential communication applies to each violation.
- Provides that a person who aids and abets the commission of disclosing or distributing the unauthorized recording of a confidential communication when another party to the confidential communication is a health care provider is subject to an alternate felony-misdemeanor, as specified.
- Provides that for these purposes a person “aids and abets the commission of an offense” when he or she, with knowledge of the unlawful purpose of the perpetrator and with the intent or 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.
- 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 state prison for 16 months, two years or three years. If the person has a previous conviction for this offense, the fine is increased to \$10,000, and may additionally be subject to one year in county jail, or state prison for 16 months, two years, or three years.
- Provides a definition of “health care provider,” as specified.
- 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.
- Adds human trafficking to the offenses exempted in PC § 633.5.

**Related Legislation:** None known.

**Staff Comments:** By creating a new alternate felony-misdemeanor, this bill could result in increased costs for enforcement and incarceration by state and local agencies.

Staff notes the act of legislating invites litigation. Generally, this Committee treats the potential for litigation as an indirect cost of any bill and does not consider it as part of the fiscal analysis. However, as noted in the Senate Public Safety Committee analysis (pp. 6-7, June 28, 2016) of this measure:

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*...

...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...

Consequently, to the extent this measure contains language that could be challenged as unconstitutional, this bill could result in potentially significant costs associated with litigation, both to the courts and to the Attorney General.

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