



BUSINESS LAW SECTION
THE HEALTH LAW COMMITTEE
THE STATE BAR OF CALIFORNIA
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PHYSICIAN OWNERSHIP AND REFERRAL ACT OF 1993

LEGISLATIVE PROPOSAL (BLS-2012-03)

To: Office of Governmental Affairs

From: The Health Law Committee, State Bar of California Business Law Section

Date: May 9, 2011

Re: Proposed Amendments to Business and Professions Code §§650.01 and 650.02

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee (the “Executive Committee”): June 3, 2011
Approval Vote: For: 15 Against: 0

Executive Committee Contact	Standing Committee Contacts
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HISTORY, DIGEST AND PURPOSE

Mission Statement

The Mission of the Committee on Health Law of the Business Law Section of the California State Bar ("Committee") is to serve as a resource for the legal community, the California State Bar, and the public by providing a forum for California lawyers and others with an interest in Health Law:

- (1) to promote education and training programs and materials in the practice of Health Law;
- (2) to study, review, consider, discuss, and develop formal positions on issues involving laws, regulations, and governmental action affecting health care issues and to advocate for such positions;
- (3) to promote the efficiency and professionalism of Health Law practice including a review of the potential of establishing a formal specialization in Health Law practice; and
- (4) to interface and collaborate with other professional organizations such as bar associations, substantive law committees, sections and other Health Law trade associations.

Proposal and Reasons for the Proposal

Existing law, the Physician Ownership and Referral Act of 1993, ("PORA") makes it unlawful for a healing arts licensee, including physicians and surgeons, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners, to refer a person for certain health care services if the licensee has a financial interest, as defined, with the person or entity that receives the referral. Existing law provides specified exemptions from this prohibition. A violation of PORA is a misdemeanor offense that may subject a physician to civil penalties and disciplinary action by the Medical Board of California.

This Proposal seeks to make a clarifying change to certain provisions of Business and Professions Code Sections 650.01 and 650.02, to encourage the adoption of electronic health record ("EHR") technology in California health care settings by permitting health care providers to subsidize up to 85% of the cost of a physician's acquisition of EHR technology (consistent with the requirements of subsections (x) and (y) of Section 1001.952 of Title 42 of the Code of Federal Regulations and Business and Professions Code Section 650(e)), conditioned upon the provider and physician satisfying specific and detailed requirements designed to limit the risk of fraud and abuse. Under the current California law, the providers' subsidization of a physician's acquisition of EHR technology could potentially be viewed as violating PORA by creating an impermissible financial interest between the provider and the physician. The proposed changes to PORA will clarify that this type of subsidization complies with PORA when it satisfies the requirements of federal law, thus encouraging the use of EHR technology. The importance of such technology to the provision of medical care in the 21st Century is recognized by state and federal officials, including former President George W. Bush and former California Governor

Arnold Schwarzenegger, both of whom issued executive orders directing the respective federal and state agencies to accelerate the use of health information technology by medical providers. *See Executive Order 13410* (August 28, 2006); *Executive Order S-06-07* (March 14, 2007).

Furthermore, the use of EHR technology enhances the efficiency and quality of patient care, and is therefore of vital importance to the health and well being of Californians. The proposed changes to the law are designed to exempt from the prohibition the provision of subsidized hardware, software, or information and technology and training services relating to EHR, and thereby accelerate the adoption of EHR technology by creating an avenue for health care providers to share in the costs of such technology.

The changes will create consistency in current California law. California previously updated Business & Professions Code Section 650 in 2008 to follow the federal safe harbors under 42 C.F.R. § 1001.952(x) and (y) and allow for EHR subsidization. However, the legislature did not modify Section 650.01 and 650.02, thus undermining the benefit of the change to Section 650. This proposal will conform Sections 650.01 and 650.02 to Section 650 so that subsidization of EHR technology will be clearly exempt from PORA, just as it had already been exempted under Section 650. *See Stats. 2008, c. 290.* The federal counterpart to PORA is known as the Stark law.

With respect to Section 650.01, this proposal would provide that a financial interest shall not include the provision of nonmonetary remuneration, in the form of hardware, software, or information technology and training services, as described in Section 650(e).

Additional changes to Section 650.02 clarify existing law by explicitly permitting certain exceptions to the prohibition of Section 650.01 to apply to the group practices of licensees, as well as to individual licensees. These changes will clarify the situations under which parties wish to enter into legitimate, commercially reasonable arrangements that are permitted under federal law, but for which the current status is unclear under state law.

With respect to Section 650.02, this proposal would clarify that a loan between a licensee and the recipient of the referral also includes a loan between an office of a group practice and the recipient of a referral. A similar clarification would be made to the personal services exception and to the exception for lease of space or equipment. In addition, with respect to lease arrangements the proposal would include in the rental payments an allocation to lessee of a pro rata share of the operating expenses or common area maintenance fees.

History

Business & Professions Code § 650.01. Referral to health care provider in which practitioner or immediate family member has financial interest; prohibition; cross-referral arrangements, was added by Stats.1993, c. 1237 (A.B.919), § 2. Amended by Stats.1995, c. 221 (A.B.1864), § 1; Stats.1995, c. 749 (A.B.1177), § 1, eff. Oct. 10, 1995; Stats.1996, c. 817 (A.B.2443), § 1.

Business & Professions Code § 650.02. Exemptions; referrals by financially interested licensees, was added (Added by Stats.1993, c. 1237 (A.B.919), § 3. Amended by Stats.1995, c. 221 (A.B.1864), § 2; Stats.1996, c. 817 (A.B.2443), § 2; Stats.2002, c. 309 (S.B.1907), § 1.)

APPLICATION

If enacted in 2012, the proposed legislation would become effective in 2013.

PENDING LITIGATION

We are not aware of any specific pending litigation that would be affected by this Proposal.

LIKELY SUPPORT AND OPPOSITION

We anticipate support from physicians, physician organizations, and other healthcare-related organizations but have not taken any steps to assess the potential for or solicit such support. We are unaware of any specific segments that might oppose this Proposal.

FISCAL IMPACT

The fiscal impact of this proposed legislation is uncertain, but it could result in additional revenues to the state by encouraging the purchase and use of EHR software and hardware, which may lead to increased sales tax revenues. In addition, the use of such technology may lead to more efficient and higher quality health care, establishing California as a front runner in modern technology driven medical care, and potentially attracting patients from around the country and overseas to California hospitals.

GERMANENESS

The matters addressed in this Proposal require the special knowledge, training, experience, or technical expertise of the Section and of members of the Committee. The position advanced would promote clarity, consistency, and comprehensiveness in the law.

TEXT OF PROPOSAL

SECTION 1. Section 650.01 of the Business and Professions Code is amended to read:

§ 650.01. Referral to health care provider in which practitioner or immediate family member has financial interest; prohibition; cross-referral arrangements; disclosure to patients is amended to read:

(a) Notwithstanding Section 650, or any other provision of law, it is unlawful for a licensee to refer a person for laboratory, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, or diagnostic imaging goods or services if the licensee or his or her immediate family has a financial interest with the person or in the entity that receives the referral.

(b) For purposes of this section and Section 650.02, the following shall apply:

(1) “Diagnostic imaging” includes, but is not limited to, all X-ray, computed axial tomography, magnetic resonance imaging nuclear medicine, positron emission tomography, mammography, and ultrasound goods and services.

(2) A “financial interest” includes, but is not limited to, any type of ownership interest, debt, loan, lease, compensation, remuneration, discount, rebate, refund, dividend, distribution, subsidy, or other form of direct or indirect payment, whether in money or otherwise, between a licensee and a person or entity to whom the licensee refers a person for a good or service specified in subdivision (a). A financial interest also exists if there is an indirect financial relationship between a licensee and the referral recipient including, but not limited to, an arrangement whereby a licensee has an ownership interest in an entity that leases property to the referral recipient. Any financial interest transferred by a licensee to any person or entity or otherwise established in any person or entity for the purpose of avoiding the prohibition of this section shall be deemed a financial interest of the licensee. For purposes of this paragraph, “direct or indirect payment” shall not include a royalty or consulting fee received by a physician and surgeon who has completed a recognized residency training program in orthopedics from a manufacturer or distributor as a result of his or her research and development of medical devices and techniques for that manufacturer or distributor. For purposes of this paragraph, “consulting fees” means those fees paid by the manufacturer or distributor to a physician and surgeon who has completed a recognized residency training program in orthopedics only for his or her ongoing services in making refinements to his or her medical devices or techniques marketed or distributed by the manufacturer or distributor, if the manufacturer or distributor does not own or control the facility to which the physician is referring the patient. A “financial interest” shall not include the receipt of capitation payments or other fixed amounts that are prepaid in exchange for a promise of a licensee to provide specified health care services to specified beneficiaries. A “financial interest” shall not include the receipt of remuneration by a medical director of a hospice, as defined in Section 1746 of the Health and Safety Code, for specified services if the arrangement is set out in writing, and specifies all services to be provided by the medical director, the term of the arrangement is for at least one year, and the compensation to be paid over the term of the

arrangement is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between parties. *A “financial interest” shall not include the provision of nonmonetary remuneration, in the form of hardware, software, or information technology and training services, as described in Section 650(e).*

(3) For the purposes of this section, “immediate family” includes the spouse and children of the licensee, the parents of the licensee, and the spouses of the children of the licensee.

(4) “Licensee” means a physician as defined in Section 3209.3 of the Labor Code.

(5) “Licensee's office” means either of the following:

(A) An office of a licensee in solo practice.

(B) An office in which services or goods are personally provided by the licensee or by employees in that office, or personally by independent contractors in that office, in accordance with other provisions of law. Employees and independent contractors shall be licensed or certified when licensure or certification is required by law.

(6) “Office of a group practice” means an office or offices in which two or more licensees are legally organized as a partnership, professional corporation, or not-for-profit corporation, licensed pursuant to subdivision (a) of Section 1204 of the Health and Safety Code, for which all of the following apply:

(A) Each licensee who is a member of the group provides substantially the full range of services that the licensee routinely provides, including medical care, consultation, diagnosis, or treatment through the joint use of shared office space, facilities, equipment, and personnel.

(B) Substantially all of the services of the licensees who are members of the group are provided through the group and are billed in the name of the group and amounts so received are treated as receipts of the group, except in the case of a multispecialty clinic, as defined in subdivision (l) of Section 1206 of the Health and Safety Code, physician services are billed in the name of the multispecialty clinic and amounts so received are treated as receipts of the multispecialty clinic.

(C) The overhead expenses of, and the income from, the practice are distributed in accordance with methods previously determined by members of the group.

(c) It is unlawful for a licensee to enter into an arrangement or scheme, such as a cross-referral arrangement, that the licensee knows, or should know, has a principal purpose of ensuring referrals by the licensee to a particular entity that, if the licensee directly made referrals to that entity, would be in violation of this section.

(d) No claim for payment shall be presented by an entity to any individual, third party payer, or other entity for a good or service furnished pursuant to a referral prohibited under this section.

(e) No insurer, self-insurer, or other payer shall pay a charge or lien for any good or service resulting from a referral in violation of this section.

(f) A licensee who refers a person to, or seeks consultation from, an organization in which the licensee has a financial interest, other than as prohibited by subdivision (a), shall disclose the financial interest to the patient, or the parent or legal guardian of the patient, in writing, at the time of the referral or request for consultation.

(1) If a referral, billing, or other solicitation is between one or more licensees who contract with a multispecialty clinic pursuant to subdivision (l) of Section 1206 of the Health and Safety Code or who conduct their practice as members of the same professional corporation or partnership, and the services are rendered on the same physical premises, or under the same professional corporation or partnership name, the requirements of this subdivision may be met by posting a conspicuous disclosure statement at the registration area or by providing a patient with a written disclosure statement.

(2) If a licensee is under contract with the Department of Corrections or the California Youth Authority, and the patient is an inmate or parolee of either respective department, the requirements of this subdivision shall be satisfied by disclosing financial interests to either the Department of Corrections or the California Youth Authority.

(g) A violation of subdivision (a) shall be a misdemeanor. The Medical Board of California shall review the facts and circumstances of any conviction pursuant to subdivision (a) and take appropriate disciplinary action if the licensee has committed unprofessional conduct. Violations of this section may also be subject to civil penalties of up to five thousand dollars (\$5,000) for each offense, which may be enforced by the Insurance Commissioner, Attorney General, or a district attorney. A violation of subdivision (c), (d), or (e) is a public offense and is punishable upon conviction by a fine not exceeding fifteen thousand dollars (\$15,000) for each violation and appropriate disciplinary action, including revocation of professional licensure, by the Medical Board of California or other appropriate governmental agency.

(h) This section shall not apply to referrals for services that are described in and covered by Sections 139.3 and 139.31 of the Labor Code.

(i) This section shall become operative on January 1, 1995.

SEC. 2. Section 650.02 of the Business and Professions Code is amended to read:

§ 650.02. Exemptions; referrals by financially interested licensees is amended to read:

The prohibition of Section 650.01 shall not apply to or restrict any of the following:

(a) A licensee may refer a patient for a good or service otherwise prohibited by subdivision (a) of Section 650.01 if the licensee's regular practice is located where there is no alternative provider of the service within either 25 miles or 40 minutes traveling time, via the shortest route on a paved road. If an alternative provider commences furnishing the good or service for which a

patient was referred pursuant to this subdivision, the licensee shall cease referrals under this subdivision within six months of the time at which the licensee knew or should have known that the alternative provider is furnishing the good or service. A licensee who refers to or seeks consultation from an organization in which the licensee has a financial interest under this subdivision shall disclose this interest to the patient or the patient's parents or legal guardian in writing at the time of referral.

(b) A licensee, when the licensee or his or her immediate family has one or more of the following arrangements with another licensee, a person, or an entity, is not prohibited from referring a patient to the licensee, person, or entity because of the arrangement:

(1) A loan between a licensee *or office of a group practice* and the recipient of the referral, if the loan has commercially reasonable terms, bears interest at the prime rate or a higher rate that does not constitute usury, is adequately secured, and the loan terms are not affected by either party's referral of any person or the volume of services provided by either party.

(2) A lease of space or equipment between a licensee *or office of a group practice* and the recipient of the referral, if the lease is written, has commercially reasonable terms, has a fixed periodic rent payment *that may include an allocation to lessee of a pro rata share of the operating expenses or common area maintenance fees*, has a term of one year or more, and the lease payments are not affected by either party's referral of any person or the volume of services provided by either party.

(3) Ownership of corporate investment securities, including shares, bonds, or other debt instruments that may be purchased on terms generally available to the public and that are traded on a licensed securities exchange or NASDAQ, do not base profit distributions or other transfers of value on the licensee's referral of persons to the corporation, do not have a separate class or accounting for any persons or for any licensees who may refer persons to the corporation, and are in a corporation that had, at the end of the corporation's most recent fiscal year, or on average during the previous three fiscal years, stockholder equity exceeding seventy-five million dollars (\$75,000,000).

(4) Ownership of shares in a regulated investment company as defined in Section 851(a) of the federal Internal Revenue Code, if the company had, at the end of the company's most recent fiscal year, or on average during the previous three fiscal years, total assets exceeding seventy-five million dollars (\$75,000,000).

(5) A one-time sale or transfer of a practice or property or other financial interest between a licensee and the recipient of the referral if the sale or transfer is for commercially reasonable terms and the consideration is not affected by either party's referral of any person or the volume of services provided by either party.

(6) A personal services arrangement between *an office of a group practice*, a licensee or an immediate family member of the licensee, and the recipient of the referral if the arrangement meets all of the following requirements:

- (A) It is set out in writing and is signed by the parties.
 - (B) It specifies all of the services to be provided by *or to* the *office of a group practice, the* licensee or *the an* immediate family member of the licensee.
 - (C) The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement.
 - (D) A person who is referred by a licensee or an immediate family member of the licensee is informed in writing of the personal services arrangement that includes information on where a person may go to file a complaint against the licensee or the immediate family member of the licensee.
 - (E) The term of the arrangement is for at least one year.
 - (F) The compensation to be paid over the term of the arrangement is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
 - (G) The services to be performed under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any state or federal law.
- (c)(1) A licensee may refer a person to a health facility, as defined in Section 1250 of the Health and Safety Code, or to any facility owned or leased by a health facility, if the recipient of the referral does not compensate the licensee for the patient referral, and any equipment lease arrangement between the licensee and the referral recipient complies with the requirements of paragraph (2) of subdivision (b).
- (2) Nothing shall preclude this subdivision from applying to a licensee solely because the licensee has an ownership or leasehold interest in an entire health facility or an entity that owns or leases an entire health facility.
- (3) A licensee may refer a person to a health facility for any service classified as an emergency under subdivision (a) or (b) of Section 1317.1 of the Health and Safety Code.
- (4) A licensee may refer a person to any organization that owns or leases a health facility licensed pursuant to subdivision (a), (b), or (f) of Section 1250 of the Health and Safety Code if the licensee is not compensated for the patient referral, the licensee does not receive any payment from the recipient of the referral that is based or determined on the number or value of any patient referrals, and any equipment lease arrangement between the licensee and the referral recipient complies with the requirements of paragraph (2) of subdivision (b). For purposes of this paragraph, the ownership may be through stock or membership, and may be represented by a parent holding company that solely owns or controls both the health facility organization and the affiliated organization.

- (d) A licensee may refer a person to a nonprofit corporation that provides physician services pursuant to subdivision (l) of Section 1206 of the Health and Safety Code if the nonprofit corporation is controlled through membership by one or more health facilities or health facility systems and the amount of compensation or other transfer of funds from the health facility or nonprofit corporation to the licensee is fixed annually, except for adjustments caused by physicians joining or leaving the groups during the year, and is not based on the number of persons utilizing goods or services specified in Section 650.01.
- (e) A licensee compensated or employed by a university may refer a person for a physician service, to any facility owned or operated by the university, or to another licensee employed by the university, provided that the facility or university does not compensate the referring licensee for the patient referral. In the case of a facility that is totally or partially owned by an entity other than the university, but that is staffed by university physicians, those physicians may not refer patients to the facility if the facility compensates the referring physicians for those referrals.
- (f) The prohibition of Section 650.01 shall not apply to any service for a specific patient that is performed within, or goods that are supplied by, a licensee's office, or the office of a group practice. Further, the provisions of Section 650.01 shall not alter, limit, or expand a licensee's ability to deliver, or to direct or supervise the delivery of, in-office goods or services according to the laws, rules, and regulations governing his or her scope of practice.
- (g) The prohibition of Section 650.01 shall not apply to cardiac rehabilitation services provided by a licensee or by a suitably trained individual under the direct or general supervision of a licensee, if the services are provided to patients meeting the criteria for Medicare reimbursement for the services.
- (h) The prohibition of Section 650.01 shall not apply if a licensee is in the office of a group practice and refers a person for services or goods specified in Section 650.01 to a multispecialty clinic, as defined in subdivision (l) of Section 1206 of the Health and Safety Code.
- (i) The prohibition of Section 650.01 shall not apply to health care services provided to an enrollee of a health care service plan licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).
- (j) The prohibition of Section 650.01 shall not apply to a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, a request by a radiologist for diagnostic radiology services, or a request by a radiation oncologist for radiation therapy if those services are furnished by, or under the supervision of, the pathologist, radiologist, or radiation oncologist pursuant to a consultation requested by another physician.
- (k) This section shall not apply to referrals for services that are described in and covered by Sections 139.3 and 139.31 of the Labor Code.
- (l) This section shall become operative on January 1, 1995.