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## Referrals and Disclosure Requirements under California Law

Several California laws require health care providers to disclose any financial interest they may have in an entity or facility to which they refer patients. The disclosure obligation may include disclosure to the Medical Board of California, disclosure to the patients who are being referred for services, and in certain instances, disclosure to insurance companies and attorneys. There are some disclosure laws that apply to all licensed health care providers for all services, and there are some that apply only to referrals for certain "designated health services."

The purpose of this memo is to review the steps which should be taken to satisfy this disclosure obligation. We have included at the end of this memo sample disclosure notices, both in English and in Spanish, with instructions on how to use them. These sample forms must be completed by adding the names of the doctors and facilities with shared financial interests, and must be updated whenever there is a change.

There are three primary laws in California which contain prohibitions upon a physician giving or receiving compensation in return for the referral of patients or from referring patients to an entity in which the physician has a financial interest. These are: Business and Professions Code §650 and §650.01 and 650.02 and Labor Code §139.3 and §139.31. All physicians should first be sure that their structures, transactions, and relationships are in compliance with these laws. Additional information can be found in our memo entitled Bribes and Kickbacks, The Continuing Governmental Regulation of the Practice of the Healing Arts.

We urge our clients to err on the side of over-disclosure. There are penalties for not disclosing...but no real penalties for disclosing even when disclosure is not required, as long as the basic structure is legal. Therefore, the common sense answer is to make the disclosure even if you believe it might not be required.

### **Business & Professions Code § 654.2**

The most basic disclosure requirement is contained in Business and Professions Code §654.2. This law requires all licensed health care providers to disclose to patients "significant beneficial interests" that a licensee or any member of the licensee's immediate family may have in any organization to which the licensee refers patients. The disclosure must be made before the referral is made. "Significant beneficial interests" is defined broadly as "any financial interest that is equal to or greater than the lesser of the following: (A) Five percent of the whole or (B) Five thousand dollars

(\$5,000). The term may include employment contracts, ownership interests, rental arrangements, service contracts and group practice arrangements.

Thus, if a doctor owns an interest in a surgical center, diagnostic facility, or group practice, or has any significant financial interest (such as space or equipment rental, services contract or employment), disclosure of the financial interest must be made. Additionally, this means that when any doctor who is employed by the group practice refers to another member of the group for services, he or she must disclose before a referral is made, that he or she has a financial interest in the group. In order to comply with this law, the written disclosure must inform the patient of alternate choices for the services being ordered by the referring doctor.

This disclosure may be satisfied by either posting a conspicuous sign in an area which is likely to be seen by all patients using the facility or by giving a written notice to the patient. Obviously, posting of the notice is the easiest, most efficient, and most readily verified. However, other California laws will likely require written notice directly to the patient. Therefore, as a practical matter, we suggest you do both.

### **Business & Professions Code §2426**

Business & Professions Code §2426 requires a physician and surgeon, at the time of license renewal, to report to The Medical Board of California ("MBOC") any financial interest that the doctor or any member of the doctor's immediate family may have in a health related facility. The MBOC provides a form for this disclosure at the time of license renewal.

Licensed chiropractors do not have this reporting requirement to the Board of Chiropractic Examiners, although there is a requirement for chiropractors to register ancillary offices with the Board.

### **Labor Code §139.3 (e)**

Labor Code §139.3(e) provides:

*“A physician who refers to or seeks consultation from an organization in which the physician has a financial interest shall disclose this interest to the patient or if the patient is a minor, to the patient’s parents or legal guardian in writing at the time of the referral.”*

### **Business and Professions Code §650.01**

Business and Professions Code §650.01(f) provides:

*“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.”*

While Labor Code §139.3 and B&PC §650 generally apply only to “designated services”, the notice language of these sections does not limit itself to “designated services”. Therefore, our recommendation would be to comply with both disclosure laws by written notice (a) to the patient and (b) posted in the office.

### **Additional Requirements in Workers Compensation Cases**

#### **Labor Code §139.31 (4)(D)**

In addition, there are disclosure requirements that apply only to referrals for certain designated health services as enumerated in the California Self-Referral laws. Those laws are Labor Code Sections 139.3 and 139.31 (the Workers' Compensation self-referral laws) and Business and Professions Code Sections 650.01 and 650.02 (the Physician Ownership Referral Act - PORA). The "designated health services" set forth in these laws are:

- 1. Clinical laboratory**
- 2. Diagnostic nuclear medicine**
- 3. Radiation oncology**
- 4. Physical therapy**
- 5. Physical rehabilitation**
- 6. Psychometric testing**
- 7. Home infusion therapy**
- 8. Diagnostic imaging goods or services**
- 9. Surgical centers.**

Labor Code §139 (which applies to Workers' Compensation cases) provide that it is unlawful for a physician to refer a person for any designated service if the physician or his or her immediate family has a financial interest with the person or in the entity that receives the referral. While this is the general prohibition, there are some significant exceptions, each of which requires a certain type of disclosure.

One of the most significant exceptions is the group practice exception. Whenever a member of the group makes a referral to another member of the group for any of the above services, disclosure must take place at the time the referral is made. (LC §139.3(e); B&PC §650.01 (f)).

A second commonly used exception is where the physician has an ownership interest in office space or equipment which is leased to the practice to which the referral

is made. This exception contains numerous requirements, including the requirement of disclosure at the time the referral is made.

To this point, both Labor Code §139.3 and Business and Professions Code §650.01 require a written notice to the patient at the time the referral is made.

### **Additional Requirements for Personal Services Arrangements**

A third commonly used exception under Labor Code §139.3 is where the physician (or an immediate family member) has a personal services arrangement with the practice or physician to whom the referral is made. This might arise when there is an independent contractor relationship, a separate billing company which provides services, or a management company, separately owned by the physician, which provides management services to the practice. **In addition to the basic requirements which would exempt this transaction from the prohibitions of 139.3 is a more extensive disclosure requirement which requires:**

**“A written notice disclosing the existence of the personal services arrangement and including information on where a person may go to file a complaint against the licensee or the immediate family member of the licensee”. The notice must be provided to the following persons:**

- (1) An injured worker who is referred by a licensee or an immediate family member of the licensee.**
- (2) The injured worker’s employer, if self-insured.**
- (3) The injured worker’s employer’s insurer, if insured.**
- (4) If the injured worker is known by the licensee or the recipient of the referral to be represented, the injured worker’s attorney.**

Note that this particular requirement applies only to Workers' Compensation cases. In other insurance cases, B&PC §650.02 applies, and requires the same disclosure, but only requires that the notice be provided to the patient.

### **Ambulatory Surgery Centers and Workers' Compensation Cases**

There is yet another specific requirement, applicable to Workers' Compensation cases, in which the referring doctor has a financial interest in "outpatient surgery". Under Labor Code §139.3, "Outpatient Surgery" is defined to include "any procedure performed on an outpatient basis in the operating rooms, ambulatory surgery rooms, endoscopy units, cardiac catheterization labs or other sections of a free standing ambulatory surgical center." The law then provides that "The term also includes the ambulatory surgery itself." Therefore, the surgeon's work in performing the surgery (at a freestanding

outpatient surgery center) is a designated service. (Note, however, that surgery performed at a hospital is not included within this definition).

Labor Code §139.31 then contains the following language which modifies the overall prohibition. *"The prohibitions of Section 139.3 shall not apply to an outpatient surgical center, as defined in paragraph (7) of subdivision (b) of Section 139.3, where the referring physician obtains a service preauthorization from the insurer or self-insured employer after disclosure of the financial relationship."*

Therefore, in order to make a proper request for authorization of outpatient surgery when the referring doctor has a financial relationship with the outpatient surgery center or surgeon, disclosure of the financial relationship must be given to the carrier or self-insured employer prior to or as part of the authorization request.

### **Physical Therapy, Psychotherapy, and Expensive Diagnostic Equipment in the Group Practice**

The Labor Code also contains yet another requirement, applicable solely to Workers' Compensation cases. One of the most common exceptions to the self-interest referral restrictions contained in Labor Code §139.3 is the "group practice exception". This generally permits physicians within a "group practice" (as defined in the law) to refer patients to other members of the group for consultation, diagnosis, and treatment. Certain procedures, however, require preauthorization from the insurance carrier or self-insured employer. These procedures include physical therapy services, psychometric testing that exceeds the routine screening battery protocols, and diagnostic imaging services performed with equipment that, when new, had a commercial retail price of \$400,000 or more. The request for preauthorization in these instances naturally includes disclosure of the financial relationship (in this instance the group practice relationship) along with the preauthorization request.

The requirement is contained in Labor Code §139.31 (e), which states:

(e) The prohibition of [Section 139.3](#) shall not apply to any service for a specific patient that is performed within, or goods that are supplied by, a physician's office, or the office of a group practice. Further, the provisions of [Section 139.3](#) shall not alter, limit, or expand a physician'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. **With respect to diagnostic imaging services performed with equipment that, when new, had a commercial retail price of four hundred thousand dollars (\$400,000) or more, or for physical therapy services, or for psychometric testing that exceeds the routine screening battery protocols, with a time limit of two to five hours, established by the administrative director, the referring physician obtains a service preauthorization from the insurer or self-insured**

**employer. Any oral authorization shall be memorialized in writing within five business days.**

Although the language of this section of the law is not complete, at least one case has interpreted the preauthorization requirement as mandatory, disallowing the doctor's lien for physical therapy services when the preauthorization was not obtained. Jones v. Target Stores (w/d) (1998) 63 CCC 1385.<sup>1</sup>

### **Sample Disclosure Notices**

To satisfy the different disclosure obligations we recommend the following:

1. Post a notice in the office in a conspicuous place. You can use the sample notice labeled as Sample Notice A which follows.
2. Every patient should sign a disclosure form as one of the initial intake forms that are filled out on the first office visit. This will satisfy the obligation to disclose "significant beneficial interests" prior to a referral being made. (Sample Notice B).
3. A written disclosure form should go out to a patient at the time a referral is made. This will satisfy the obligations of the self-referral laws with one exception.
4. **On a Workers' Compensation case**, if there is a personal services arrangement and the referral relates to any of the "designated services", then written disclosure must be given to three people: the patient, the insurer (or self insured company) and the patient's attorney. This notice should be sent with a proof of service.

The determination of what notice is required and when depends upon each doctor's individual situation. Some sample notices are attached, but which would need to be customized specifically for each practice, and modified as the health care providers change.

### **The penalties**

The penalty for violation of Business & Professions Code §654.2 is a misdemeanor, punishable by a fine up to \$2,500 and by imprisonment in the county jail for up to six months. Additionally, a criminal conviction for violation of this law may lead to disciplinary action by the doctor's licensing board as well. B&PC §652.5.

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<sup>1</sup> The problems with this law are further complicated by the fact that the term "physical therapy" is not defined. While the statute in defining the term "designated services" includes both "physical rehabilitation" and "physical therapy", this section only uses the term "physical therapy". Therefore, there is an unresolved question as to whether physical rehabilitation or other types of physiotherapy are included within this section.

The penalty for violation of LC §139.3 is particularly severe. Claims can be denied, but denial of a claim is actually the least of the problem. The penalties are described in the last section of the law as follows:

"A violation of subdivision (c), (d), (e), or (f) 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."

Because the potential penalties are so severe, we urge our clients to exercise caution in the structuring of the practice and any financial relationships, the way in which referrals are made and documented, and the required notices.

If you need assistance with preparation of the notices, or should you have questions, please don't hesitate to call.

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***THIS MEMORANDUM CONTAINS A GENERAL DISCUSSION OF LEGAL PRINCIPLES APPLICABLE IN CALIFORNIA AS OF SEPTEMBER 9, 2009. IT SHOULD NOT BE TAKEN AS SPECIFIC LEGAL ADVICE. PRACTICE STRUCTURE AND OPERATIONAL ISSUES HAVE BECOME LEGALLY COMPLEX DUE TO SIGNIFICANT AMOUNTS OF GOVERNMENTAL REGULATION. WE URGE EACH DOCTOR TO CONSULT WITH A COMPETENT HEALTH CARE ATTORNEY ON THESE AND OTHER ISSUES AFFECTING THE PRACTICE OF THE HEALTH PROFESSIONS.***

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# **Sample Notice A**

**Post in the office**

**Modify as doctors and facilities change**

**Keep a file of prior notices with posting dates**

**This notice must be completed by inserting the names of all doctors and facilities in which there are any financial interests**



## **THE FOLLOWING NOTICE IS REQUIRED BY CALIFORNIA LAW**

### **Doctors and Facilities**

*You may be referred to one or more of the doctors or facilities listed below for services. Each of the doctors listed below has a financial interest with or provides services to one or more of the other doctors and/or facilities listed.*

### **Patient's Freedom of Choice**

*You are free to choose any doctor or organization you wish for obtaining services that may be ordered or requested for you by any of the doctors listed below. This choice, however, may be affected by restrictions imposed by your insurance plan. Your doctor would be happy to discuss alternatives with you.*

*Potential sources of information concerning alternatives can also be obtained from the Yellow Pages, the internet, or the county medical association.*

*The following addresses are provided for the filing of any complaints relevant to this notice or the services provided: Medical Board of California, 2005 Evergreen Street, Suite 1200, Sacramento, CA 95815; Osteopathic Medical Board of California, 1300 National Drive, Suite 150, Sacramento, CA 95834; Board of Chiropractic Examiners, 2525 Natomas Park Drive, Suite 260, Sacramento, CA 95833-2931.*

**Doctors and Facilities:**

**LA SIGUIENTE NOTIFICACIÓN SE REQUIERE DE  
ACUERDO A LA LEY DE CALIFORNIA**

**Doctores e Instalaciones**

***A usted se le puede recomendar a uno o más de los doctores o instalaciones indicados abajo para prestación de servicios. Cada uno de los doctores indicados abajo tiene un interés financiero en o proporciona servicios a uno o más de los doctores y/o instalaciones indicados.***

**Libertad de Opción del Paciente**

***Usted tiene la libertad de escoger a cualquier doctor o instalación que usted desee para obtener servicios que se ordenen o soliciten para usted por cualquiera de los doctores indicados abajo. Esta opción, sin embargo, se podría ver afectada por restricciones impuestas por su plan de seguro. Su doctor discutirá con gusto alternativas con usted.***

***Fuentes potenciales de información con respecto a alternativas también se pueden obtener de las páginas amarillas, el internet, o la asociación médica del condado.***

***Las siguientes direcciones se proporcionan para presentar cualquier queja pertinente a esta notificación o los servicios proporcionados: Medical Board of California, 2005 Evergreen Street, Suite 1200, Sacramento, CA 95815; Osteopathic Medical Board of California, 1300 National Drive, Suite 150, Sacramento, CA 95834; Board of Chiropractic Examiners, 2525 Natomas Park Drive, Suite 260, Sacramento, 95833-2931.***

**Doctores e Instalaciones:**

## **SAMPLE NOTICE B**

**We suggest you have each patient sign this disclosure as part of your initial paperwork. Maintain a signed copy in the patient's file.**

**Additionally, during the course of care, if a patient is referred to another provider with whom there is a financial interest, notice should be given to the patient at the time of the referral. Place an additional copy in the patient's file.**

**If a referral is made for a designated service to an organization for which a doctor provides services, then written notice must be given to the patient, the insurer (or self insured company) and the patient's attorney. This should be sent with a proof of service. Maintain a copy in the patient's file.**

**This notice must be completed by inserting the names of all doctors and facilities in which there are any financial interests.**

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**Doctors and Facilities:**

**I hereby acknowledge receipt of this notice.**

**Patient's Name:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Patient's Signature:** \_\_\_\_\_

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**Doctores e Instalaciones:**

**Por la presente acuso recibo de esta notificación.**

**Nombre del paciente: \_\_\_\_\_ Fecha: \_\_\_\_\_**

**Firma del paciente: \_\_\_\_\_**