1-1-1996

Business Associations and Professions

University of the Pacific; McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

Part of the Legislation Commons

Recommended Citation

University of the Pacific; McGeorge School of Law, Business Associations and Professions, 27 Pac. L. J. 399 (1996).
Available at: https://scholarlycommons.pacific.edu/mlr/vol27/iss2/12
The Department of Alcoholic Beverage Control (Department) has the exclusive right and power to license, and regulate the sale of alcoholic beverages in the state.

Existing law prohibits the Department from issuing an original retail off-sale beer and wine license until January 1, 1998 if the applicant's place of business is located in a particular area where the ratio of existing licenses to population exceeds the statutory maximum.

Chapter 834, however, permits the Department to issue a replacement license if the applicant premises received a license within the past twelve months, and the prior licensee either abandoned the premises or the original license is subject to

1. See CAL. BUS. & PROF. CODE § 23050 (West 1985) (establishing the Department of Alcoholic Beverage Control).
2. See id. § 23320 (West Supp. 1995) (listing different types of licenses issued by the Department of Alcoholic Beverage Control, including, but not limited to, on-sale beer and wine licenses, on-sale general license, retail package off-sale beer and wine license, retail package off-sale general licenses, wine broker's license, and public warehouse license).
3. See id. § 23025 (West 1985) (defining "sale" to include any transaction in which title to alcoholic beverage is transferred from one person to another for any consideration).
4. See id. § 23004 (West 1985) (defining "alcoholic beverage" as including anything fit for consumption by drinking that contains more than one-half of one percent alcohol by volume).
5. CAL. CONST. art. XX, § 22; see id. (granting exclusive power to the Department of Alcoholic Beverage Control to license and regulate the manufacture, sale, purchase, possession, transportation, and disposition of intoxicating liquors within the State); CAL. BUS. & PROF. CODE § 23820 (West 1985) (granting power to the Department to limit the number of licenses in order to protect public welfare and morals); see also Lacabanne Properties, Inc. v. Department of Alcoholic Bev. Control, 261 Cal. App. 2d 181, 188, 67 Cal. Rptr. 734, 738 (1968) (holding that the state may limit the operation of businesses that sell intoxicating liquor); Shaub's, Inc. v. Department of Alcoholic Bev. Control, 153 Cal. App. 2d 858, 865, 315 P.2d 459, 464 (1957) (holding that the regulation of intoxicating liquor rests in the governing authority).
6. See CAL. BUS. & PROF. CODE § 23394 (West 1985) (authorizing the sale to consumers of distilled spirits, beer, and wine, for consumption off the premises where sold).
7. Id. § 23817.5(a) (amended and repealed by Chapter 834); see id. (establishing a moratorium on off-sale beer and wine licenses until 1998, if the following conditions exist: (1) applicant premises are located in an incorporated city or county where the number of licenses exceed one for each 2,500 inhabitants or (2) premises are located in a city and county where the number of licenses exceeds one for each 1,250 inhabitants); id. § 23821 (West 1985) (declaring that the Department may issue more licenses in the event of an increase in population between censuses, upon evidence of increase in population); see also City of San Diego v. State Bd. of Equalization, 82 Cal. App. 2d 453, 465, 186 P.2d 166, 172 (1947) (holding that sufficient documentary support of an increase in population will sustain determination); 7 Op. Cal. Att'y Gen. 269, 270 (1946) (discussing the policy of adopting a limitation upon the number of certain licenses that might be issued).
8. See CAL. BUS. & PROF. CODE § 23817.5(b)(2) (amended and repealed by Chapter 834) (defining "abandoned" as premises that are not subject to the exercise of dominion or control by the prior licensee).
a bankruptcy proceeding.9 The replacement license is nontransferable and is restricted by all the conditions imposed on the original license.10 Additionally, transfer of the original license is prohibited after the replacement license is issued.11 Chapter 834 also requires applicants to include a fee of $100.00 when submitting their replacement license application.12

COMMENT

The current moratorium prohibiting the Department from issuing retail off-sale beer and wine licenses demonstrates the State’s commitment to limiting the number of beer and wine retailers.13 The State has long recognized that public welfare and morals require that there be a limitation on the number of premises licensed for the sale of distilled spirits.14

Chapter 834 was enacted to permit grocers that have taken over abandoned stores or stores that have lost their licenses through bankruptcy, to receive a replacement license, even if the stores are located in areas that already have an excessive number of existing licenses.15 Grocers contend that they could not remain profitable and would be forced to close without the ability to sell alcoholic beverages.16 Furthermore, abandoned stores that are generally located in low-income urban areas would remain vacant unless the Department had the power to issue replacement licenses to the new owners.17 Thus, Chapter 834 will help

9. Id. § 23817.5(b)(1)(2) (amended and repealed by Chapter 834).
10. Id. § 23817.5(c)(1)(2) (amended and repealed by Chapter 834).
11. Id. § 23817.5(c)(3) (amended and repealed by Chapter 834).
12. Id. § 23817.5(b)(3) (amended and repealed by Chapter 834).
13. See Assembly Floor, Committee Analysis of SB 646, at 2 (July 13, 1995) (asserting that a three-year moratorium on the issuance of new off-sale beer and wine licenses was to reduce the high concentrations of these establishments); see also Rachel Gordon, A Bid to Curtail Neighborhood Liquor Licensees, S.F. Examiner, Feb. 8, 1994, at A7 (reporting that San Francisco Supervisor Willie Kennedy is calling for a ban on new liquor licenses, because “the widespread availability of alcohol is harming the quality of life in several San Francisco neighborhoods”); Greg Lucas, Law to Ban New Liquor Licensees, S.F. Chron., Sept. 20, 1994, at A15 (noting that a growing number of local governments complain that “when the concentration of stores selling beer, wine and distilled spirits increases, so does the incidence of fights, loitering, trash and crimes); Victor Valle, Foes of Beer and Wine License for Gas Store Lose Round, Fight On, L.A. Times, Sept. 15, 1985, at 1 (San Gabriel Valley) (discussing how residents opposed the sale of alcoholic beverages at an Arco AM-PM mini-market, because they claimed that another outlet selling alcohol would worsen traffic and parking problems and increase gang violence, drug use, and littering).
14. See Cal. Bus. & Prof. Code § 23001 (West 1985) (declaring that the protection of the safety, welfare, health, and morals of the people of the State, requires creating a division to regulate disposing of alcoholic beverages); see also Lacabanne Properties, Inc., 261 Cal. App. 2d at 188, 67 Cal. Rptr. at 738 (holding that the selling of liquor is attendant with dangers, and that the State may limit the operation of such businesses to conditions which will minimize its evils); Dave’s Market, Inc. v. Department of Alcoholic Bev. Control, 222 Cal. App. 2d 671, 680, 35 Cal. Rptr. 348, 353-54 (1963) (permitting the Legislature to control retail price cutting in order to prevent an increase in consumption of alcoholic beverages).
15. Assembly Floor, Committee Analysis of SB 646, at 2 (July 13, 1995).
17. Id.
unlicensed grocers overcome financial difficulties, prevent job losses that result when a grocer is unable to compete with licensed stores, and turn abandoned stores into viable businesses in low-income neighborhoods.18

Because Chapter 834 only applies to stores that have lost their licenses within the past twelve months, the issuance of a replacement license will not dramatically affect the statutory permissible ratio of licenses to population.19 Therefore, Chapter 834 is consistent with the state’s desire to limit the number of alcohol retailers, and protects grocers from the financial perils of not being able to sell beer or wine.20

Anthony A. Babcock

Business Associations and Professions; automotive repair

Business and Professions Code § 9880.2 (repealed, amended, and new).
SB 827 (Kelley); 1995 STAT. Ch. 572

Existing law requires the registration of automotive repair dealers1 by the Bureau of Automotive Repair,2 a division of the Department of Consumer Affairs.3 Existing law exempts certain individuals performing automotive repair

18. Id.
19. See CAL. BUS. & PROF. CODE § 23817.5(b)(1) (amended and repealed by Chapter 834) (limiting replacement licenses to stores that have already been licensed within the previous 12 month period); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 646, at 2 (Apr. 17, 1995) (purporting that the need for replacement licenses will be limited to probably less than 10 per year).
20. See CAL. BUS. & PROF. CODE § 23001 (West 1985) (instructing the Department to protect welfare and morals and promote temperance in the consumption of alcoholic beverages); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 646, at 2 (Apr. 17, 1995) (claiming that without the ability to sell beer and wine, stores would be forced to close).

2. See id. § 9882 (West 1995) (establishing the Bureau of Automotive Repair as an agency of the Department of Consumer Affairs); see also CAL. HEALTH & SAFETY CODE § 44001.5 (West Supp. Pamphlet 1995) (listing the duties of the Bureau of Automotive Repair).
3. CAL. BUS. & PROF. CODE § 9884.6(a) (West 1995); see CAL. CODE REGS. tit. 16, § 3351 (1995) (providing that automotive repair dealers must register by using the appropriate forms and paying a registration fee, and that no separate registration is necessary for mobile emergency road service or towing equipment used by automotive repair dealers); 55 Op. Cal. Att’y Gen. 276, 277 (1972) (holding that machine shops and others rebuilding parts for motor vehicles must register as automotive repair dealers); see also CAL. BUS. & PROF. CODE §§ 100-166 (West 1988 & Supp. 1995) (establishing and defining the powers and duties of the Department of Consumer Affairs); People v. Calvert, 18 Cal. App. 4th 1820, 1834, 23 Cal. Rptr. 2d 644, 653 (1993) (determining that the automobile repair industry is closely monitored with extensive and detailed regulations); cf. N.Y. VEH. & TRAF. LAW § 398-c (McKinney 1986 & Supp. 1995) (requiring all motor vehicle repair shops to be registered with the state before they can perform any repair work). But see infra note 10 (asserting that Chapter 572 will not require the registration of machine shops, or of shops which only repair

Selected 1995 Legislation
from this registration. Chapter 572 provides an additional exemption from the registration requirement for a person whose primary business is the wholesaling of new or rebuilt automotive parts.

Chapter 572 further provides that any person who falls within this exemption must provide the consumer with a specified notice and a written description of the remachining services to be performed, and obtain an authorization from the consumer to perform the work. Chapter 572 will remain in effect until January 1, 1998, when it will be repealed and automatically reenacted with only a listing of those persons exempted from the registration requirement of the Bureau of Automotive Repair.

COMMENT

Chapter 572 is intended to exempt automotive parts stores, which do not conduct repairs on vehicles, from registration fees charged by the Bureau of Automotive Repair. Chapter 572 was enacted in response to a superior court decision regarding the registration fee for automotive repair shops that only
Business Associations and Professions

perform parts repair, but never actually come in contact with an entire automobile.10

One concern about Chapter 572 is whether the exemption of parts repair shops from the registration requirements imposed upon automotive repair dealers leaves consumers with adequate protection.11 Yet the customers that typically use this type of service are themselves registered automotive repair dealers and thus not typically an unsophisticated consumer.12 Since the fiscal impacts of Chapter 572 are not large, and the benefit of deregulating a section of the auto repair industry that is overburdened by regulations is great, Chapter 572 is found to be a needed change to California law.13

Ralph J. Barry

---

10. Telephone Interview with Glen Ayers, Legislative Consultant for Senator David Kelley on SB 827 (June 26, 1995) (notes on file with the Pacific Law Journal); see id. (claiming that Chapter 572 was specifically enacted in response to the superior court decision in the Terrill v. Bureau of Automotive Repair case); id. (explaining that Chapter 572 will now clearly state that California law will not consider machine shops and part repair shops to be automobile repair dealers, and thus no registration will be needed); see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 827, at 2 (May 23, 1995) (reporting that Bob Terrill, owner of Terrill's Aluminum Cylinder Heads of Chico, was cited by the Bureau of Automotive Repair for refusing to pay the $200 registration fee and was subsequently convicted in municipal court); id. (reporting that on appeal in the superior court the conviction was overturned; the court announced that the issue was whether a person who engages in the business of repairing only detached automobile parts is subject to the requirement of registration with the Bureau of Automotive Repairs and found that he or she should not be required to register); SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 827, at 10 (Mar. 27, 1995) (describing Terrill's arguments used to convince the superior court to overturn his conviction for nonregistration as the following: (1) The California Business and Professions Code defines an automotive repair dealer as a person engaged in repairing or diagnosing malfunctions of motor vehicles; (2) a "motor vehicle" is defined as "a passenger vehicle required to be registered with the Department of Motor Vehicles;" and (3) since an auto part is not required to be registered with the Department of Motor Vehicles it is therefore not a motor vehicle, and thus no registration is needed for individuals whose sole business is the repair of auto parts); id. (concluding that the superior court found that an automotive "part is not . . . a motor vehicle, although it may once have been attached to a motor vehicle").

11. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 827, at 10 (Mar. 27, 1995); see id. (declaring that existing law offered the consumer an avenue of appeal and assistance in any complaints against repair shops, through the registration and licensing regulations, yet with no registration required for certain repair shops under Chapter 572, consumers are left on their own to challenge any misconduct).

12. Id.; see id. (suggesting that the superior court in the Terrill case found that the statute's primary purpose is to afford consumers protection, only the more knowledgeable consumers are patrons of machine shops, and such consumers are not in need of the some degree of protection as the average person seeking automotive repair services).

13. Telephone Interview with Glen Ayers, supra note 10; see id. (noting that this change in law is small in terms of financial burdens on the State, yet the change is necessary to allow for businesses to operate smoothly, and without unneeded governmental interference); see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 827, at 2 (May 23, 1995) (stating that SB 827 will only exempt 463 part repair shops and the annual revenue lost for the 1995-96 fiscal year would only be $46,000).
Business Associations and Professions; child passenger restraints—public notice

Health and Safety Code §§ 1204.3, 1212, 1268, 1596.95 (amended); Vehicle Code § 27366 (new); §§ 27360, 27362, 27363.5, 27364 (amended).
SB 503 (Petris); 1995 STAT. Ch. 512

Existing law imposes various conditions for the licensing of clinics, alternative birth center specialty clinics, health facilities, and child day care centers. Further, hospitals must provide information and discuss existing California law that requires the use of child passenger restraint systems for children under four years of age or weighing less than forty pounds with anyone to whom the hospital releases such a child.

Chapter 512 requires, as a condition of licensing a hospital, alternative birth center, clinic, child day care center, or when issuing a special permit for special services, that the applicant have a written policy for the dissemination of information on child passenger restraint systems. Day care center applicants,

1. See CAL. HEALTH & SAFETY CODE §§ 1200, 1200.1(a) (West 1990) (defining "clinic" as an organized outpatient health facility which provides direct medical, surgical, dental, optometric, psychological, or podiatric advice, services, or treatment to patients who remain less than 24 hours).
2. See id. § 1204(b)(4) (West Supp. 1995) (defining "alternative birth center" as a clinic that is not part of a hospital and provides comprehensive perinatal services and delivery care to pregnant women who remain less than 24 hours at the facility).
3. See id. § 1250 (West Supp. 1995) (defining "health facility" as any facility operated for the diagnosis and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, where persons are admitted for a 24-hour stay or longer).
4. Id. §§ 1200-1245 (West 1990, Supp. 1995 & amended by Chapter 512); see id. (setting forth licensing requirements, offenses, grounds for suspension and revocation, and generally referring to regulations relating to clinics); id. §§ 1250-1260 (West 1990 & Supp. 1995) (setting forth licensing requirements for health facilities); id. §§ 1596.80-.879 (West 1990 & Supp. 1995) (setting forth the requirements and administration of licensure of child day care centers); see also id. §1596.750 (West Supp. 1995) (defining "child day care facility" as a facility that provides nonmedical care to children under 18 years of age on less than a 24-hour basis, including day care centers, employer sponsored child care centers, and family day care homes).
5. CAL. VEH. CODE § 27363.5(a) (amended by Chapter 512); cf. ARIZ. REV. STAT. ANN. § 28-507(A) (Supp. 1994) (requiring children who weigh 40 pounds or less, or are under four years of age, to be secured in a child passenger restraint system when riding in a car); id. § 28-907(H) (Supp. 1994) (requiring hospitals to provide the parents of the child with a copy of the statute requiring the use of child safety seats for children under four years or 40 pounds before the release of any newly born child).
6. CAL. HEALTH & SAFETY CODE § 1204.3(a)(5) (amended by Chapter 512); see id. (requiring an applicant for an alternative birthing center license to have a written policy for disseminating a summary of current state law which require child passenger restraint systems to be used when transporting children, a list of child passenger restraint programs within that county, and information on the risks of death and injury resulting from failure to use such systems); see also id. § 1212(i) (amended by Chapter 512) (mandating the same requirements of applicants for clinic licenses); id. § 1268(b) (amended by Chapter 512) (mandating the same requirements for health facility licenses, but allowing hospitals to satisfy those requirements by reproducing the materials provided to the hospital by the California Highway Patrol in accordance with California Vehicle Code § 27366, and providing them to patients without charge); id. § 1268(b)(3) (amended
under Chapter 512, are further required to post signs, at the entry to the facility, relating to child passenger restraint systems.\(^7\)

Chapter 512 further requires county health departments to designate coordinators to manage fine revenues and information distribution, the Office of Traffic Safety to maintain a list of all child restraint programs in the state, and the California Highway Patrol to distribute educational materials, administer a billboard campaign on using child restraint systems, and cooperate with other state agencies to coordinate programs.\(^8\)

**COMMENT**

Chapter 512 was introduced to address the rising number of child injuries and fatalities resulting from automobile accidents.\(^9\) In 1983, 4273 children under four years of age were injured, and 60 were killed in automobile accidents; then in

---

by Chapter 512) (declaring that if a hospital does not have those materials, but it has made a written request to the Department of the California Highway Patrol for those materials, it is in compliance with requirements of this paragraph); CAL. VEH. CODE § 27366(a) (enacted by Chapter 512) (directing the Department of the California Highway Patrol to prepare and disseminate materials for educating the public about child passenger restraint systems, produce a billboard campaign regarding child passenger restraint systems, and coordinate with the Office of Traffic Safety and the State Department of Health Services).

7. CAL. HEALTH & SAFETY CODE § 1596.95(g) (amended by Chapter 512); see id. (requiring applicants for day care center permits to post signs at the entry of the building that contain the telephone number of the local health department, and state the following language: (1) “protect your child—it is the law”; (2) “children under the age of four years, or weighing less than 40 pounds, must be in an approved child passenger restraint system”; (3) “you may be cited for a violation of the child passenger restraint system provisions. In addition, your automobile insurance rates could be adversely affected as a result”; and (4) “call your local health department for more information”).

8. CAL. VEH. CODE § 27360(d)(1) (amended by Chapter 512); id. § 27366(a) (enacted by Chapter 512); see id. § 27360(d)(1) (amended by Chapter 512) (requiring all county health departments to designate coordinators to manage the transfer of funds from the municipal court system to the program, and maintain a list of all programs in their counties); id. § 27366(a)(1) (enacted by Chapter 512) (requiring the California Highway Patrol to disseminate materials discussing the importance of using child passenger restraint systems including, but not limited to, audiovisual aids and written materials); id. § 27366(a), (b) (enacted by Chapter 512) (requiring the California Highway Patrol to administer a billboard campaign that stresses the importance of utilizing child passenger restraint systems and informing the public on where to obtain those systems, and to meet annually with the Office of Traffic Safety and the State Department of Health Services to coordinate their efforts to promote the use of such systems); see also Telephone Interview with Lisa Ramer, Administrative Assistant, Office of Senator Nicholas Petris (June 9, 1995) (notes on file with the Pacific Law Journal) (stating that in all counties with successful child passenger restraint system programs, there was a coordinator who managed the transfer of funds from the municipal courts to the program, while in counties with unsuccessful programs there was no coordinator, and money collected from fines by the courts never made it to the county program).

9. SENATE FLOOR, OPENING STATEMENT OF SB 503, at 1 (May 18, 1995); see id. (explaining that past legislation has had a limited impact and babies are still needlessly dying); id. at 3 (depicting a 23% increase in infant fatalities from 1983 to 1992); see also Julio Moran, Motorists at Checkpoint Get Lesson in Child Safety, L.A. TIMES, Sept. 2, 1994, at B4 (reporting that in September 1994, a checkpoint that was setup in Los Angeles by the national program, Project Safe Baby, which stopped all motorists who were not using or improperly using child safety seats, gave away more than 50 seats for free).
1992, 6440 were injured and 74 were killed in California. Although all fifty states have laws requiring the use of safety seats for children, and California, thirteen years ago, made it illegal for a child under four years of age or weighing less than forty pounds to ride without a child safety seat, hospitals and the public are not aware of the need for child passenger restraint systems. Chapter 512 solves this problem by requiring facilities that are most likely to encounter parents of children under four years of age or weighing under forty pounds, to disseminate information about the need for these systems, as well as requiring county health departments and the California Highway Patrol to coordinate their efforts in educating the public on the need for these systems.

Michael A. Guiliana

Business Associations and Professions; clinical laboratory regulations

Business and Professions Code §§ 1229, 1241.1 (repealed); §§ 1202.5, 1206.5, 1224.5, 1288.5, 1310 (new); §§ 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1209.1, 1210, 1211, 1212, 1220, 1222, 1222.5, 1223, 1224, 1227, 1241, 1245, 1246.5, 1261, 1261.5, 1262, 1263, 1265, 1269, 1300, 1301, 1320, 1321, 1322, 1323, 1324, 1325, 1327 (amended).

SB 113 (Maddy); 1995 STAT. Ch. 510

10. SENATE FLOOR, OPENING STATEMENT OF SB 503, at 3 (May 18, 1995); see Geoff Boucher, Group to Raise Funds to Buy Car Seats, L.A. TIMES, Dec. 17, 1993, at B2 (finding that more than 70,000 children in the United States are hurt or killed each year, 59 children in California were killed because they were not in a safety seat or buckled in correctly, and that 71% of child deaths in auto accidents could likely have been prevented if the child was properly strapped into a seat); Rose Kim, Seats Aplenty for Precious Cargo, L.A. TIMES, Feb. 16, 1992, at B3 (commenting that officials estimate that 30% of drivers neglect to buckle up youngsters while driving on the freeway, 80% fail to do so on local streets, and 71% of child deaths and 66% of child injuries in traffic collisions could be prevented if parents used restraints); Moran, supra note 9 (declaring that annually, more than 1700 children are killed and more than 170,000 are injured in automobiles, but a properly used child safety seat reduces the risk of death by 71%, hospitalization by 67%, and minor injuries by 50%).

11. See Moran, supra note 9 (observing that all 50 states have laws requiring the use of child passenger restraint systems, and that awareness of the requirement is critical); see also SENATE FLOOR, OPENING STATEMENT OF SB 503, at 1 (May 18, 1995) (asserting that very few hospitals, who are required by existing law to inform parents about the law, had a policy on informing parents, and many did not know about the law); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 503, at 3 (May 18, 1995) (quoting supporters’ arguments that although California passed child passenger restraint requirements 13 years ago, people either do not know about the law, do not understand the fatal risks for children, or cannot afford car seats); Telephone Interview with Lisa Ramer, supra note 8 (stating that in approximately 30 meetings with county officials and hospitals, few successful programs existed in hospitals, the major problem being the lack of knowledge of the existing requirements).

12. ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 503, at 1-2 (July 10, 1995).
Under existing law, the Department of Health Services (DHS)\(^1\) is responsible for the licensure and regulation of state clinical laboratories\(^2\) and various clinical laboratory health care professionals.\(^3\) Chapter 510 incorporates federal standards under the Clinical Laboratory Improvement Amendments of 1988 (CLIA)\(^4\) into California clinical laboratory law.\(^5\)

Prior law authorized various licensed clinical laboratory health care professionals to perform certain clinical laboratory procedures.\(^6\) Chapter 510 restructures state regulations around the complexity of the tests performed.\(^7\) The

---

1. See CAL. HEALTH & SAFETY CODE § 100 (West 1990) (creating the Department of Health Services within the Health and Welfare Agency).

2. See CAL. BUS. & PROF. CODE § 1206(a)(7) (amended by Chapter 510) (defining a "clinical laboratory" as any place used for the performance of clinical laboratory tests or examinations); see also id. § 1206(a)(4) (amended by Chapter 510) (providing that a "clinical laboratory test or examination" refers to the detection, identification, measurement, evaluation, correlation, monitoring, and reporting or any entity within a biological specimen for the purpose of obtaining scientific data to aid in disease detection, prevention, and assessment).

3. Id. § 1224 (amended by Chapter 510); see id. (establishing that the DHS may adopt, amend or repeal any regulations necessary for the administration of clinical laboratories); id. § 1223(a) (amended by Chapter 510) (allowing the DHS to employ or contract for the employment of inspectors, special agents, and investigators, and to provide clerical and technical assistance as necessary).

4. See 42 U.S.C.A. § 263a (West 1991) (providing requirements which must be met by an individual laboratory before a certificate indicating compliance with federal regulations may be issued).

5. 1995 Cal. Legis. Serv. ch. 510, sec. 1, at 3114; see id. (explaining the legislative scheme operating within state clinical laboratory regulations); id. (establishing that all state laws enacted after Chapter 510 must be at least as stringent as similar federal regulations provided under the CLIA); id. (providing that the intent of the Legislature is to enact laws permitting the use of state services and facilities while pursuing compliance with CLIA regulations). But see N.Y. PUB. HEALTH LAW § 570 (McKinney's Supp. 1995) (declaring that the proper performance of clinical laboratory and blood banking services is vital to the public health, and that the improper performance of such procedures may contribute to erroneous diagnosis, resulting in prolonged or unnecessary hospitalization, injury, or death); R.I. GEN. LAWS § 23-16.3-2 (Supp. 1994) (denoting that the purpose of clinical laboratory regulation is to provide for the better protection of the public health by assuring that the personnel administering the tests attain the highest degree of professional competency).

6. 1993 Cal. Legis. Serv. ch. 694, sec. 1, at 3237 (amending CAL. BUS. & PROF. CODE § 1207(a), (b)); see id. (establishing that a clinical chemist, clinical microbiologist, clinical toxicologist, clinical molecular biologist or clinical cytogeneticist may only engage in clinical laboratory practice limited to his or her area of specialization); id. (noting that the DHS must identify the areas of specialization for all license categories); see also id. sec. 2, at 3237-38 (amending CAL. BUS. & PROF. CODE § 1210) (providing that a clinical chemist technologist, clinical microbiologist technologist, clinical toxicologist technologist, clinical immunohematologist technologist, clinical molecular biologist technologist, clinical cytogeneticist technologist, or clinical histocompatibility technologist may only engage in clinical laboratory practice limited to the science in which he or she is licensed); id. at 3238 (declaring that the DHS must identify the sciences included within each license category).

7. CAL. BUS. & PROF. CODE § 1206.5 (enacted by Chapter 510); see id. § 1206.5(a) (enacted by Chapter 510) (mandating that a clinical laboratory test or examination classified as waived under the CLIA may only be performed under the direction of a laboratory director and that the procedure may only be undertaken by the following personnel: (1) a licensed physician and surgeon, (2) a licensed podiatrist or dentist when the test results are lawfully used in his or her practice, (3) any person licensed to engage in clinical laboratory practice or direct a clinical laboratory, (4) a person authorized to perform examinations of specimens from suspected incidents of disease and for milk, waters, and food products, (5) a licensed physician assistant under the supervision of a licensed physician or surgeon, (6) a licensed professional nurse, (7) a licensed vocational nurse, (8) a perfusionist acting in compliance with California Business and Professions Code § 2590, (9) a
complexity standard serves as the basis for classifying clinical laboratories as licensed or registered under Chapter 510. Chapter 510 also utilizes the

licensed respiratory care practitioner, (10) a medical assistant when the test is waived in accordance with California Business and Professions Code § 2069, or (11) other health care personnel providing direct patient care; id. § 1206.5(b) (enacted by Chapter 510) (providing that a laboratory test classified as of moderate complexity under CLIA must be performed under the direction of a laboratory director and that the procedure may only be undertaken by the following personnel: (1) a licensed physician and surgeon, (2) a licensed podiatrist or dentist when the test results may be lawfully used in his or her practice, (3) any person licensed to engage in clinical laboratory practice or direct a clinical laboratory, (4) a person authorized to perform examinations of specimens from suspected incidents of disease and for milk, water, and food products, (5) a licensed physician assistant under the supervision of a licensed physician and surgeon, (6) a licensed professional nurse, (7) a perfusionist acting in compliance with California Business and Professions Code § 2590, (8) a licensed respiratory care practitioner, (9) a person engaging in nuclear medicine technology, (10) any person performing blood gas analysis in accordance with California Business and Professions Code § 1245, (11) a person licensed as a psychiatric technician, a vocational nurse, a midwife, or a nurse assistant or home health aide meeting minimum clinical laboratory requirements who provide direct patient care, or (12) a person with a physician office laboratory when the test is performed under the supervision of the patient's physician and surgeon or podiatrist who is accessible to provide onsite consultation); id. § 1206.5(c) (enacted by Chapter 510) (stating that a laboratory test classified as of high complexity under CLIA must be performed under the direction of a laboratory director and that the procedure may only be undertaken by the following personnel: (1) a licensed physician and surgeon, (2) a licensed podiatrist or dentist when the test results may be lawfully used in his or her practice, (3) any person licensed to engage in clinical laboratory practice or direct a clinical laboratory, (4) a person authorized to perform examinations of specimens from suspected incidents of disease and for milk, water, and food products when the test is within a specialty or subspecialty recognized by the person's certification, (5) a licensed physician assistant under the supervision of a licensed physician and surgeon, (6) a perfusionist acting in compliance with California Business and Professions Code § 2590, (7) a licensed respiratory care practitioner, (8) a person engaging in nuclear medicine technology, (9) any person performing blood gas analysis in accordance with California Business and Professions Code § 1245, or (10) a person within a physician office laboratory when the test is performed under the supervision of the patient's physician and surgeon or podiatrist who is accessible to provide onsite consultation); id. § 1206.5(d) (enacted by Chapter 510) (declaring that a test classified as physician-performed microscopy under CLIA must be performed by a licensed physician or surgeon); see also id. § 1224.5 (enacted by Chapter 510) (instructing the DHS to conduct a study to determine whether persons administering tests in physician office laboratories produce accurate, reliable, and necessary test results comparable to those produced by persons performing moderate and high complexity tests); 42 C.F.R. § 493.15(b) (1994) (defining "waived tests" as simple clinical laboratory procedures which are (1) cleared by the FDA for home use, (2) employing methodologies that render the likelihood of erroneous results negligible, and (3) rendering the risk of harm to the patient from an incorrectly performed test negligible); id. § 493.16(a), (b) (1994) (providing a sub-category under moderately complex tests for physician-performed microscopy examinations performed by a physician during a patient's visit on a specimen provided by the patient where the primary instrument used in the examination is a microscope); id. § 493.17(a) (1994) (providing a complexity grading system that classifies all non-waived clinical laboratory tests as either moderately complex or highly complex based upon the following seven criteria: (1) knowledge, (2) training and experience, (3) reagents and materials preparation, (4) characteristic of operational steps, (5) calibration, quality control, and proficiency testing materials, (6) test system troubleshooting and equipment maintenance, and (7) interpretation and judgment). Each clinical laboratory test is assigned a numerical score of 1, 2, or 3 in each of the seven specified criteria; a test receiving a combined numerical score of 12 or less is classified as moderately complex, while a test receiving a combined numerical score greater than 12 is categorized as highly complex. Id.; see id. § 493.10(a) (1994) (providing that all federal laboratory tests must be categorized as waived, moderately complex or highly complex).

8. CAL. BUS. & PROF. CODE § 1265(a)-(c) (amended by Chapter 510); see id. § 1246.5 (amended by Chapter 510) (establishing that any person may request, and any licensed clinical laboratory may perform, a test that is subject to a certificate of waiver under CLIA if laboratory has registered with the DHS); id. § 1265(a)(1) (amended by Chapter 510) (declaring that a clinical laboratory performing tests classified as either
of moderate or high complexity under CLIA must obtain a clinical laboratory license; id. (providing that the
DHS will not issue a license unless the laboratory and its personnel meet CLIA requirements); id. § 1265(a)(2)
(amended by Chapter 510) (stating that a clinical laboratory performing tests subject to a certificate of waiver
or physician-performed microscopy under CLIA must register with the DHS); id. (noting that the DHS will
only issue a clinical laboratory registration to a person applying on a form provided by the DHS and meeting
all applicable state and CLIA requirements).

9. Id. § 1207(a) (amended by Chapter 510); see id. (providing that a clinical chemist, clinical
microbiologist, clinical toxicologist clinical genetic molecular biologist, or clinical cytogeneticist may perform
tests classified as high complexity (limited to his or her area of specialty or subspecialty), moderate complexity
or waived under CLIA); id. § 1210(a) (amended by Chapter 510) (stating that a clinical chemist, clinical
microbiologist scientist, clinical toxicologist scientist, clinical immunohematologist scientist, clinical
genetic molecular biologist scientist, clinical cytogeneticist scientist, or clinical histocompatibility scientist may
perform tests classified as high complexity (limited to his or her area of specialty or subspecialty), moderate
complexity or waived under CLIA).

10. See id. § 1206(a)(12) (amended by Chapter 510) (defining a “specialty” as histocompatibility,
microbiology, diagnostic immunology, chemistry, hematology, immunohematology, pathology, genetics, or
area specified by regulation adopted by the DHS).

11. See id. § 1206(a)(6) (amended by Chapter 510) (defining “clinical laboratory practice” as the
application of clinical laboratory sciences within or outside of a licensed or registered clinical laboratory).


13. Cal. Bus. & Prof. Code § 1261 (amended by Chapter 510); see id. (providing that the DHS may
issue a clinical laboratory scientist's license or a limited clinical laboratory scientist's license to a person who
holds at least a baccalaureate degree, applies for the license on forms provided by the DHS and meets all
reasonable qualification established by the DHS); id. (noting that an exception to the degree requirement may
be allowed by the DHS only if the license applicant has completed at least two years of experience as a licensed
trainee); id. § 1261.5 (amended by Chapter 510) (authorizing the DHS to issue limited clinical laboratory
scientists' licenses in chemistry, microbiology, toxicology, histocompatibility, immunohematology, genetic
molecular biology, cytogenetics, or other area of laboratory specialty recognized by the DHS as necessary to
keep current with laboratory or scientific technology); id. § 1262 (amended by Chapter 510) (providing that
the DHS will not issue a clinical laboratory scientist's or limited clinical laboratory scientist's license except
after an examination); id. (allowing the issuance of a license without the examination requirement in two
situations: (1) where the applicant has passed an examination of the national accrediting board whose require-
ments are equal to or greater than those by the DHS, and (2) where the applicant has passed an examination
of another state whose regulations are equal to or greater than those required by the DHS); see also id. § 1263
(amended by Chapter 510) (providing that the DHS may issue licenses to trainees who intend to train for a
clinical laboratory scientist's license or a limited clinical laboratory scientist's license).

14. See id. § 1206(a)(13) (amended by Chapter 510) (defining “subspecialty” separately for each
individual specialty as: (1) for purposes of microbiology, including bacteriology, mycobacteriology, mycology,
parasitology, virology, molecular biology, serology for diagnosis of infectious diseases, or other DHS adopted
subspecialty specified by regulation; (2) for purposes of diagnostic immunology, including syphilis serology,
general immunology, or other DHS adopted subspecialty specified by regulation; (3) for purposes of chemistry,
including routine chemistry, clinical microscopy, endocrinology, toxicology, or other DHS adopted
subspecialty specified by regulation; (4) for purposes of immunohematology, including ABO/Rh Type and
Group, antibody detection for transfusion, antibody detection nontransfusion, antibody identification,
Chapter 510 also updates the duties and responsibilities of unlicensed laboratory personnel, laboratory directors, and individual licensees. Further, Chapter

compatibility, or other DHS adopted subspecialty specified by regulation; (5) for purposes of pathology, including tissue pathology, oral pathology, diagnostic cytology, or other DHS adopted subspecialty specified by regulation; and (6) for purposes of genetics, including molecular biology concerning diagnosis of human genetic abnormalities, cytogenetics, or other DHS adopted subspecialty specified by regulation).

15. Id. § 1207(b) (amended by Chapter 510); see id. (providing the specialty or subspecialty for a licensed clinical chemist, clinical microbiologist, clinical toxicologist, clinical genetic molecular biologist, and clinical cytogeneticist, and the clinical laboratories that a person licensed in these categories may direct); id. § 1210(b) (amended by Chapter 510) (delineating the specialties and subspecialties for the following license categories: (1) clinical chemist scientist, (2) clinical microbiologist scientist, (3) clinical toxicologist scientist, (4) clinical genetic molecular biologist scientist, (5) clinical cytogeneticist scientist, (6) clinical immunohematologist scientist, and (7) clinical histocompatibility scientist).

16. See id. § 1212(a) (amended by Chapter 510) (defining “unlicensed laboratory personnel” as a laboratory aide, histocompatibility technician, cardiopulmonary technician, or other person engaging in activities pursuant to California Business and Professions Code § 1269); see also id. § 1269(a) (amended by Chapter 510) (establishing that unlicensed laboratory personnel may perform certain laboratory tests under the direct and constant supervision of a physician and surgeon, or any other person licensed under state clinical laboratory regulations, except trainees).

17. See id. § 1209(a) (amended by Chapter 510) (defining a “laboratory director” as a duly licensed physician and surgeon, or a person licensed to direct a clinical laboratory, who substantially complies with the laboratory director qualifications under CLIA for the complexity of tests offered by that laboratory); see also id. § 1209.1 (amended by Chapter 510) (providing for a histocompatibility laboratory director, which may be a licensed physician, a bioanalyst, or a person who has earned a doctoral degree in a biological science, while subsequent to graduation completing four years of experience in immunology, two of which in histocompatibility testing). But see Tenn. Code. Ann. § 68-29-125 (1992) (declaring that clinical laboratory directors must establish a quality control program).

18. Cal. Bus. & Prof. Code § 1203 (amended by Chapter 510); see id. (providing that a clinical laboratory bioanalyst or bioanalyst may perform clinical laboratory tests classified as waived, of moderate complexity, or of high complexity); id. (setting forth the duties and responsibilities of a laboratory director, technical consultant, clinical consultant, technical supervisor, and general supervisor in the specialties of histocompatibility, microbiology, diagnostic immunology, chemistry, hematology, immunohematology, genetics, or other DHS adopted specialty or subspecialty specified under regulation under CLIA); id. § 1204 (amended by Chapter 510) (providing that a clinical laboratory scientist is a person, other than a licensed clinical laboratory bioanalyst or bioanalyst, licensed under California Business and Professions Code § 1261 or § 1262 who may perform clinical laboratory tests classified as waived, of moderate complexity, or of high complexity and the duties and responsibilities of a laboratory director, technical consultant, clinical consultant, technical supervisor, and general supervisor in the specialties of histocompatibility, microbiology, diagnostic immunology, chemistry, hematology, immunohematology, genetics, or other DHS adopted specialty or subspecialty specified under regulation under CLIA); id. § 1205 (amended by Chapter 510) (authorizing the DHS to issue licenses to trainees for the purpose of receiving experience and instruction in various clinical laboratory procedures); id. § 1209(b) (amended by Chapter 510) (delineating the responsibilities of a laboratory director, which include (1) the overall operation and administration of the clinic, (2) the selection and supervision of procedures, (3) reporting results, and (4) assuring compliance with the CLIA); id. (requiring that a laboratory director be directly responsible for all laboratory work undertaken by his or her subordinate staff); id. § 1209(d) (amended by Chapter 510) (requiring a laboratory director do the following activities as part of the overall operation and administration of a clinical laboratory: (1) ensure that all personnel, before commencing specimen testing, have the requisite education, experience, and training for the complexity of the test administered, (2) establish policies and procedures to monitor persons conducting preanalytical, analytical, and postanalytical phases of testing, and (3) provide in writing the responsibilities and duties of persons conducting preanalytical, analytical, and postanalytical phases of testing); id. § 1209(e) (amended by Chapter 510) (requiring a laboratory director to evaluate and document the competency and performance of clinical
510 repeals emergency regulations specifying licensure requirements for persons performing genetic testing.\(^\text{19}\)

Existing law requires the maintenance of adequate records, equipment, and facilities for all clinical laboratory services rendered.\(^\text{20}\) Prior law required all clinical laboratories to demonstrate satisfactory performance in a DHS approved proficiency testing program.\(^\text{21}\) Chapter 510 revises specifications pertaining to specialty proficiency testing.\(^\text{22}\) Chapter 510 also supplements current monitoring procedures by specifying when the DHS must conduct inspections of licensed and registered state clinical laboratories.\(^\text{23}\)

Chapter 510 establishes procedures governing the adoption of new clinical laboratory regulations by requiring that the DHS establish certain criteria whenever a new category of license, or a modification of an existing license, is required.\(^\text{24}\) Under Chapter 510, DHS must consult with a multidisciplinary committee to evaluate any regulation adopted by the Health Care Financing

---


20. CAL. BUS. & PROF. CODE § 1220(a)(1) (amended by Chapter 510); see id. § 1220(b) (amended by Chapter 510) (mandating that each clinical laboratory be conducted, maintained and operated without injury to the public health).


22. CAL. BUS. & PROF. CODE § 1220(a)(2)(A) (amended by Chapter 510); see id. (requiring all laboratories performing non-waived tests to demonstrate successful participation in a proficiency testing program approved by the HCFA for each specialty and subspecialty in which it performs clinical examinations); see also id. § 1220(a)(2)(B) (amended by Chapter 510) (providing that each laboratory must report its proficiency test results to the DHS in an electronic format).

23. Id. § 1220(c)(1) (amended by Chapter 510). Compare id. (providing that licensed clinical laboratories must be inspected at least once every two years and the DHS must maintain records to ensure that every clinical laboratory in California is inspected at least that often with id. § 1220(c)(2) (amended by Chapter 510) (providing that registered clinical laboratories shall not be routinely inspected by DHS) and id. § 1220(c)(3) (amended by Chapter 510) (authorizing the DHS to conduct investigations of complaints regarding any clinical laboratory, including an inspection of the laboratory).

24. Id. § 1208(a) (amended by Chapter 510); see id. (providing that if the DHS determines that a new license category is required, it must specify (1) any necessary regulations identifying the license category or modification, (2) the education, training, and examinations necessary to obtain the license, and (3) any specialty or subspecialty within the new or modified license category).
Administration (HCFA) as a final rule. Chapter 510 further requires the DHS to publish a notice in the California Regulatory Notice Register indicating that a particular regulation has been adopted by the HCFA as a final rule. Any HCFA final rule deemed by the DHS to be equivalent to or more stringent than California law will become effective the later of either ninety days following publication or January 1, 1996. Any HCFA final rule less stringent than California law must be noticed by the DHS for a rulemaking proceeding.

Prior law established a licensing fee structure for state clinical laboratories and clinical laboratory health care professionals. Chapter 510 updates the existing fee structure for application, registration and licensing fees. Chapter 510 also provides for a federal fee deduction.
Existing law specifies certain reasons for allowing the DHS to deny, suspend, or revoke any clinical laboratory license.\(^{33}\) Chapter 510 adds additional grounds upon which a license or registration may be suspended, revoked, or denied.\(^{34}\) Chapter 510 also enables the DHS to prescribe certain alternative disciplinary actions.\(^{35}\)

\[\text{Selected 1995 Legislation} \]

\[413\]
Prior law required the DHS to approve schools accredited as medical technologist education programs by the American Medical Association. Chapter 510 instead allows the DHS to approve schools accredited by the National Accreditation Agency for Clinical Laboratory Services.

Existing law allows certain clinical laboratories to enjoy an exemption from state clinical law regulations. Under prior law, laboratories owned and operated by an individual licensed physician used exclusively for laboratory work on their own patients were exempt from state regulations. Prior law also required that an exempted laboratory complete a proficiency training program.

Chapter 510 eliminates the physician owned clinical laboratory exemption, but does allow certain other exemptions. Chapter 510 also requires that the DHS deem certain clinical laboratories accredited by private non-profit organizations.
to be in compliance with state licensure or registration requirements. Chapter 510 repeals the proficiency training program for exempted laboratories.

COMMENT

All clinical laboratories within the United States must comply with federal CLIA regulations, unless the clinical laboratory performs testing on human specimens solely for research or forensic purposes or the clinical laboratory is regulated by an approved state program that is at least as stringent as the CLIA standards. Prior to the enactment of Chapter 510, California clinical laboratory regulations were not consistent with federal regulatory standards. The purpose

42. CAL. BUS. & PROF. CODE § 1223(b) (amended by Chapter 510); see id. (providing that the DHS may deem laboratories accredited by private, nonprofit organizations as complying with state licensure or regulation requirements if the following conditions are met: (1) the private, nonprofit organization is approved by the HCFA as an accredited body under the CLIA, (2) the DHS determines that the private, nonprofit organization has standards equal to, or more stringent than, state licensure and registration requirements, (3) the private, nonprofit organization agrees to allow the DHS to conduct random inspections of clinical laboratories accredited by it, (4) the clinical laboratory meets the accreditation standards for the private, nonprofit organization, and (5) the laboratory agrees to allow the private, nonprofit organization to provide records and other information to the DHS upon request); id. § 1223(c) (amended by Chapter 510) (stating that a certificate of accreditation will be renewed annually if laboratories accredited by private, nonprofit organizations comply with clinical laboratory regulations).


44. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 113, at 1 (Apr. 24, 1995); see id. (noting that CLIA does not preempt state law except to the extent that California clinical laboratory law is inconsistent with CLIA); see also 42 U.S.C.A. § 263a(a) (West 1991) (failing to include laboratories which conduct testing on human specimens solely for research or forensic purposes); id. § 263a(p) (West 1991) (exempting a state from compliance with CLIA regulations if that state enacts laws in a subject matter covered by the CLIA equal to or more stringent than the respective CLIA requirements). But see Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 HARV. J. L. & TEC. 109, 177-78 (1991) (arguing that forensic laboratories should be regulated by the federal government in order to improve the performance and quality of forensic science, which plays an important role in criminal cases). See generally Enactment of CLIA Has Not Limited Patient Access to Tests, IG Reports, HEALTH CARE DAILY (BNA), June 26, 1995, available in LEXIS, Lawrev library, Allrev file (presenting a report from the Department of Health and Human Services Office of Inspector General indicating that the enactment of CLIA regulations has not limited the number of clinical laboratory tests administered, even though the amendments required CLIA compliance from physician office laboratories, as well as other previously exempt sites).

45. See Letter from Tracy I. Williams, Director, Legislative Advocacy, California Association of HMOs, Inc., to Assemblymember Poochigian (Aug. 10, 1995) (copy on file with the Pacific Law Journal) (indicating that clinical laboratory were subject to review by both federal and state regulations, and that SB 113 will create one efficient regulatory system that will replace the dual system for clinical laboratory review and the assessment of fees); see also Telephone Interview with Jo-Ann Slinkard, Chief of Staff to Senator Maddy on SB 113 (Sept. 11, 1995) (notes on file with the Pacific Law Journal) (stating that the fact that there were inconsistencies between the state and federal clinical laboratory law provided an impetus for SB 113); id. (noting that SB 113 provides the best of both the state and federal clinical laboratory regulations, which will allow clinical laboratory service providers to undertake tests and examinations that are of the highest quality, while at the same time economical to administer). But cf. Richard B. Passey, Is CLIA Understood by Clinical Laboratorians?, MED. LABORATORY OBSERV., July 1994, at 54 (arguing that many clinical laboratorians misunderstand CLIA's complexity model).
of Chapter 510 is to allow California to seek exemption from the federal clinical laboratory standards by creating a state regulatory scheme at least as stringent as the CLIA standards.\textsuperscript{46}

The DHS's Laboratory Field Service Branch (LFSB) regulated approximately 2500 clinical laboratories in California prior to the adoption of the CLIA standards under Chapter 510.\textsuperscript{47} The DHS estimates that the incorporation of CLIA standards will bring approximately 16,000 more clinical laboratories under state regulations.\textsuperscript{48} The rise in costs under Chapter 510, due to increased licensing, regulation, and enforcement actions regarding clinical laboratories, will be completely offset by the annual revenue to the Clinical Laboratory Insurance Fund from fees charged to clinical laboratories.\textsuperscript{49}

The primary difference between the federal CLIA regulations and prior state regulations concern the qualifications of personnel allowed to perform laboratory tests.\textsuperscript{50} Chapter 510 retains the heightened educational requirements for laboratory

\textsuperscript{46}. Senate Committee on Business and Professions, Committee Analysis of SB 113, at 4 (Apr. 24, 1995); see id. (providing that at a series of meetings which occurred in the Spring of 1994, the DHS decided to keep existing California law as the basis for future clinical laboratory regulations, but decided that CLIA's complexity model should be merged into state law to modify the applicable standard for clinical laboratory regulations); id. Assembly Floor, Committee Analysis of SB 113, at 3 (Sept. 1, 1995) (stating that the purpose of SB 113 is to integrate state and federal clinical laboratory law together, which will result in a streamlined regulatory process for clinical laboratories in California); Letter from Stephen A. Arditti, Director, State Governmental Relations, University of California, to Assemblymember Poouchian (Aug. 11, 1995) (copy on file with the Pacific Law Journal) (providing that SB 113 continues high standards for laboratory practice without overregulation, which will effectively protect the public health); see also 1995 Cal. Legis. Serv. ch. 510, sec. 1, at 3114 (stating that changes in technology that increase the efficiency of health care delivery should be accommodated when service providers can do so competently). See generally Telephone Interview with Jo-Ann Slinkard, Chief of Staff to Senator Maddy on SB 113, supra note 45 (specifying that SB 113 is the Legislature's attempt to ensure that all clinical laboratory tests are administered in a safe manner, by trained personnel, to provide the most reliable results possible).

47. Senate Committee on Business and Professions, Committee Analysis of SB 113, at 4 (Apr. 24, 1995); see id. (providing that most of these laboratories were large commercial or hospital-associated laboratories); see also id. (stating that CLIA regulations are enforced throughout the nation, including California by either HCFA or its agents, and that LFSB is the primary HCFA agent in California); id. (noting that LFSB is funded from revenues the HCFA receives from regulated laboratories, which are collected biannually under the CLIA); cf. Jonakait, supra note 44, at 172 (providing that prior to the 1988 CLIA regulations, as much as 25% of all clinical laboratory testing was completed in laboratories that were either unregulated, or subject to only diminished or ambiguous regulations).

48. Senate Rules Committee, Committee Analysis of SB 113, at 5 (May 25, 1995); see id. (establishing that the majority of the newly regulated laboratories will consist of previously unregulated physician office laboratories).

49. Assembly Floor, Committee Analysis of SB 113, at 2 (Sept. 1, 1995); see id. (demonstrating that the $4.5 million in increased costs associated with the implementation of SB 113 will be more than offset by the $4.7 million in fee revenue which will be generated under SB 113); id. at 3 (noting also that clinical laboratories prior to SB 113 paid $3.8 million in fees annually; $1.5 million to the state government, and $2.3 million to the federal government).

50. Assembly Floor, Committee Analysis of SB 113, at 3 (Sept. 1, 1995); see id. (providing that CLIA regulations specify fairly low educational requirements for health care personnel performing basic laboratory tests, but rise as the complexity of the administered test increases); see also Letter from Stephen A. Arditti, supra note 46 (noting that rapid advancements in technology have made it possible for health care
health care personnel promulgated under the prior state regulations, while utilizing the flexibility of the CLIA complexity standards.51

J. Scott Alexander

Business Associations and Professions; counselors, social workers, and psychologists—increase in licensing fees and continuing education requirements

Business and Professions Code §§ 4994.1, 4996.22 (new); §§ 4980.54, 4984.7, 4986.80, 4996.3, 4996.4, 4996.6, 4996.18 (amended).
SB 26 (Alquist); 1995 STAT. Ch. 839

Under existing law, the Board of Behavioral Science Examiners I (BBSE) administers the regulations for the licensure of marriage, family, and child personnel to perform an increasing number of laboratory tests; cf. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 113, at 3 (Sept. 1, 1995) (noting that in juxtaposition to CLIA standards are the prior California clinical laboratory regulations which required that all clinical laboratory personnel administering laboratory tests be licensed to perform each specific test).

51. See SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 113, at 3-4 (Apr. 24, 1995) (providing that the Department of General Services reviewed the scope of practice of California's health care providers to determine the extent to which the providers have received education and training in clinical laboratory sciences); id. at 6 (commenting that supporters of SB 113 believed that clinical laboratory law would be strengthened by streamlining clinical laboratory regulations into one system); see also Letter from Joan Hall, Associate Director, Division of Government Relations, California Medical Association, to Assemblymember Poochigian (Aug. 15, 1995) (copy on file with the Pacific Law Journal) (stating that SB 113 represents an attempt to ensure that clinical laboratory tests are administered by competent clinical laboratory personnel); cf. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 113, at 5-6 (Apr. 24, 1995) (establishing that opponents of SB 113 believe that it will weaken state clinical laboratory regulations by allowing unskilled personnel to perform moderately complex tests without proper education or training). But see Heide K. Lana, Is State Personnel Licensure Worth the Toil and Trouble?, ADVANCE FOR MED. PROF. LABORATORY, May 9, 1994, at 8 (noting that many people find that clinical laboratory regulations are a waste of time and money because the are watered down by the time they appear on the legislative floor).

1. See CAL. BUS. & PROF. CODE § 4980.35(b) (West Supp. 1995) (describing the duties of the Board of Behavioral Science Examiners). See generally id. §§ 4990.1-4990.16 (West 1990 & Supp. 1995) (defining the office, powers, and duties of the Board of Behavioral Science Examiners); id. § 4980.34 (West 1990) (stating the Legislature's intent that the Board employ its resources for the licensing of marriage, family, and child counselors, clinical social workers, and educational psychologists; the development and administration of written and oral licensing examinations and examination procedures; enforcement of laws designed to prevent incompetent, unethical, or unprofessional practitioners from harming the public; and consumer education).
counselors,\textsuperscript{2} licensed educational psychologists,\textsuperscript{3} and clinical social workers.\textsuperscript{4} Existing California law also establishes separate fees relating to the licensure of each of these practitioners.\textsuperscript{5}

Chapter 839 increases the amounts of some of these licensing fees.\textsuperscript{6} Further

\begin{enumerate}
\item See id. § 4980.02 (West Supp. 1995) (defining the practice of marriage, family, and child counseling as a service performed with individuals, couples, or groups wherein interpersonal relationships are examined improving marital and family relationships).
\item See id. § 4986.10 (West 1990) (authorizing licensed educational psychologists to perform any of the following professional functions pertaining to academic learning processes or the educational system or both: (1) evaluation, diagnosis, and test interpretation assessing academic ability, learning patterns, achievement, motivation, and personality factors associated with academic learning problems; (2) counseling services for children or adults for academic learning problems; and (3) over educational, research and services); see also id. § 4986.20 (West Supp. 1995) (listing the qualifications for a license as a licensed educational psychologist). See generally id. § 4986.81 (West 1990) (stating that any person who violates California Business and Professions Code §§ 4986-4988.2 is guilty of a misdemeanor); id. § 4986.90 (West 1990) (declaring that in addition to other proceedings, whenever any person has engaged, or is about to engage in any acts or practices which constitute, or will constitute, an offense against this article, the superior court in and for the county in which the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining that conduct on application of the board, the Attorney General, or the district attorney of the county); id. § 4987 (West 1990) (stating that the board may adopt, amend, or repeal rules of professional conduct appropriate to establishing and maintaining a high standard of professional integrity).
\item Id. §§ 4980.07, 4990.13, 4990.14 (West 1990); see id. § 4996 (West 1990) (declaring that it is misdemeanor for any person to engage in the practice of clinical social work, or hold himself or herself out to be a licensed clinical social worker, or use any words or symbols to indicate that he or she is a licensed clinical social worker, unless at the time of so doing such person holds a valid, unexpired, and unrevoked license); see also id. § 4996.9 (West 1990) (defining the practice of clinical social work as a service directed at assisting people to achieve more rewarding and productive social adjustments); id. § 4996.12 (West 1990) (providing that it is a misdemeanor for any person to violate §§ 4990-4998.3 of the California Business and Professions Code relating to social workers). See generally id. § 4980(a) (West 1990) (declaring that many California families and many individual Californians are experiencing difficulty and distress, and are in need of effective counseling in order to enable them sustain healthy family relationships); id. (stating that healthy individuals, families, and relationships are beneficial and crucial to a healthy society); id. (noting that "marriage, family, and child counselors provide a crucial support for the well-being of the people and the State of California").
\item Id. §§ 4984.7, 4986.80, 4996.3, 4996.4, 4996.6, 4996.18 (amended by Chapter 839); see id. § 4984.7 (amended by Chapter 839) (describing the fee schedule for the licensing of persons engaged in the business of marriage, family, and child counseling); id. § 4986.80 (amended by Chapter 839) (discussing the fee schedule for licensing of educational psychologists); id. § 4996.3 (amended by Chapter 839) (listing application fees for the licensure of clinical social workers); id. § 4996.4 (amended by Chapter 839) (describing the fee for reexaminations of clinical social workers); id. § 4996.6 (amended by Chapter 839) (discussing additional fees relating to the licensure of clinical social workers); id. § 4996.18 (amended by Chapter 839) (stating the fees for registration as an associate clinical social worker).
\item Id. §§ 4984.7, 4986.80, 4996.3, 4996.4, 4996.6, 4996.18 (amended by Chapter 839); see id. § 4984.7 (amended by Chapter 839) (listing the Chapter 839 changes as: (1) increasing the initial license fee for marriage, family, and child counselors to $180; (2) increasing the renewal fee to $180 for those persons whose license expires on or after January 1, 1996; (3) setting the delinquency fee at $90; (4) increasing the intern registration fee to $90, for those persons registering as interns on or after January 1, 1996; (5) increasing renewal fee for interns to $75, for those persons whose registration as an intern expires on or after January 1, 1996; (6) increasing the oral examination fee to $200; (7) increasing written reexamination fee to $100; (8) increasing the oral reexamination fee to $200; (9) increasing the rescoring written examination fee to $20; (10) increasing the appeal for an oral examination to $100; (11) increasing the fee for issuance of any replacement registration, license, or certificate to $20; and (12) increasing the fee for issuance of a certificate or letter of
more, Chapter 839 requires a fee reduction if certain monies are redeposited in the Behavioral Science Examiners Fund.\(^7\)

Existing law additionally prescribes the qualifications for the licensure as a marriage, family, and child counselor, and a clinical social worker.\(^8\) The BBSE is required to administer these licensure provisions.\(^9\)

On and after January 1, 1999, Chapter 839 prohibits the BBSE from renewing a marriage, family, and child counselor or clinical social worker license unless the applicant certifies to the board that he or she has completed not less than thirty-six

good standing to $25); id. § 4986.80 (amended by Chapter 839) (stating the changes of Chapter 839 as: (1) setting the delinquency fee for licensed educational psychologists licenses as $75; (2) increasing the oral examination fee to $200; (3) increasing the fee for rescoring of a written examination to $20; (4) increasing the fee for an appeal of an oral examination to $100; (5) increasing the fee for issuance of any replacement registration, license, or certificate to $20; and (6) increasing the fee for issuance of a certificate or letter of good standing to $25); id. § 4996.3 (amended by Chapter 839) (describing the Chapter 839 changes accordingly: (1) increasing the application for examination fee of clinical social workers received on or after January 1, 1996, to $150; (2) increasing oral examination fee to $200; (3) increasing the fee for rescoring a written examination to $20; (4) increasing the fee for an appeal of an oral examination to $100; and (5) setting the fee for issuance of the initial license at a maximum of $155); id. § 4996.4 (amended by Chapter 839) (setting the reexamination fee of clinical social workers at $150 and the oral reexamination fee at $200); id. § 4996.6 (amended by Chapter 839) (increasing the renewal fees for clinical social workers licenses that expire on or after January 1, 1996, to a maximum of $155, setting the delinquency fee at $75, increasing the fee for issuance of any replacement registration, license, or certificate to $20, and the fee for issuance of a certificate or letter of good standing to $25); id. § 4996.18 (amended by Chapter 839) (increasing the fee for the application to register as an associate clinical social worker to $90 and the renewal fee to $75).

7. Id. § 4994.1 (enacted by Chapter 839); see id. § 4984.6(a) (West 1990) (stating that the Behavioral Science Examiners Fund is continuously appropriated, without regard to fiscal years, to the Board of Behavioral Science Examiners for carrying out and enforcing the provisions of the chapter relating to marriage, family, and child counselors).

8. Id. § 4980(b) (West 1990); id. § 4996.2 (West Supp. 1995); see id. § 4980(b) (West 1990) (stating that no person may engage in the practice of marriage, family, and child counseling for remuneration as defined by California Business and Professions Code § 4980.02, unless that persons holds a valid marriage, family, and child counselor license, or unless specifically exempted from that requirement); id. (prohibiting any person not holding a license from advertising himself or herself as being able to perform marriage, family, child, domestic, or marital consultant services, or in any way using these or any similar titles to imply that he or she performs the same); id. § 4980.40(a)-(h) (West Supp. 1995) (stating the qualifications for a license to be a marriage, family, and child counselor); id. § 4980.41 (West Supp. 1995) (specifying the course work and training to be completed by applicants for licensure as a marriage, family, and child counselor); id. § 4996.2 (West Supp. 1995) (listing the requirements for a license to be a clinical social worker). See generally id. § 480 (West 1990) (listing the grounds for which the board may deny a license to an applicant); id. § 4983 (West 1990) (declaring that any person who violates any provisions of §§ 4980-4989 of the California Business and Professions Code relating to marriage, family, and child counselors is guilty of a misdemeanor); id. § 4983.1 (West 1990) (stating that in addition to other proceedings, whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense pursuant to §§ 4980-4989 of the California Business and Professions Code, the superior court of the county in which the acts or practices take place, or are about to take place, may issue an appropriate order, restraining such conduct on application of the authorized officials); CAL. PENAL CODE § 17 (West Supp. 1995) (defining a misdemeanor).

9. CAL. BUS. & PROF. CODE § 4980.07 (West 1990); id. § 4990.13 (West 1990); see id. § 4990.14 (West 1990) (providing that the board make such rules and regulations as may be necessary for the enforcement of §§ 4990-4998.3 of the California Business and Professions Code relating to social workers and may by rule and regulation prescribe the qualifications for licensure).
hours of approved continuing education in the preceding two years. The BBSE is allowed to waive the requirement for good cause. The applicant is further required to maintain records of completion of the continuing education coursework for a minimum of two years, and the BBSE may audit the records to verify completion of the requirement.

Lastly, Chapter 839 mandates that the BBSE establish a procedure for approving providers of continuing education courses. The BBSE must, on and

10. Id. § 4980.54(c) (amended by Chapter 839); id. § 4996.22(a) (enacted by Chapter 839); see id. § 25 (West 1990) (requiring any person applying for a license or license renewal as a licensed marriage, family, and child counselor, a licensed clinical social worker, or a licensed psychologist to show that he or she has completed training in human sexuality; such training must be creditable toward continuing education requirements as deemed appropriate by the agency regulating such business or profession, and such course must not exceed more than 50 contact hours); id. § 29 (West Supp. 1995) (instructing that the Board of Psychology and the Board of Behavioral Science Examiners to consider adopting continuing educational requirements for all persons applying for renewal of a license as a psychologist, clinical social worker, or marriage, family, and child counselor—including training in the area of recognizing chemical dependency and early intervention); id. § 32(a) (West Supp. 1995) (declaring that the Legislature finds that there is a need to ensure that professionals of the healing arts, including clinical social workers, who have or intend to have significant contact with patients who have, or are at risk to be exposed to, acquired immune deficiency syndrome (AIDS) are provided with training in the form of continuing education regarding the characteristics and methods of assessment and treatment of the condition); see also 1995 Cal. Legis. Serv. ch. 839, sec. 1 at 4968 (amending CAL. BUS. & PROF. CODE §§ 4980.54, 4984.7, 4986.80, 4996.3, 4996.4, 4996.6, 4996.18 and enacting CAL. BUS. & PROF. CODE §§ 4994.1, 4996.22) (declaring the Legislative intent for Chapter 839 as follows: (1) The practices of social work and counseling are affected by changing social conditions; (2) the public health and safety would be enhanced by requiring all persons licensed engaging in the practices of social work and marriage, family, and child counseling to remain current in their fields through continuing education; (3) the Board of Behavioral Science Examiners and members of the profession are the best in establishing comprehensive continuing education standards; (4) there exists a need to have in place a system to address the latest issues of concern that may affect the provision of professional social work and marriage, family, and child counseling services to the public; and (5) a comprehensive continuing education program will "provide consistency, quality control, and a structure within which important social issues and problems, and clinical advances can be brought to the attention of licensed clinical social workers and licensed marriage, family, and child counselors").

11. Id. § 4980.54(e) (amended by Chapter 839); id. § 4996.22(c) (enacted by Chapter 839); see id. (stating that the board may establish exceptions from the continuing education requirement of this section for good cause as defined by the board).

12. Id. § 4980.54(d) (amended by Chapter 839); id. § 4996.22(b) (enacted by Chapter 839).

13. Id. § 4980.54(f)(3) (amended by Chapter 839); id. § 4996.22(d)(3) (enacted by Chapter 839); see id. § 4980.54(f)(1), (2) (amended by Chapter 839) (requiring that continuing education for marriage, family, and child counselors be obtained from one of the following sources: (1) an accredited school or state approved school that meets the requirements set forth in California Business and Professions Code § 4980.40; or (2) other listed continuing education providers); id. § 4996.22(d)(1), (2) (enacted by Chapter 839) (requiring that continuing education for clinical social workers be obtained from one of the following: (1) an accredited school of social work, as defined in California Business and Professions Code § 4990.4, or a school or department of social work that is a candidate for accreditation by the Commission on Accreditation of the Council on Social Work Education; or (2) other listed continuing education providers); see also id. § 4980.54(g) (amended by Chapter 839) (declaring that training, education, and coursework for marriage, family, and child counselors by approved providers must incorporate one or more of the following: (1) aspects of the discipline that are fundamental to the understanding, or the practice, of marriage, family, and child counseling; (2) aspects of the discipline of marriage, family, and child counseling in which significant recent developments have occurred; and (3) aspects of other disciplines that enhance the understanding, or the practice, of marriage, family, and
after January 1, 1997, assess continuing education provider fees and submit a report to the Legislature no later than January 1, 2001, evaluating the progress of continuing education for marriage, family, and child counselors and clinical social workers.\textsuperscript{14}

**COMMENT**

Chapter 839 was sponsored by the Board of Behavioral Science Examiners (BBSE) so as to avoid a pending budget deficit in fiscal year 1996-1997.\textsuperscript{15} The increase in licensing fees for marriage, family, and child counselors, licensed educational psychologists, and clinical social workers will enable the BBSE to maintain a yearly budget with the Attorney General’s office.\textsuperscript{16} Without Chapter 839’s fee increases, the BBSE would no longer be able to function as a board since the Legislature transferred approximately $1,394,000 in 1991 and $461,000 in 1992 from the Behavioral Science Examiners Fund to the General Fund and

---

\textsuperscript{14} Id. § 4980.54(h) (amended by Chapter 839) (noting that a system of continuing education for licensed marriage, family, and child counselors must include courses directly related to the treatment of the client population they serve); id. § 4996.22(e) (enacted by Chapter 839) (stating that training, education, and coursework for clinical social workers by approved providers must include one or more of the following: (1) fundamental aspects of the discipline; (2) significant recent developments of the social work discipline; and (3) aspects of other related disciplines that enhance the understanding, or the practice, of social work); id. § 4996.22(f) (enacted by Chapter 839) (stating that a system of continuing education for licensed clinical social workers must be directly related to the treatment of the client population). See generally id. § 4980.40(a) (West Supp. 1995) (setting forth the requirements of an accredited or state approved school); id. (setting forth what areas the coursework must include); id. § 4990.4 (West Supp. 1995) (defining approved school of social work as a school that is accredited by the Commission on Accreditation of the Council on Social Work Education); id. § 4996.22(g) (enacted by Chapter 839) (stating that the continuing education requirements of California Business and Professions Code § 4996.22 must comply fully with the guidelines for mandatory continuing education established by the Department of Consumer Affairs); id. 4996.22(h) (enacted by Chapter 839) (noting that the board may adopt regulations as necessary to implement California Business and Professions Code § 4996.22).

\textsuperscript{15} Id. § 4980.54(i) (amended by Chapter 839); id. § 4996.22(i) (enacted by Chapter 839); see id. § 4980.54(j) (amended by Chapter 839), § 4996.22(j) (enacted by Chapter 839) (stating that on and after January 1, 1997, the board must, by regulation, fund the administration of California Business and Professions Code §§ 4980.54 and 4996.22 through continuing education provider fees to be deposited in the Behavioral Science Examiners Fund); id. § 4980.54(k) (amended by Chapter 839) (requiring the continuing education requirements to comply fully with the guidelines for mandatory continuing education as established by the Department of Consumer Affairs).

\textsuperscript{16} Senate Floor, Committee Analysis of SB 26, at 2 (May 4, 1995); see id. (noting that the BBSE states that based on current projections, a deficit for the fiscal year 1996/1997 is estimated at $305,000 and will increase to $795,000 in fiscal year 1997/1998 and $1,468,000 in fiscal year 1998/1999); id. (commenting that the BBSE further states that the deficit is an ongoing problem and can be attributed to annual increases in expenditures for the enforcement and examination components of the budget without offsetting increases to revenue).

\textsuperscript{17} Id.; see id. at 3 (stating that the BBSE is a special fund agency which receives no General Fund support and is entirely supported by fees collected from licensees who are regulated by the BBSE).
has never repaid the funds.\textsuperscript{17}

Moreover, Chapter 839's continuing education requirements for the renewal of marriage, family and child counselor and clinical social workers' licenses will benefit both the practices and the clients by helping to ensure competent practitioners.\textsuperscript{18} Overall, Chapter 839 brings California law in line with other states' laws that require continuing education for the renewal of counselor and social worker's licenses.\textsuperscript{19}

\textit{Michelle M. Sheidenberger}

\textsuperscript{17} Id.; see id. (stating that the courts have ruled that the Legislature's taking of these monies from the various special funds within the Department of Consumer Affairs was not legal). \textit{See generally} Daugherty \textit{v. Riley}, 1 Cal. 2d 298, 309-10, 34 P.2d 1005, 1010 (1934) (holding that the Legislature has the power to transfer a special fund reserve temporarily from one purpose to another, but when these diversions are made, the transfers are deemed to be a loan from the special fund, to be returned to that fund as soon as funds are available).

\textsuperscript{18} Id. \textit{But see} Toni M. Massaro & Thomas L. O'Brien, \textit{Constitutional Limitations on State-Impossed Continuing Competency Requirements for Licensed Professionals}, 25 WM. & MARY L. REV. 253, 255-56 (1983) (noting that although many writers have asserted that compulsory continuing competency requirements for professionals could reduce or eliminate incompetence, others have doubted the value of increased regulation of professionals, believing instead that existing policing methods are adequate, and that proposed additional safeguards would be costly and result in minimal benefits); Catharina J.H. Dubbelday, Comment, \textit{The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved}, 34 EMORY L.J. 777, 814 (1985) (stating that licensing and certification statutes have not been totally successful in raising professional standards and in screening out incompetents); Kathleen Z. McKenna, \textit{How Counselors Dance Around Reform Attempts}, SACRAMENTO BEE, June 7, 1993, at A8 (quoting Mary Riemersma, the executive director of the California Association of Marriage and Family Therapists, as saying that a license or a credential of any kind does not ensure competency; however, it does present a mechanism for people to use if something goes wrong); Dan Walters, \textit{Professionals and Politics}, SACRAMENTO BEE, May 17, 1994, at A3 (stating that "state licensing boards can become closed bureaucracies dominated by the professions they purport to regulate and can thus lose sight of their consumer protection missions").

\textsuperscript{19} \textit{See, e.g.}, ILL. ANN. STAT. ch. 225 para. 20/11(a) (Smith-Hurd Supp. 1995) (stating that proof of continuing education requirements are required for all license renewals of clinical social workers); MONT. CODE ANN. § 37-22-201(4) (1993) (declaring that the Board of Social Work Examiners and Professional Counselors must establish requirements for continuing education as a condition for license renewals of licensed social workers); N.D. CENT. CODE § 43-41-09(10) (1993) (mandating that the Board establish continuing education requirements for license renewal of social workers); OHIO REV. CODE ANN. § 4757.11 (Anderson 1994) (stating that the Board must issue a renewed license to counselors and social workers as long as they satisfy the continuing education requirements); OR. REV. STAT. § 675.565 (Supp. 1994) (setting forth that the Board of Clinical Social Workers must require evidence of continuing education from psychologists, occupational therapists, clinical social workers, licensed professional counselors and marriage and family therapists as a requirement for renewal of licensure in order to insure the highest quality of professional services to the public); TEX. HUM. RES. CODE ANN. § 50.034(a) (West Pamphlet 1995) (stating that the Board by rule must establish mandatory continuing education requirements for licensed social workers); WIS. STAT. ANN. § 457.20(3)(b) (West Supp. 1994) (providing that renewal applications for social workers, marriage and family therapists, and professional counselors must be accompanied by proof of completion of continuing education requirements).
Business Associations and Professions

Business Associations and Professions; dieticians—reimbursement for services

Business and Professions Code § 2585 (amended).
SB 486 (Solis); 1995 STAT. Ch. 180

Existing law requires that persons representing themselves as dieticians possess certain state-prescribed qualifications. Prior law required those persons representing themselves as registered dieticians to meet two state-prescribed qualifications. Existing law permits a registered dietician to provide dietary counseling, assessments, and treatments for individuals or groups if the dietician has a referral.
from a health care provider to provide such services.

Existing law authorizes, but does not require, disability insurers to reimburse registered dieticians who provide services as prescribed by a physician and surgeon.

Chapter 180 requires those persons representing themselves as registered dieticians to meet only one of two state-prescribed qualifications.

Chapter 180 also allows dieticians, registered dieticians, or other nutritional professionals with a master’s degree or higher, who are deemed qualified to provide dietary services through a referral from a physician and surgeon, to be reimbursed for the dietary services they provide.

**COMMENT**

The sponsor of Chapter 180, the California Dietetic Association (CDA), argues that although dietetic care is a beneficial and cost effective form of therapy, many disability insurers permit reimbursement only to licensed health care professionals. The CDA reports that this limitation precludes dieticians,

---

4. See **CAL. BUS. & PROF. CODE** § 2586(d) (West 1990) (defining a "health care provider" as any person licensed or certified pursuant to California Business and Professions Code, division two, or licensed pursuant to the Osteopathic Initiative Act).

5. Id. § 2586(a) (West 1990); see id. (providing that the referral must be accompanied by a written prescription signed by the health care provider which details the patient's diagnosis and includes a statement of the desired objective of dietary treatment).

6. **CAL. INS. CODE** § 10176.25 (West 1993); see id. (indicating that the disability insurance policy may provide that reimbursement for a dietician's services will be paid only if rendered pursuant to a method of treatment prescribed by a person holding a physician’s and surgeon’s certificate issued by the Medical Board of California); cf. **IND. CODE ANN.** § 25-14.5-7-3(c) (West Supp. 1994) (indicating that nothing requires direct third-party reimbursement to registered dieticians); **MD. CODE ANN., INS.** § 354Z(e)(1) (1994) (providing that dieticians are permitted to receive reimbursement for their services when a licensed physician deems such services medically necessary); **Minn. Stat. Ann.** § 62Q.095(4) (West Supp. 1995) (noting that a health plan company must pay each allied independent health provider in the expanded network the same rate per unit of service as paid to allied independent health providers in the preferred network); id. § 62Q.095(5)(b) (West Supp. 1995) (defining an "allied independent health provider" as a number of health professions including dieticians).

7. **CAL. BUS. & PROF. CODE** § 2585(b) (amended by Chapter 180); see id. § 2585(b)(1), (2) (amended by Chapter 180) (providing that any person representing themselves as a registered dietician need only meet either of the qualifications as stated in California Business and Professions Code § 2585(a)(1), (2)).

8. Id. § 2585(e) (amended by Chapter 180); see id. (providing that nothing in the provisions of Chapter 180 mandate direct reimbursement of dieticians, registered dieticians, or nutrition professionals as a separate provider type under the Medi-Cal program).

9. **ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 486,** at 2 (June 20, 1995); see **Health Medicare Report, supra** note 1, at 4 (declaring that dieticians are one of the most highly trained allied health professionals and that other allied health professionals, such as occupational or physical therapists, receive consistent medical reimbursement under the Medicare program); id. (requesting that dieticians be named in the list of those allied health professionals who receive reimbursement from the Medicare program); see also Carole Sugarman, **Dieticians are Driving Their Message Home; With Hospitals Discharging Patients Earlier, House Calls Become a Valuable Service,** WASH. POST, Apr. 25, 1995, at Z20 (indicating that insurance companies are just now realizing the cost and value of dieticians, and until recently none of them reimbursed.
registered dieticians, and other nutritional professionals from receiving reimbursement for their services. Chapter 180 is intended to fill this loophole and allow for reimbursement in the event that a disability policy provides reimbursement for only licensed health care professionals.

Legislation similar to the provisions of Chapter 180 was vetoed in 1994 (AB 2696) under the premise that such legislation would require the development of a new state-only funded Medi-Cal service. However, the provisions of Chapter 180 specifically provide that nothing in its provisions will mandate reimbursement under Medi-Cal.

Darrell C. Martin II

Business Associations and Professions; diversion programs for physicians

Business and Professions Code § 2350 (amended).
SB 779 (Lewis); 1995 STAT. Ch. 252

Existing law provides for the licensing and discipline of physicians and surgeons by the Medical Board of California. The board is separated into two divisions with the first being the Division of Licensing, which is responsible for approving educational requirements and issuing licenses.

---

1. CAL. BUS. & PROF. CODE § 2001 (West Supp. 1995); see id. § 2041 (West 1990) (stating that for the purpose of enforcement and licensing, the Medical Board of California views the role of physician as including all licensed podiatrists); id. § 2340 (West 1990) (providing that the legislative intent behind the Medical Board of California is to seek ways to identify and rehabilitate physicians with drug abuse problems); see also id. § 160 (West 1990) (announcing that investigators of the Medical Board of California have the same authority as peace officers when engaged in examinations or investigations into a physician’s conduct).

2. See id. § 2003 (West Supp. 1995) (providing that the Medical Board of California is divided into two divisions: (1) a Division of Licensing, and (2) a Division of Medical Quality); id. § 2018 (West 1990) (permitting each division to adopt or repeal regulations necessary to perform its duties).

3. Id. § 2005 (West 1990); see id. (granting the Division of Licensing the following responsibilities: (1) approving medical education programs, (2) approving clerkship programs, (3) creating and administering examinations for medical licenses, (4) issuing licenses, (5) administering continuing medical education, and (6) administering a student loan program); CAL. CODE REGS. tit. 16, §§ 1300-1354 (1994) (setting forth the licensing requirements and procedures for physician applicants).

Selected 1995 Legislation 425
The second division, the Division of Medical Quality, is responsible for enforcing regulations established by the Medical Board of California, and for disciplinary measures taken against physicians and surgeons.

Existing law authorizes the Division of Medical Quality to establish a diversion program for the rehabilitation of physicians addicted to drugs or alcohol. Existing law also authorizes the Division of Medical Quality to establish criteria for the acceptance, denial, or termination of physicians from the program.

---

4. See CAL. BUS. & PROF. CODE § 2220 (West Supp. 1995) (detailing the enforcement and administrative powers of the Division of Medical Quality).

5. Id. § 2004 (West 1990); see id. (granting the Division of Medical Quality responsibility for (1) the enforcement of the disciplinary and criminal portions of the Medical Board of California regulations; (2) administration of disciplinary actions; (3) enforcing decisions reached by the Medical Quality Review Committee; (4) suspending or revoking licenses of physicians or surgeons after conclusions of disciplinary actions; and (5) reviewing the quality of physicians and surgeons medical procedures); California Med. Ass'n v. Lackner, 124 Cal. App. 3d 28, 39-41, 177 Cal. Rptr. 188, 195 (1981) (stating that a physician in violation of the Department of Health Services regulations is not subject to discipline by that Department, but rather by the Medical Board of California, Division of Medical Quality); see also Windham v. Board of Med. Quality Assurance, 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566, 573 (1980) (holding that in short, the purpose of discipline is to make the licensees a better physician); Furnish v. Board of Med. Examiners, 149 Cal. App. 2d 326, 331, 308 P.2d 924, 928 (1957) (holding that the purpose of physician discipline is not penal, but rather to protect the life, health and welfare of the public at large).

6. See People v. Superior Court, 11 Cal. 3d 59, 61-62, 520 P.2d 405, 407, 113 Cal. Rptr. 21, 23 (1974) (defining "diversion programs" as those which (1) identify the experimental or beginning drug user before they become deeply involved with drugs, and show them the error of their ways by prompt exposure to educational and counseling programs, and to restore them to productive citizenship without the lasting stigma of a criminal conviction; and (2) to reduce the clogging of the criminal justice system by drug abuse prosecutions and thus enable the courts to devote their limited time and resources to cases requiring more attention).

7. CAL. BUS. & PROF. CODE § 2340 (West 1990); see id. (providing the Legislature's intent that the Medical Board of California seek methods to rehabilitate those physicians with impairments caused by addiction to drugs and alcohol which will affect the competency of the physician); id. § 2342 (West Supp. 1995) (describing the committee as being composed of five members; three physicians, two individuals who are not physicians, and that all members must have knowledge and experience regarding evaluation of individuals addicted to drugs or alcohol); see also Antony C. Gualtieri et al., The California Experience with a Diversion Program for Impaired Physicians, JAMA, Jan. 14, 1983, at 285 (announcing that four key elements have made the California Diversion Program both unique and successful: (1) a rapid response mechanism, (2) an individually tailored rehabilitation program, (3) strict confidentiality, and (4) frequent monitoring by involved colleagues and the program's staff); cf. KAN. STAT. ANN. § 65-2836(l) (1992) (stating that any physician who is under investigation or facing a disciplinary action for drug or alcohol abuse must have the opportunity to demonstrate that he or she may resume competent practice of medicine with reasonable skill and safety to any patients).

8. See CAL. CODE REGS. tit. 16, § 1357.1 (1995) (listing the criteria for admission to the diversion program: (1) licensed physician in California, (2) residence in California, (3) abuse of drugs or alcohol which may affect the physician's ability to practice medicine safely, (4) physician has voluntarily requested admission to the diversion program, (5) physician agrees to any medical or psychiatric examinations needed, (6) physician provides medical information, disclosure authorizations, and liability releases, and (7) physician agrees in writing to comply with all elements of the diversion treatment program as designed by the Division of Medical Quality).

9. See id. § 1357.4 (1995) (listing the reasons for denial of admission to the diversion program: (1) physician does not meet requirements of § 1357.1 of the California Code of Regulations; (2) physician has been subject to a disciplinary decision by any state medical licensing authority; (3) complaints or information have been received which indicate the physician has violated the Medical Practice Act; or (4) the committee
Prior California case law had established that the Division of Medical Quality could not continue investigations or disciplinary actions against a physician who was formally participating in a diversion program.\(^\text{12}\)

Chapter 252 allows a physician who is currently under investigation by the Division of Medical Quality to request entry into the diversion program, and requires a committee to evaluate the physician's request and eligibility to participate in the program. Chapter 252 also allows a physician who is not under investigation to voluntarily enter into a diversion program on a confidential basis.\(^\text{13}\)

Chapter 252 provides that neither acceptance or participation in a diversion program precludes the Division of Medical Quality from investigating or com-

determines that the physician will not substantially benefit from participation in the program, or the public is put at a great risk from physician participating in program).

10. See id. § 1357.5 (1995) (listing causes for termination from the diversion program as: (1) the physician has successfully completed the treatment program; (2) the committee votes to terminate the program because, the physician has failed to comply with the treatment program, or any cause for denial of an application that is detailed in § 1357.4 of the California Code of Regulations, or for failing to comply with requirements for admission as detailed in § 1357.1 of the California Code of Regulations, or the committee determines the physician has not substantially benefited from participation in the program, or continued participation in the program creates a great risk to public health or safety).

11. CAL. BUS. & PROF. CODE § 2350(a) (amended by Chapter 252); see id. (stating only those physicians who voluntarily request diversion treatment will be allowed to participate in the diversion program); see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 779, at 3 (Apr. 27, 1995) (reporting that since the creation of the diversion program there have been 479 successful participants out of a total 695, resulting in a success rate of 78%, with only 31 participants re-entering the program). But see Stephen Magagnini, State Records Hazy on Extent of Medical Misconduct, SACRAMENTO BEE, Dec. 8, 1994, at A1 (noting that many hospitals fail to report serious actions taken against their doctors, thus a key source of information about dangerous physicians is not available to the Medical Board of California, or the general public).

12. Kees v. Medical Bd. of Cal., 7 Cal. App. 4th 1801, 1812, 10 Cal. Rptr. 2d 112, 118 (1992); see id. (holding that if formal participation in the diversion program cannot be proven then the Board of Medical Quality was allowed to investigate and institute disciplinary action); B.W. v. Board of Med. Quality Assurance, 169 Cal. App. 3d 219, 230-31, 215 Cal. Rptr. 130, 136 (1985) (asserting that the diversion program is an alternative to discipline if the physician has voluntarily and formally entered into the program with the purpose to divert the disciplinary process for an act of professional misconduct); see also Board of Med. Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55, 61 (1979) (discussing the state's interest in protecting the public from harm by physicians who are so impaired that they cannot practice medicine safely).

13. CAL. BUS. & PROF. CODE § 2350(b) (amended by Chapter 252); see id. (instructing that the current investigation into the physician's conduct must have been based on the physician's self administration of drugs or alcohol); Gualtieri et al., supra note 7 (noting that in the first year of California's diversion program the threat of discipline provided the coercion necessary to encourage voluntary enrollment, yet by the second year, 75% of the physicians were self-referrals).

14. CAL. BUS. & PROF. CODE § 2350(f) (amended by Chapter 252); see id. (providing that the requirements of a committee analysis for eligibility are not required for voluntary entrances into the diversion program); Gualtieri et al., supra note 7 (stating that the diversion program is closed to public scrutiny, and that all information gathered by the diversion program is destroyed upon completion of the rehabilitation program).
mencing with disciplinary action against a physician.\textsuperscript{15} Chapter 252 also allows disciplinary action to be taken against any physician who has been terminated from the diversion program for failure to comply with the requirements and regulations of the program.\textsuperscript{16}

Chapter 252 provides that any physician who successfully completes the diversion program will not be subject to disciplinary actions for any unprofessional conduct which caused the physician to seek access to the diversion program.\textsuperscript{17}

\textbf{COMMENT}

Chapter 252 should correct two previous problems in the diversion program that were created by the \textit{Kees v. Medical Board of California}\textsuperscript{18} decision.\textsuperscript{19} First, the Division of Medical Quality could not investigate or discipline participants in a diversion program.\textsuperscript{20} Chapter 252 corrected this problem by allowing the Division of Medical Quality to investigate and institute disciplinary action against physicians participating in any diversion program.\textsuperscript{21} The second problem was that the \textit{Kees} decision resulted in a policy of limiting participation in diversion programs to those physicians who were actually referred to the program after a

\begin{footnotesize}
\begin{enumerate}
\item[15.] \textsc{Cal. Bus. \\ \\ & Prof. Code} § 2350(e), (d) (amended by Chapter 252); see id. § 2350(e) (amended by Chapter 252) (stating that investigations may be conducted for any unprofessional actions committed before, during, or after entrance into the diversion program); \textit{id} § 2350(d) (amended by Chapter 252) (providing that disciplinary action may be taken for any action committed before, during, or after entrance into the diversion program, except for that conduct which resulted in the physician's entrance into the diversion program); see also Weissbuch v. Board of Med. Examiners, 41 Cal. App. 3d 924, 928-29, 116 Cal. Rptr. 479, 481-82 (1974) (holding that a physician's personal use of drugs may constitute grounds for disciplinary action even though no impairment occurred to his or her professional ability).
\item[16.] \textsc{Cal. Bus. \\ \\ & Prof. Code} § 2350(e) (amended by Chapter 252); see id. (stating that any unprofessional action taken by the physician may be grounds for discipline, including the conduct which gained the physician access to the diversion program); see also \textit{id} (requiring a physician to sign a document stating that he or she understands that violations of law can be prosecuted if the physician is terminated from the diversion program for failure to comply with its requirements).
\item[17.] \textit{id}. § 2350(g) (amended by Chapter 252); see id. (defining successful completion as two years free of drug or alcohol use and the adoption of a sober lifestyle).
\item[18.] 7 Cal. App. 4th 1801, 10 Cal. Rptr. 2d 112 (1992).
\item[19.] Telephone Interview with Jay DeFuria, Consultant to California State Senate Business and Professions Committee (June 26, 1995) (notes on file with the Pacific Law Journal) (explaining that the \textit{Kees} case interpreted California law in a way the Legislature did not agree with); see also \textsc{Senate Floor, Committee Analysis of SB 779}, at 3 (Apr. 27, 1995) (stating that \textsc{SB 779} will correct two problems which exist in California case law due to the \textit{Kees} decision).
\item[20.] \textsc{Senate Floor, Committee Analysis of SB 779}, at 3 (Apr. 27, 1995); see \textit{Kees}, 7 Cal. App. 4th at 1812, 10 Cal. Rptr. 2d at 118 (holding that formal participants in a diversion program may not be disciplined or investigated).
\item[21.] \textsc{Senate Committee on Business and Professions, Committee Analysis of SB 779}, at 3 (Mar. 27, 1995); see Gualtieri et al., \textit{supra} note 7 (stating that although the threat of discipline is ever present, personal and peer pressure have become the major stimulus in encouraging impaired physicians to complete the diversion program).
\end{enumerate}
\end{footnotesize}
disciplinary investigation, and thus precluded voluntary admission to the
diversion program.\textsuperscript{22} Chapter 252 corrected this problem by allowing voluntary
admission to the diversion program by physicians who had not yet caused harm
to the public.\textsuperscript{23} The effect of Chapter 252 will be to allow investigations and
disciplinary actions against participants in diversion programs, while also
increasing rehabilitation of physicians by allowing more to participate, at an
earlier time, and before events have occurred which jeopardize the physician’s
ability to practice medicine in the future.\textsuperscript{24}

\textit{Ralph J. Barry}

\textbf{Business Associations and Professions; inmate health care}

Business and Professions Code § 650.01 (amended); Civil Code § 1542.1
(new); Government Code §§ 827, 6254.14, 12511.5 (new); Health and
Safety Code §§ 1250, 1250.1 (amended); Penal Code §§ 5007.5, 5023
(amended); Welfare and Institutions Code § 14165.11 (new).
AB 1177 (Cunneen); 1995 STAT. Ch. 749
\textit{(Effective October 10, 1995)}

Existing law requires a physician\textsuperscript{1} who refers a patient to another organization
for consultation or additional medical attention, to disclose to the patient any

\begin{enumerate}
\item \textit{See CAL. LAB. CODE § 3209.3(a) (West Supp. 1995) (defining “physician” as a doctor or surgeon
holding an M.D. or D.O. degree and licensed by the state and including dentists, chiropractors, psychologists,
and acupuncturists).}
\end{enumerate}

\textbf{Selected 1995 Legislation}
financial interest held by the physician in that organization.

Chapter 749 would mandate that a physician who is working for the Department of Corrections or the California Youth Authority, be required to disclose any financial interest to the department in which the inmate is incarcerated, instead of informing the inmate. Chapter 749 exempts physicians who make referrals to medical organizations in which they hold a financial interest if the referral is made in a case of workers' compensation, in which case the laws governing workers' compensation would control these physician referrals.

Existing law also creates an exception to the public's right to inspect records held by state agencies when the records held contain information concerning the state's relationship with health care providers or insurance coverage contracts.

2. See CAL. BUS. & PROF. CODE § 650.01(b)(2) (amended by Chapter 749) (defining "financial interest" as any type of ownership interest, debt, loan, discount, rebate, refund, or any other form of direct or indirect payment made to the physician for the act of referring the patient to the organization).

3. Id. § 650.01(f) (amended by Chapter 749); see id. (stating that the referral is unlawful if the physician, or any of his or her immediate family, has a financial interest in the organization the patient is being referred to); see also id. § 650.01(e) (amended by Chapter 749) (indicating that it is unlawful for a physician to enter into an arrangement or scheme by which referrals are made which would be in violation of the California Business and Professions Code § 650.01); id. § 650.01(d), (e) (amended by Chapter 749) (providing that no payments may be presented for collection or paid by any party or insurance company if a referral has been made which is in violation of this section); id. § 650.01(g) (amended by Chapter 749) (explaining that a violation of the California Business and Professions Code § 650.01(a) is a misdemeanor with an eligible civil penalty of up to $5000; and a violation of § 650.01(c)-(e) is a public offense, punishable by fine of up to $15,000 and possible revocation of the professional license).

4. See CAL. PENAL CODE § 5002 (West Supp. 1995) (setting forth the powers and duties of the Department of Corrections); see also CAL. GOV'T CODE § 12811 (West Supp. 1995) (stating that the Youth and Adult Correctional Agency contains the Department of Corrections); People v. Horton, 264 Cal. App. 2d 192, 196, 70 Cal. Rptr. 186, 188 (1968) (declaring that the Department of Corrections is a part of the executive branch of government, and that the court system has no power to direct actions to be taken by the Department, unless the Department is in clear abuse of a legislative order).

5. See CAL. WELF. & INST. CODE § 1700 (West 1984) (explaining the California Youth Authority provides training and treatment for young people who have been convicted of crimes, instead of requiring them to be retributively punished); see also CAL. GOV'T CODE § 12811 (West Supp. 1995) (noting that the Youth and Adult Correctional Agency contains the California Youth Authority); People v. Mack, 2 Cal. App. 3d 724, 730, 82 Cal. Rptr. 771, 774 (1969) (holding that the purpose of the Youth Authority is to provide methods for rehabilitation instead of punishment).

6. CAL. BUS. & PROF. CODE § 650.01(f)(2) (amended by Chapter 749).

7. Id. § 650.01(h) (amended by Chapter 749); see CAL. LAB. CODE § 139.3 (West Supp. 1995) (creating a similar system of restraints on physician referrals for physicians handling workers' compensation cases); id. § 139.31 (West Supp. 1995) (listing permissible referrals that a physician may perform when dealing with workers' compensation patients).

8. CAL. GOV'T CODE § 6254(q) (West 1995); see id. (stating that except for the portion on rates and payment, the contracts between the state and medical providers and insurance companies are open to public inspection after one year, and the entire contract is open for inspection three years after it was initially opened to the public; four years total time lapse for complete disclosure).
Existing law permits the Joint Legislative Audit Committee⁹ to inspect or audit these health and insurance contracts at any time.¹⁰ Chapter 749 mandates that records of the Department of Corrections dealing with health care service contracts not to be held open to inspection by the general public.¹¹ Chapter 749 also makes these health services and insurance contracts open to inspection by the Bureau of State Audits.¹²

Existing law requires a correctional treatment center¹³ to provide basic medical services and authorizes additional medical services under specific conditions.¹⁴ Existing law also requires the State Department of Mental Health¹⁵ to adopt regulations specifying the level of care in correctional treatment centers for patients that need acute psychiatric services.¹⁶

---

9. See id. § 10501 (West 1992) (authorizing that the Joint Legislative Audit Committee to provide information to the Legislature regarding revenue and audit procedures of the state); see also id. § 10502 (West 1992) (mandating that the Joint Legislative Audit Committee consists of seven members of both the Senate, and the Assembly); id § 10503 (West 1992) (detailing the power and duties of the Joint Legislative Audit Committee).

10. Id. § 6254(q) (West 1995); see id. (providing that the Joint Legislative Audit Committee must maintain the confidentiality of the contracts until the time has elapsed for the documents to be available to the general public).

11. Id. § 6254.14(a) (enacted by Chapter 749); see id. (specifying that documents which reveal the deliberation process, negotiations, theories, or strategies of the Department of Corrections and the California Medical Assistance Commission regarding health care for inmates are not open to inspection by the general public); id. (declaring that the legislative intent behind Chapter 749 is to protect the competitive nature of the negotiation process between the Department of Corrections and the medical community).

12. Id. § 6254.14(b) (enacted by Chapter 749); see id. (providing that both the Joint Legislative Audit Committee and the Bureau of State Audits can inspect these records, and that both must maintain the confidentiality of the contracts until the time has elapsed for the documents to be available for the general public); see also id. § 8543 (West Supp. 1995) (creating the Bureau of State Audits to be an organization independent of the executive and legislative branches of government); id. § 8543.1 (West Supp. 1995) (detailing the duties of the Bureau of State Audits).

13. See CAL. HEALTH & SAFETY CODE § 1250(j)(1) (amended by Chapter 749) (defining "correctional treatment center" as a health facility operated by the Department of Corrections, the Department of the Youth Authority, or by any law enforcement agency within the state).

14. Id.; see id. (requiring the correctional treatment center to provide the following basic staff and services: (1) physician and surgeon, (2) psychiatrist, (3) pharmacy, (4) nursing, and (5) dietary); id. § 1250(j)(1), (2) (amended by Chapter 749) (allowing a correctional treatment center to provide (1) laboratory, (2) radiology, (3) prenatal, and (4) outpatient surgery using anesthesia if the patient would remain less than 24 hours); see also Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (holding that deliberate indifference to serious medical needs of prisoners constitutes an Eighth Amendment violation, in that it would be cruel and unusual punishment); John Hurst, State Denies Health Care to Women Inmates, Suit Says, L.A. TIMES, Apr. 5, 1995, at A7 (reporting that the Corrections Department ensures that all prison inmates have adequate medical care, and that sometimes inmates have better access to medical care than people who are not in prison).

15. See CAL. WELF. & INST. CODE § 4334 (West Supp. 1995) (detailing the duties of the Department of Mental Health).

16. CAL. HEALTH & SAFETY CODE § 1250.1(a)(12) (amended by Chapter 749); see id. (stating that the Department of Mental Health must adopt regulations that would allow for differing levels of care 24 hours a day); see also id. § 1250(b) (amended by Chapter 749) (providing that acute psychiatric care is 24 hour care for mentally disordered or incompetent patients); cf. FLA. STAT. ANN. § 945.41 (West 1985) (stating that mentally ill inmates must receive evaluation and appropriate treatment for their mental illness through services offered by the Department of Corrections); N.Y. CORRECT. LAW § 402(1) (McKinney 1987) (detailing the
Prior law provided that these treatment regulations for correctional treatment centers would remain operative until January 1, 1997. Chapter 749 deletes this provision and creates a perpetual correctional treatment center policy for California’s correctional system.

Existing law authorized the Director of Corrections to charge inmates a five dollar fee for each medical visit initiated by the inmate. Prior law required that the fees received be transferred to the State’s General Fund. Chapter 749 amends the transfer of funds portion of this section by mandating that, upon appropriation by the Legislature, the funds received from the inmates medical visits must be returned to the department from which the funds came in order to reimburse that department for the expense of having medical services provided to the inmates.
Prior law authorized the California Medical Assistance Commission\(^\text{23}\) to negotiate contracts, binding upon the Department of Corrections, for inpatient hospital services of inmates and authorized the Department of Corrections to enter into contracts with outside hospitals to provide services for inmates.\(^\text{24}\) Chapter 749 creates a relationship between the California Medical Assistance Commission and the Department of Corrections which allows joint planning and negotiating of contracts for the purchase of health care services for inmates.\(^\text{25}\)

Under existing law, the Attorney General represents the interest of California in all legal matters concerning the welfare of the state, including actions taken against its agencies or officers.\(^\text{26}\) Chapter 749 authorizes the Attorney General to defend a public or private provider of health care against any claim that the civil rights of a person in state custody were violated in the provision of health care services.\(^\text{27}\) Chapter 749 also states that any health care provider who is defended by the Attorney General is indemnified against any future liability arising from

\(^{23}\) See CAL. WELF. & INST. CODE \(\S\) 14087.5(a) (West 1991) (permitting the California Medical Assistance Commission to negotiate exclusive contracts with any county seeking to provide health care services for a public social service).

\(^{24}\) 1994 Cal. Legis. Serv. ch. 145, sec. 5, at 1107 (enacting CAL. PENAL CODE \(\S\) 5023); cf. FLA. STAT. ANN. \(\S\) 945.6033 (West Supp. 1995) (stating that the Florida Department of Corrections has full authority to enter into contracts with hospitals and health maintenance organizations for the medical care services of inmates); KAN. STAT. ANN. \(\S\) 75-5210(c) (Supp. 1994) (stating the Secretary of Corrections has the authority to set standards for inmate health with respect to outpatient and hospital medical visits).

\(^{25}\) CAL. PENAL CODE \(\S\) 5023(b) (amended by Chapter 749); see id. (requiring the Department of Corrections to consult with the California Medical Assistance Commission, and then the Commission must negotiate directly with providers on behalf of the Department, as was mutually agreed upon by both entities); see also id. \(\S\) 5023(a) (amended by Chapter 749) (declaring that the intent of the Legislature is that the Department of Corrections operate in the most efficient manner, and to achieve this the Department must have the benefit and experience of the California Medical Assistance Commission); CAL. WELF. & INST. CODE \(\S\) 14165.11 (enacted by Chapter 749) (asserting identical legislative intent and reasons for the Department of Corrections and the California Medical Assistance Commission to work together for providing medical services to inmates).

\(^{26}\) CAL. GOV'T CODE \(\S\) 12511 (West 1992); see id. (providing that the Attorney General does not have authority over the Regents of the University of California or other boards or officers which are allowed by law to employ their own attorneys); id. \(\S\) 12512 (West 1992) (stating that the Attorney General must attend the Supreme Court to prosecute or defend all causes to which the State or any county, or any officer of the State or county is a party); Pierce v. Superior Court, 1 Cal. 2d 759, 761-62, 37 P.2d 453, 461 (1934) (holding that the Attorney General has power to file any civil action involving rights and interests of the state, or for enforcement of state laws, preservation of order, and protection of public rights and interests); People v. San Diego Unified Sch. Dist., 19 Cal. App. 3d 252, 258, 96 Cal. Rptr. 658, 661 (1971) (holding that the Attorney General has the authority, in the absence of any legislative restriction, to file civil actions for the enforcement of the laws of the state or the United States Constitution for the protection of public rights and interests); West Coast Poultry Co. v. Glasner, 231 Cal. App. 2d 747, 755, 42 Cal. Rptr. 297, 301 (1965) (holding that the Attorney General is authorized to defend all causes to which state officers are parties in their official capacity, and that the complaint does not need to show the officer is being sued in his or her official capacity before the Attorney General can intervene).

\(^{27}\) CAL. GOV'T CODE \(\S\) 12511.5 (enacted by Chapter 749); see also CAL. CTY. CODE \(\S\) 1542.1 (enacted by Chapter 749) (instructing that providers of health care, and all staff of these providers, must release the state from any claim arising from the Attorney General providing a defense in court for any actions taken against the health care providers).
the same transaction or occurrence.\textsuperscript{28} Under Chapter 749, the defense of health care providers and their subsequent indemnification for liability are both conditioned upon the health care provider maintaining insurance to cover professional negligence.\textsuperscript{29}

\section*{Comment}

Chapter 749 reaffirms existing law regarding regulations at correctional treatment centers and provides a perpetual system of medical attention for inmates.\textsuperscript{30} Chapter 749 was also designed to protect the personal safety of the California Department of Corrections physicians and their families by not allowing personal information to be given to inmates, but instead requiring the physicians to disclose financial information concerning a referral to the Department instead of to the inmate.\textsuperscript{31}

Another purpose of Chapter 749 is to protect the state taxpayers from being forced to pay higher prices to hospitals for the medical services provided to inmates by allowing negotiations between the respective departments and hospitals to remain confidential.\textsuperscript{32} During budget discussions, the Legislature

\begin{footnotes}
\item[28] CAL. GOV'T CODE § 827 (enacted by Chapter 749); see also id. § 825(a) (West Supp. 1995) (providing that the state government will indemnify any employee or agency that acts within the scope of their employment); Rivas v. City of Kerman, 10 Cal. App. 4th 1110, 1122-23, 13 Cal. Rptr. 2d 147, 154 (1992) (holding that public policy considerations support a limitation on California Government Code § 825, requiring a public entity to pay judgments against public employees for liabilities incurred within the scope of their employment, to situations in which the employee was defended by the public entity).
\item[29] CAL. GOV'T CODE §§ 827, 12511.5 (enacted by Chapter 749); see id. § 827 (enacted by Chapter 749) (clarifying that no provider of health care can be indemnified unless the health care provider maintains insurance for professional negligence, and if the basis of any civil rights claim is negligence, then the provider's private insurance must be the source of recovery, not the state); Johnson v. California, 69 Cal. 2d 782, 791-92, 447 P.2d 352, 359, 73 Cal. Rptr. 240, 247 (1968) (holding that the principal purpose of the indemnification scheme contained in the California Government Code is to limit the personal threat of suit or liability, and thus encourage the zealous execution of official duties by public employees, and also to alleviate any fears of personal liability by the indemnification provisions).
\item[30] ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1177, at 3 (Apr. 18, 1995).
\item[31] Id.; see id. (stating that physicians have been forced by prior law to inform inmates of personal or family financial information when referring that inmate to another medical facility); Telephone Interview with Monica Butler, Legislative Consultant for Assemblymember Jim Cunneen on AB 1177 (July 17, 1995) (notes on file with the Pacific Law Journal) (confirming that one of the primary purposes of Chapter 749 is to increase the safety of the physician and the physician's family, through amending the requirement that the physician notify an inmate of a financial interest held in another medical facility or treatment center); id. (noting further that allowing physicians to report financial interest to the Department of Corrections instead of to the inmate protects physicians by not allowing this personal information to be used and manipulated by an inmate).
\item[32] ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1177, at 4 (Apr. 18, 1995); see id. (asserting that without the ability to negotiate contracts in privacy the state would be forced to release information about current prices and contract rates to hospitals who ask for the information, and if rates remain confidential, hospitals must bid an offer based on their own cost structure, and not on what the state is willing to pay); id. (stating that the California Department of Corrections contracts for more than $30 million
mandated the development of a formal relationship between the Department of Corrections and the California Medical Association, and thus Chapter 749 incorporates this decision by forcing the two entities to advise and discuss any changes to medical services for inmates.33

Another purpose of Chapter 749 is to help offset the Department of Corrections’ $1.7 million dollar budget deficit by allowing a five dollar copayment to be taken from the prisoner’s account and be paid to the agency providing the medical services.34

Chapter 749 also provides for the defense and indemnification of health care providers by the State for any claims or liability brought against them for services rendered to inmates.35 Chapter 749 has included these defense and indemnification sections because health care providers who were employed by the Department of Corrections were finding it hard to get medical malpractice insurance.36 Insurers viewed inmates as a unique category of patient who could sue for both violations of civil rights in treatment, as well as on the basis of tort malpractice claims.37 Chapter 749 requires health care providers to maintain malpractice insurance to cover any possible tort malpractice claim, and the State will then defend and indemnify the providers for any claim or liability brought under alleged violations of an inmate’s civil rights.38 Thus, the sections of Chapter

worth of hospital services, and thus a one percent savings would represent $300,000 savings to the taxpayers of the state); id. (suggesting that without confidentiality the Department will not be effective in securing the best possible hospital rates); see also SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1177, at 3 (June 27, 1995) (finding that the Legislature had reduced the California Department of Corrections medical budget by $3 million in anticipation of contract savings through the use of the California Medical Assistance Commissions consultation and negotiation experience, yet the Department has petitioned the Governor to restore the $3 million dollars in light of the non-confidentiality of contracts already negotiated with health care providers without the use of the California Medical Assistance Commission).

33. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1177, at 3 (Apr. 18, 1995); see id. (stating that AB 1177 establishes clear authority for the Department of Corrections and the California Medical Assistance Commission to negotiate mutually with hospitals in confidence for services to inmates, thus allowing the Department of Corrections to use the superior expertise of the California Medical Assistance Commission in negotiating and consultation with health care providers).

34. Id.; see also Shields, supra note 20, at 294 (warning that although copayment statutes may lower state costs and cut down on unnecessary medical visits, they may operate as a denial of health care to those inmates who refuse to pay); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985) (involving an inmate who allegedly was denied medical care because he refused to pay).

35. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1177, at 5 (June 27, 1995);

36. Id.; see Telephone Interview with Monica Butler, supra note 31 (asserting that in order for the Department of Corrections to get the largest group of possible health care providers, and thus the best chance for the lowest price through competition, the State needed to supplement the standard malpractice insurance policy which only covered basic tort claims, and not the infringement of inmates civil rights).

37. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1177, at 5 (June 27, 1995); see Telephone Interview with Monica Butler, supra note 31 (confirming that most insurers would not grant policies to health care providers who treated inmates, due to the dual nature of claims that could be brought by inmates; the basic tort malpractice claim, and the civil rights claim).

38. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1177, at 5 (June 27, 1995).
providing for the defense and indemnification of health care providers is a method to increase health care providers protection, which will in turn increase the willingness of health care providers to contract with the Department of Corrections. 39

Ralph J. Barry

Business Associations and Professions; licensing—auto body repair shops

Business and Professions Code §§ 9889.50, 9889.51, 9889.52, 9889.53 (new); § 9882 (amended).
SB 137 (Craven); 1995 STAT. Ch. 445

Prior law called for a study of auto body repair practices by an advisory committee on auto body repair and ordered the report of the committee’s findings to be presented to the Legislature by July 1, 1994.1

Existing law, the Automotive Repair Act,2 requires the registration of automotive repair dealers3 by the Bureau of Automotive Repair4 of the Depart-

39. See Telephone Interview with Monica Butler, supra note 31 (suggesting that AB 1177 will not only increase protection for health care providers, but also encourage a larger pool of providers to compete for contracts with the Department of Corrections, subsequently providing increased competition which should lower the cost of health care coverage of inmates).

1. 1993 Cal. Legis. Serv. ch. 379, sec. 1, at 1825 (amending CAL. BUS. & PROF. CODE § 9889.62); see id. (enacting CAL. BUS. & PROF. CODE § 9889.60) (declaring that the purposes of the study are to identify the following: (1) potential harm to consumers through unsafe or fraudulent auto body repairs; (2) areas which need to be improved, like competency of body shop owners, technicians, adjusters, and appraisers; (3) why problems are not being resolved under existing laws; (4) needed minimum requirements for auto body repair shops, such as equipment used in shops, employee standards, education, and training; (5) the frequency of noncompliance with state requirements for obtaining necessary permits and licenses; (6) possible solutions to problems uncovered, including self-regulation, licensing, and consumer classes; and (7) costs and funding sources for any proposed legislation). See generally Auto Body Repair Advisory Committee, A Study of Auto Body Repair Problems with Findings and Recommendations (July 1, 1994) [hereinafter A Study of Auto Body Repair] (detailing the findings of the committee concerning the areas of fraud and poor workmanship in the areas of special interest to the Legislature).

2. See CAL. BUS. & PROF. CODE §§ 9880-9889.68 (West 1995) (establishing the Automotive Repair Act, which states guidelines and regulations with which auto repair shops and auto repair personnel must comply); 55 Op. Cal. Att’y Gen. 276, 278 (1972) (announcing that the Automotive Repair Act was enacted to foster fair dealing and to eliminate misunderstandings between the general public and the auto repair industry).

3. See CAL. BUS. & PROF. CODE § 9880.1(a) (West 1995) (defining “automotive repair dealer” as a person who is paid for the repairing or diagnosing mechanical malfunctions with motor vehicles).

4. See id. § 9882 (amended by Chapter 445) (setting forth the authority and duties of the Bureau of Automotive Repair); see also id. § 101(y) (West Supp. 1995) (stating the Bureau of Automotive Repair is an agency of the Department of Consumer Affairs).
ment of Consumer Affairs. Existing law also allows the Bureau of Automotive Repair to establish standards for the certification of automotive repair dealers.

Existing law also gives the Bureau of Automotive Repair the authority to deny any application for registration. In addition, Chapter 445 gives the Bureau of Automotive Repair the authority to take disciplinary action against any automotive repair dealer.

5. **IME** § 9882 (amended by Chapter 445); see id. (declaring that the Bureau of Automotive Repair has the duty of enforcing and administering the rules and regulations of the Automotive Repair Act); **id.** § 9884.6(a) (West 1995) (making it unlawful for any person to operate as an automotive repair dealer without being registered with the Bureau of Automotive Repair); see also **id.** §§ 100-472.5 (West 1990 & Supp. 1995) (defining the powers and authority of the Department of Consumer Affairs).

6. **Id.** § 9882 (amended by Chapter 445); see id. (allowing the Director of the Bureau of Automotive Repair to adopt and enforce any rules and regulations necessary to carry out the purposes of the Automotive Repair Act); **id.** § 9884.19 (West 1995) (permitting the Bureau of Automotive Repair to adopt, amend, or repeal any rules or regulations necessary to protect the public from fraudulent or misleading advertising by any automotive repair dealer).

7. **Id.** § 9884.7(1) (West 1995); see id. (stating the Director of the Bureau of Automotive Repair may refuse to validate, or may temporarily or permanently invalidate the registration of an automotive repair dealer for any of the following: (1) making a written or oral statement that is known to be untrue or misleading, (2) allowing a customer to sign any work order which does not state the repairs requested by the customer or the vehicle's odometer reading at time of repair, (3) failing to give the customer a copy of any document signed by the customer, (4) any fraudulent conduct, (5) any conduct grossly negligent, (6) failure to comply with any provisions established by the Automotive Repair Act, (7) willful departure from accepted trade standards of good and workmanlike repair work, (8) making false statements to influence the customer to authorize any repair work, (9) having repair work done by some other automotive repair dealer without the consent of the customer, and (10) conviction of a violation of § 551 of the California Penal Code); see also **id.** § 9884.2 (West 1995) (stating that the Director of the Bureau of Automotive Repair must validate any application which is filled out correctly and where the registration fee has been received); **id.** § 9884.4 (West 1995) (mandating that the registration of any automotive repair dealer will cease to be valid when the Director of the Bureau of Automotive Repair finds that any of the information provided on the application form is outdated); **id.** § 9884.7(2) (West 1995) (stating that where an automotive repair dealer operates more than one facility, the Director of the Bureau of Automotive Repair may only invalidate the registration of the facility which is in violation); **id.** § 9884.7(3) (West 1995) (stating that if the automotive repair dealer has repeatedly engaged in violations of this act, the Director of the Bureau of Automotive Repair may invalidate the registration of all facilities operated by the dealer); **CAL. PENAL CODE** § 551 (West Supp. 1995) (declaring it unlawful for any automotive repair dealer to offer to any insurance agent, or insurance adjuster, a fee for referring an insured to that automotive repair dealer); cf. **WASH. REV. CODE ANN.** § 46.71.045(1)-(7) (West Supp. 1995) (setting forth an identical list of actions which are considered unlawful for an auto body repair shop to participate in).

8. **CAL. BUS. & PROF. CODE** § 9882 (amended by Chapter 445); see id. (granting authority to establish a system for issuing citations to violators of auto repair shop regulations); **id.** § 9882.5 (West 1995) (permitting the Director of the Bureau of Automotive Repair to investigate and gather evidence of violations of this act by any automotive repair dealer, and he or she may suggest to the dealer methods of compensation that would help the dealer in any subsequent disciplinary hearings); **id.** § 9884.14 (West 1995) (stating that the superior court of the county in which a violating automotive repair dealer operates may, upon application from the Director of the Bureau of Automotive Repair, issue an injunction or other restraining order to prohibit any conduct which violates this act); Bennett v. Hayes, 53 Cal. App. 3d 700, 703, 125 Cal. Rptr. 825, 826 (1975) (declaring that the Automotive Repair Act sufficiently protects consumers by vesting in the Director of the Bureau of Automotive Repair the ability to suspend or revoke the licenses of violating auto repair shops).

**Selected 1995 Legislation**
Chapter 445 details legislative findings concerning the state of the auto body repair industry and auto body repair shops in California. Chapter 445 changes the registration form necessary to gain validation as an auto body repair shop by requiring a written statement, signed under penalty of perjury, which requires the applicant to admit that he or she has the necessary permits and licenses to operate an auto repair shop. Chapter 445 also gives the Bureau of Automotive Repair the authority to issue citations and to levy fines against any licensed auto repair shop for violations of the Automotive Repair Act.

**COMMENT**

Chapter 445 codifies provisions comparable to the findings and recommendations of the Auto Body Repair Advisory Committee. This committee's findings and recommendations in greater detail.

9. See Cal. Bus. & Prof. Code § 9889.51 (enacted by Chapter 445) (defining "auto body repair shop" as a place of business, operated by an automotive repair dealer, where automobile collision repair is performed).

10. Id. § 9889.52(1)-(6) (enacted by Chapter 445); see id. (declaring the Legislature finds the following: (1) thousands of California automobiles require repair work each year, (2) Californians are suffering from unsafe, improper or incompetent auto body repairs, (3) there is a lack of proper training for employees of auto body repair shops, (4) California has no minimum level of competency for auto body repair shops, (5) existing laws regulating the auto repair industry are ineffective, and (6) there is a great need for increased competency and training for the auto body repair industry). See generally A Study of Auto Body Repair, supra note 1, at 29-31 (setting forth the findings of the committee which were given to the Legislature and further stating their recommendations in greater detail).

11. Cal. Bus. & Prof. Code § 9889.52 (enacted by Chapter 445); see id. (stating that the application for registration as an auto body repair shop, designates that the applicant is registering as a auto body repair shop, and must be included with a written, signed statement, stating that all local and state licenses and permits necessary to operate an auto body repair shop are in the possession of the applicant); id. § 9889.52(1)-(4) (enacted by Chapter 445) (listing the licenses and permits needed as "(1) a city or county business license, (2) a State Board of Equalization identification or resale permit number, (3) an Environmental Protection Agency hazardous waste permit number, [and] (4) a State Board of Equalization identification or resale permit number")

12. Id. § 9882 (amended by Chapter 445); see id. (allowing the Director of the Bureau of Automotive Repair to adopt a system for the issuance of citations as specified by the California Business and Professions Code § 125.9); see also id. § 125.9(a), (b)(3) (West Supp. 1995) (allowing all branches of the Department of Consumer Affairs to establish a system for the issuance of citations and fines, with the maximum fine for each violation not to exceed $2500); cf. N.Y. Veh. & Traf. Law § 398-f (McKinney 1986 & Supp. 1995) (discussing the ability of the Commissioner of Motor Vehicles to issue citations and to levy fines against auto repair shops that violate the Motor Vehicle Repair Shop Registration Act).

13. Senate Floor, Committee Analysis of SB 137, at 1-2 (May 18, 1995); see id. (declaring that prior law had established an advisory committee on auto body repair, and its findings and recommendations have been submitted to the Legislature for use in formulating Chapter 445); Assembly Committee on Consumer Protection, Government Efficiency and Economic Development, Committee Analysis of SB 137, at 2 (June 27, 1995) (finding that 70% of autobody work done in California involves shoddy work or fraudulent pricing); Telephone Interview with Richard Steffen, Legislative Assistant to the California Assembly Committee on Consumer Protection, Government Efficiency and Economic Development on SB 137 (July 13, 1995) (notes on file with the Pacific Law Journal) (stating that the Auto Body Repair Advisory Committee's findings concerning the state of auto body repair in California prompted the Legislature to attempt to regulate the industry further); see also Zhadan v. Downtown L.A. Motors Distrib. Inc., 66 Cal. App. 3d 481, 497, 136 Cal. Rptr. 132, 141 (1976) (declaring that any violation of the Automotive Repair Act is a
findings illustrated that auto body repair shops in California were both under-
regulated, and underenforced.  

Chapter 445 seeks to help eliminate dangerous, illegal, and incompetent auto
body repair work by increasing compliance with requirements that all necessary
licenses and permits for the operation of auto body repair shops be obtained.  

Perhaps the most important change brought about by Chapter 445 is that it
eliminates a loophole in the Department of Consumer Affair’s regulations
allowing almost every agency but the Bureau of Automotive Repair to issue its
own citations and levy its own fines.

Ralph J. Barry

serious violation of this state’s public policy).

14.  SENATE FLOOR, COMMITTEE ANALYSIS OF SB 137, at 2 (May 18, 1995); see id. (observing that the
commission recommended a formal program of self regulation within the auto repair industry); A Study of Auto
Body Repair, supra note 1, at 9-10 (July 1, 1994) (finding that existing law does not require minimum levels
of competency and training of auto repair shops, and that the Bureau of Automotive Repair was not allowed
document particular violations unless complaints were lodged by consumers; which rarely occurred because
the general public was not skilled enough to know when they received shoddy workmanship, or had been
defrauded); see also Kevin Leary, Firm Settles Automotive Fraud Case Unnecessary Repairs Made and
Unneeded Parts Sold, L.A. TIMES, Oct. 26, 1993, at A20 (reporting the settlement by Winston Tires for $1.4
million after a year long investigation which uncovered overselling and charging for unneeded work, and also
charging for repair work that was never done).

15.  SENATE FLOOR, COMMITTEE ANALYSIS OF SB 137, at 3 (May 18, 1995); see A Study of Auto Body
Repair, supra note 1, at 23-24 (July 1, 1994) (theorizing that an increased focus on licenses and permits could
help to locate those shops actually involved in fraudulent activities, and that consumer protection would be
increased by providing for a more comprehensive licensing and permit system); cf. R.I. GEN. LAWS § 5-38.3-1
(Supp. Pamphlet 1994) (announcing that the purpose of the Motor Vehicle Repair Shop Act is to promote
highway safety by proper and efficient repair of disabled motor vehicles and to protect the consumer from
dishonest and fraudulent practices by auto repair shops).

16.  SENATE FLOOR, COMMITTEE ANALYSIS OF SB 137, at 3 (May 18, 1995); see id. (stating that the
Department of Consumer Affairs has been given broad powers to issue citations and levy fines, yet a loophole
appeared by which the Bureau of Automotive Repair was unable to perform a similar function and thus had
to resort to judicial remedies); Telephone Interview with Richard Steffen, supra note 13 (declaring that the
primary purpose of Chapter 445 is to give the Bureau of Automotive Repair similar authority to enforce its own
regulations); see also CAL. BUS. & PROF. CODE § 9884.14 (West 1995) (stating that the superior court of the
county in which the auto repair shop is located must issue injunctions and levy fines against violators of the
Automotive Repair Act).
Business Associations and Professions; limited liability partnerships—attorneys and accountants

Business and Professions Code § 17900 (amended); Corporations Code §§ 15047, 15048, 15049, 15050, 15051, 15052, 15053, 15054, 15055, 15056, 15057, 15058 (new); §§ 15002, 15006, 15015, 15018, 15034, 15036, 15040 (amended); Revenue and Taxation Code §§ 23097, 23098, 23099 (new); §§ 19, 28.5, 6829, 17220, 18535, 19132, 23036 (amended); Unemployment Insurance Code § 1735 (amended).

SB 513 (Calderon); 1995 STAT. Ch. 679 (Effective October 8, 1995)

Existing law authorizes the formation of corporations, professional corporations, limited liability companies, partnerships, and limited partnerships. Chapter 679 permits the creation of a new legal entity designated as the registered limited liability partnership (registered LLP).


2. See CAL. CORP. CODE § 13401(b) (West Supp. 1995) (defining a “professional corporation” as a corporation organized under the General Corporation Law or California Corporations Code § 13406 which is engaged in rendering professional services in a single profession); see also id. § 13401(a) (West Supp. 1995) (defining “professional services” as any type of professional services which may only be lawfully rendered pursuant to a license, certification, or registration authorized by the California Business and Professions Code).

3. See id. § 17001(t) (West Supp. 1995) (defining a “limited liability company” as an entity having two or more members that is organized under California Corporation Code §§ 17000-17705).

4. See id. § 15006(1) (amended by Chapter 679) (defining a “partnership” as an association of two or more persons to carry on as co-owners a business for profit); id. § 15006(2) (amended by Chapter 679) (indicating that any association formed under any other statute is not a partnership unless such association would have been a partnership prior to the Uniform Partnership Act). See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, PARTNERSHIPS §§ 22-25A (9th ed. 1989 & Supp. 1995) (describing circumstances giving rise to partnerships).

5. CAL. CORP. CODE § 162 (West 1990); id. § 13404 (West Supp. 1995); id. § 15006(1) (amended by Chapter 679); id. § 15501 (West 1991); id. § 17001(t) (West Supp. 1995); see id. § 15501 (West 1991) (defining a “limited partnership” as a partnership formed by two or more persons under the provisions of California Corporations Code § 15502, having as members one or more general partners and one or more limited partners with the limited partners not being bound by the obligations of the partnership); see also § 15502 (West 1991) (delineating requisite conditions for the formation of a limited partnership). See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, PARTNERSHIPS §§ 76-79 (9th ed. 1989 & Supp. 1995) (setting forth criteria for establishing a limited partnership).

6. CAL. CORP. CODE §§ 15047-15058 (enacted by Chapter 679); see id. § 15048(a) (enacted by Chapter 679) (providing that the name of a registered limited liability partnership must contain the words “Registered Limited Liability Partnership” or “Limited Liability Partnership” or one of the abbreviations “L.L.P.,” “LLP,” “R.L.L.P.,” or “RLLP” as the last words or letters of its name). A majority of commercial states currently authorize the establishment of LLPs. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 513, at 5 (July 5, 1995). See, e.g., ARIZ. REV. STAT. ANN. § 29-244 (Supp. 1994), CONN. GEN. STAT. ANN § 34-81b (West Supp. 1995), DEL. CODE ANN. tit. 6, § 1544 (Supp. 1994), D.C. CODE ANN. § 41-143
DEFINITION AND REGISTRATION

Under Chapter 679, a registered LLP is a partnership, other than a limited partnership, consisting of partners who are either licensed to practice law or accountancy in this state or licensed to provide professional LLP services in a jurisdiction other than California. Included in this definition are partnerships which are related to either a registered LLP, or a foreign limited liability partnership (foreign LLP) and which provide services complementary to the professional services provided by the registered LLP or foreign LLP.
To become a registered LLP, a partnership must file an application for registration with the Secretary of State (Secretary).\textsuperscript{11} A partnership may convert to a registered LLP by either the vote of a majority in interest of its partners or by a different vote pursuant to its partnership agreement.\textsuperscript{12} To transact intrastate business\textsuperscript{13} in California, a foreign LLP must submit a registration form furnished

\begin{itemize}
\item \textsuperscript{11} See id. § 15049(a) (enacted by Chapter 679); see id. (providing that the registration include the following: (1) the name of the partnership, (2) the address of principal office, (3) the name of agent for service of process if necessary, (4) a brief statement of the business in which the partnership engages, (5) other matters the partnership determines to include, and (6) the fact that the partnership is registering as a registered LLP); id. § 15049(b) (enacted by Chapter 679) (requiring a partnership to pay an $80 filing fee); id. § 15049(c) (enacted by Chapter 679) (mandating that the Secretary must register a partnership as a registered LLP upon submission of registration and fee); id. § 15049(d) (enacted by Chapter 679) (authorizing the Secretary to cancel the filing of a registration if submitted without payment of fee); id. § 15049(e) (enacted by Chapter 679) (providing that a partnership becomes a registered LLP at the time the registration is filed); id. § 15049(f) (providing that a registration on file is notice that a partnership is a registered LLP); id. § 15049(g) (enacted by Chapter 679) (requiring the Secretary to provide a registration form); id. § 15049(h) (enacted by Chapter 679) (mandating that a registered LLP must comply with all the rules and regulations that govern the particular profession in which the partnership engages); id. (prohibiting any agency from disclosing information, unless compelled by subpoena, it receives in the course of evaluating the compliance of an LLP with applicable rules and regulations); id. § 15050(a) (enacted by Chapter 679) (permitting a registration to be amended as soon as reasonably practical after information in the registration becomes inaccurate); id. § 15050(b) (enacted by Chapter 679) (obligating a registered LLP to file a notice with the Secretary if it ceases to be a registered LLP); id. § 15050(c) (enacted by Chapter 679) (requiring a $30 fee to amend a registration or to file a notice); id. § 15050(d) (enacted by Chapter 679) (mandating that the Secretary must provide forms for an amended registration and a notice).
\item \textsuperscript{12} See id. § 15051(a) (enacted by Chapter 679); see id. § 15051(b) (enacted by Chapter 679) (indicating that all the following apply after conversion: (1) all property remains vested in the registered LLP; (2) all debts, obligations, liabilities, and penalties of the partnership continue; (3) any actions, suits, or proceedings continue; (4) the partners in the partnership remain partners; and (5) a partnership that converted into a registered LLP is the same person existing before conversion.
\item \textsuperscript{13} See id. § 15055(l) (enacted by Chapter 679) (defining “transacting intrastate business” as repeatedly and successively providing professional limited liability partnership services in this state, other than in interstate or foreign commerce); id. § 15055(m) (enacted by Chapter 679) (indicating that a foreign LLP is not transacting intrastate businesses merely because its subsidiary or affiliate transacts intrastate business, or because of its status as one or more of the following: (1) shareholder of a domestic corporation or a foreign corporation transacting intrastate business, (2) limited partner of a foreign limited partnership transacting intrastate business or a domestic limited partnership, or (3) member or manager of a foreign limited liability company transacting intrastate business or a domestic limited liability company); id. § 15055(n) (enacted by Chapter 679) (providing that the following activities do not constitute transacting of intrastate business: (1) maintaining or defending an act or suit or any administrative or arbitration proceeding, or effecting the settlement of claims or disputes; (2) holding meetings of its partners or carrying on any other activities concerning its internal affairs; (3) maintaining bank accounts; (4) maintaining offices or agencies for the transfer, exchange, and registration of the foreign LLP’s securities or maintaining trustees or depositaries with respect to those securities; (5) effecting sales through independent contractors; (6) soliciting or procuring orders, whether by mail or through employees or agents, where these orders require acceptance without this state before becoming binding contracts; (7) creating or acquiring evidences of debt or mortgages, liens, or security interests in real or personal property; (8) securing or collecting debts or enforcing mortgages and security interests in real or personal property; or (9) conducting an isolated transaction that is completed within 180 days and not in the course of a number of repeated transactions of a like nature); id. § 15055(o) (enacted by Chapter 679) (explaining that a person is not transacting intrastate business because of its status as a partner of a registered LLP or a foreign LLP whether or not registered to transact intrastate business in this state).
\end{itemize}
by the Secretary and a certificate from the jurisdiction of organization of the foreign LLP stating that the foreign LLP is in good standing, or be subject to a fine.\textsuperscript{14}

\section*{LIABILITY}

Existing law holds partners jointly liable for the debts and obligations of the partnership, and jointly and severally liable if another partner commits a wrongful act or omission or misappropriates money or property while acting for the partnership.\textsuperscript{15} Under existing law, a partner must contribute toward losses incurred by the partnership in an amount equal to his or her share of the profits.\textsuperscript{16}

\begin{footnotesize}
\begin{enumerate}
\item id. §§ 15055(a), 15055(i) (enacted by Chapter 679); see id. § 15054(a) (enacted by Chapter 679) (providing that a foreign LLP must not be denied registration on the basis of a difference between the laws of this state and the state in which the LLP is organized); id. § 15055(a)(2) (enacted by Chapter 679) (permitting a foreign LLP to file a statement indicating that the jurisdiction of formation of the foreign LLP does not permit issuance of such certificates in lieu of filing a certificate); id. § 15055(b) (enacted by Chapter 679) (requiring payment of a $70 filing fee); id. § 15055(c) (enacted by Chapter 679) (mandating that the Secretary must register any partnership that submits a registration form and pays the required fee); id. § 15055(d) (enacted by Chapter 679) (authorizing the Secretary to cancel the filing of a registration if submitted without required fee); id. § 15055(e) (enacted by Chapter 679) (providing that a partnership becomes registered as a foreign LLP at the time the registration is filed); id. § 15055(f) (enacted by Chapter 679) (indicating that a registration on file is notice that a partnership is registered as a foreign LLP); id. § 15055(g) (enacted by Chapter 679) (requiring the Secretary to provide a registration form); id. § 15055(h) (enacted by Chapter 679) (prohibiting a foreign LLP from maintaining any action, suit, or proceeding in any state court until it becomes registered); id. § 15055(i) (enacted by Chapter 679) (setting the fine for noncompliance with this statute at $20 per day, but not to exceed $10,000); id. § 15055(k) (enacted by Chapter 679) (appointing the Secretary as agent for service of process); id. § 15055(p) (enacted by Chapter 679) (authorizing the Attorney General to bring an action to restrain a foreign LLP from transacting intrastate business on the basis of noncompliance with this statute); id. § 15056(a) (enacted by Chapter 679) (permitting a registration form on file to be amended); see also id. § 15056(b) (enacted by Chapter 679) (obligating a foreign LLP to file a notice with the Secretary if it ceases to be a foreign LLP); id. § 15056(c) (enacted by Chapter 679) (allowing a foreign LLP to withdraw its registration if it is no longer required to be registered); id. § 15056(d) (enacted by Chapter 679) (mandating that the Secretary must provide forms for an amended registration and a notice); id. § 15056(e) (enacted by Chapter 679) (requiring a $30 fee to amend a registration or to file a notice).
\item CAL. CORP. CODE § 15018(a) (amended by Chapter 679). See generally Russell C. Smith, Comment, How the Uniform Partnership Act Determines Ultimate Liability for a Claim Against a General Partnership and Provides for the Settling of Accounts Between Parties, 17 CAMPBELL L. REV. 333 (1995) (identifying and resolving the following three issues courts may face when a person has suffered harm through business dealings with one of the partners in a partnership: (1) From which of the partners may the third party recover?; (2) who is the responsible party, the acting partner or the partnership?; and (3) how do the partners settle accounts between themselves?).
\end{enumerate}
\end{footnotesize}
Upon dissolution of the partnership, existing law requires each partner to pay to his or her co-partners the amount necessary to satisfy his or her share of the liabilities created by any partner acting for the partnership. Under Chapter 679, a partner within an LLP is immune from liability for any debts, obligations, or liabilities of the partnership unless incurred as a result of his or her own negligence or wrongdoing. Chapter 679 requires LLPs practicing accountancy to provide security for claims arising against it by purchasing liability insurance for $100,000 multiplied by the number of licensed accountants but not to exceed $5 million, by maintaining a bank trust account in the same amount, or by providing proof of a net worth equal to at least $10 million. LLPs practicing law, on the other hand, must provide financial assurance for claims that may arise against it by purchasing liability insurance for $100,000 multiplied by the number of licensed attorneys to a maximum of $1.75 million, by maintaining a bank trust account in the same amount, or by providing a written agreement signed by each partner guaranteeing payment of the difference

17. See CAL. CORP. CODE § 15029 (West 1991) (defining "dissolution of a partnership" as a change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business).
18. Id. § 15034, 15040(d) (amended by Chapter 679); see id. § 15034(a) (amended by Chapter 679) (exempting a partner from liability for debt incurred by another partner acting for the partnership who had knowledge of dissolution caused by an act, death, or bankruptcy of a partner); id. § 15034(b) (amended by Chapter 679) (exempting a partner from liability for debt incurred by another partner acting for the partnership who had notice of a death or bankruptcy of a partner leading to a dissolution); id. § 15040(d) (amended by Chapter 679) (requiring a partner to be liable, upon dissolution, for a share of another partner's liability in an amount equal to his or her share of the profit if the other partner is insolvent or is not subject to process). See generally id. §§ 15029-15043 (West 1991 & amended by Chapter 679) (governing dissolutions of partnerships); 9 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, Partnerships §§ 47-60 (9th ed. 1989 & Supp. 1995) (describing the causes and effects of dissolutions); S. David Rosenson & Elizabeth O'Donnell, Disposition of Community Property Partnership Interests, L.A. LAW., Dec. 1992, at 28 (presenting problems in the division of a partnership interest between spouses); Robert Waxman, Unfinished Business and Law Firm Dissolutions: The Rights and Duties of Partners During the Winding-Up Process, L.A. LAW., May 1990, at 19 (looking at the Uniform Partnership Act and its application to dissolutions of partnerships).
19. CAL. CORP. CODE §§ 15015(b), 15018(a), 15034(c), 15040(d) (amended by Chapter 679); see id. § 15015(c) (amended by Chapter 679) (permitting partners of a registered LLP to agree to be liable for all or specified debts, obligations, or liabilities of the partnership before they are incurred if the majority in interest, or as may otherwise be required by a partnership agreement, specifically agree in writing); id. § 15015(d) (amended by Chapter 679) (mandating that a partner of a registered LLP is liable for his or her own tortious conduct regarding third parties); id. § 15015(e) (amended by Chapter 679) (indicating that a registered LLP providing legal services must possess an effective certificate of registration from the State Bar in order to have limited liability); id. § 15015(f) (amended by Chapter 679) (providing that a partner of a registered LLP is not a proper party to a proceeding by or against the partnership unless the partner is personally liable); id. § 15015(g) (amended by Chapter 679) (allowing a partner of a registered LLP to act as a guarantor or surety for another partner's debts).
20. Id. § 15052(a)(1), (e) (enacted by Chapter 679); see id. § 15052(c) (enacted by Chapter 679) (requiring an LLP practicing accountancy to prove it has a net worth of $10 million by filing an annual confirmation with the Secretary of State); see also Bill Ainsworth, Trial Lawyers Learn to Live with Limited Liability, THE RECORDER, at 2 (June 26, 1995) (reporting that initially the Consumer Attorneys of California opposed the measure until the sponsors added a requirement to the bill that all LLPs must purchase a liability policy).
between the maximum amount of security required, and the security actually provided.\textsuperscript{21}

**TAX IMPLICATIONS**

Existing state law levies a franchise tax of 9.3% on the net income of corporations doing business in California.\textsuperscript{22} When a corporation’s profit is low or negative, existing law imposes a minimum franchise tax of $800.\textsuperscript{23} Limited liability companies, under existing law, are subject to the minimum franchise tax and an additional fee that varies depending on income.\textsuperscript{24} Chapter 679 requires LLPs to pay the same annual privilege tax of $800.\textsuperscript{25}

**COMMENT**

According to its supporters, Chapter 679 should enhance California’s business climate by protecting accountants and attorneys from lawsuits.\textsuperscript{26} Currently,

\textsuperscript{21} CAL. CORP. CODE § 15052(a)(2) (enacted by Chapter 679); see id. § 15052(b) (enacted by Chapter 679) (permitting an LLP to aggregate its security); id. § 15052(d) (enacted by Chapter 679) (mandating that the LLP’s compliance with security requirements is not admissible in court); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 513, at 4 (May 9, 1995) (stating that it is necessary for an LLP practicing law to be able to choose to provide a written agreement guaranteeing security because liability insurance may not be readily available or affordable).

\textsuperscript{22} CAL. REV. & TAX. CODE § 23151(d) (West 1992); see id. (setting the tax rate at 9.3\% for fiscal years ending in 1987 and thereafter); Willamette Indus. v. Franchise Tax Bd., 91 Cal. App. 3d 528, 533, 154 Cal. Rptr. 183, 185 (1979) (holding that the franchise tax is imposed upon the privilege of doing business as a corporation in California); see also CAL. REV. & TAX. CODE § 23101 (West 1992) (defining “doing business” as actively engaging in any transaction for the purpose of financial or pecuniary gain or profit); id. § 24341 (West 1992) (defining “net income” as the gross income, computed under California Revenue and Taxation Code §§ 24271-24326, less the deductions allowed under California Revenue and Taxation Code §§ 24401-24417); id. §§ 24271-24326 (West 1992 & Supp. 1995) (setting forth income that is included and excluded in the determination of gross income); id. §§ 24401-24417 (West 1992 & Supp. 1995) (listing special deductions in computing taxable income).

\textsuperscript{23} CAL. REV. & TAX. CODE § 23153(d)(1) (West Supp. 1995); see SENATE COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 513, at 1 (May 3, 1995) (describing how the state levies a privilege tax even when the exercise of that privilege fails to produce a profit); id. (showing that when IBM lost billions, it still had to pay the $800 minimum franchise tax).

\textsuperscript{24} CAL. REV. & TAX. CODE §§ 23091(a), 23092(a) (West Supp. 1995).

\textsuperscript{25} id. § 23097(a) (enacted by Chapter 679); see id. § 23097(b) (enacted by Chapter 679) (declaring that the tax is due until one of the following occurs: (1) a notice of cessation is filed with the Secretary, (2) a foreign LLP withdraws its registration, or (3) the registered LLP or foreign LLP has been dissolved and finally wound up); id. § 23098 (enacted by Chapter 679) (mandating that any dissolution, withdrawal, or cancellation of a registered or foreign LLP is not possible unless the LLP obtains a tax clearance certificate from the Franchise Tax Board).

\textsuperscript{26} SENATE FLOOR, COMMITTEE ANALYSIS OF SB 513, at 3 (May 23, 1995); see Reid A. Muoio, An Independent Auditor’s Suit for Wrongful Discharge, 58 A.L. REV. 413 (1994) (indicating that the savings and loan scandal, coupled with the increase in business bankruptcies, has led to a meteoric rise in lawsuits against independent accounting firms).
thirty states authorize the formation of LLPs.\textsuperscript{27} Prior to Chapter 679, an innocent partner within a law or accounting firm risked losing his or her personal assets due to another partner's negligence or wrongdoing.\textsuperscript{28} By limiting a partner's liability, Chapter 679 is designed to encourage attorneys and accountants to continue practicing within California and to put California firms on a level playing field with LLPs from other states.\textsuperscript{29}

Prior to Chapter 679, attorneys and accountants had the option of forming professional corporations or partnerships.\textsuperscript{30} Members within a professional corporation benefit from the structure because they are shielded from personal liability for negligence of other individuals within the corporation.\textsuperscript{31} On the other hand, tax planning is easier for partnerships and partners can avoid the possibility of double taxation on income.\textsuperscript{32} Last year, to improve the business environment for businesses not considered to be professional organizations, the Legislature approved the formation of limited liability companies which combined the liability protection of a corporation and the tax advantages of a partnership.\textsuperscript{33} Under Chapter 679, attorneys and accountants can form LLPs and enjoy similar tax advantages and limited liability.\textsuperscript{34}

Despite the legislative intent of Chapter 679, it may be possible for a partner within a law firm organized as an LLP to be held personally liable for damages

\textsuperscript{27} 1995 Cal. Legis. Serv. ch. 679, sec. 20, at 4098; see id. (describing the reasons for the urgency in enacting SB 513); see also Accounting Firms Reorganize to Limit Liability, L.A. TIMES, Aug. 2, 1994, ct D10 (reporting that three of the Big Six accounting firms including Ernst & Young, Coopers & Lybrand, and Price Waterhouse reorganized their Delaware based partnership as a limited liability partnership and that the other three of the Big Six including Arthur Anderson, KPMG Peat Marwick, and Deloitte & Touche will probably follow suit along with second-tier accounting firms).

\textsuperscript{28} ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 513, at 5 (July 5, 1995).

\textsuperscript{29} Id. at 6; see id. (maintaining that the enactment of LLP legislation in other states puts California partners of a multi-state law or accounting firms at a competitive disadvantage because California partners would be at risk of losing personal assets while partners in states with LLP laws would not be at risk).


\textsuperscript{31} ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 513, at 5 (July 5, 1995); see Boennighausen, supra note 30 (reporting that partnerships are considering incorporation as a response to the liability of partners in firms implicated in the Lincoln Savings & Loan scandal).

\textsuperscript{32} Boennighausen, supra note 30; see id. (explaining that partners within a partnership avoid double taxation on income whereas a shareholder of a corporation may be taxed once on their earnings and again on corporate income).

\textsuperscript{33} ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 513, at 1 (July 5, 1995); see id. (indicating that SB 469 introduced by Senator Beverly creating limited liability companies expressly prohibited these entities from providing professional services); Jan Norman, No Stampede—Yet—for Limited Liability, SACRAMENTO BEE, May 29, 1995, at E1 (reporting that only 2300 businesses have filed to become limited liability companies since California permitted the formation of such entities). See generally Timothy M. Harris, Review of Selected 1994 California Legislation, 24 PAC. L.J. 202, 305 (1995) (reviewing SB 469, Chapter 1200, establishing limited liability companies); 1994 Cal. Legis. Serv. ch. 1200, sec. 1-95, at 6009-104.

\textsuperscript{34} SENATE COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 513, at 2-5 (May 3, 1995); see Boennighausen, supra note 30 (reporting that most large Texas firms have become limited liability partnerships in a little more than two years after the state allowed their formation). See generally Jennifer Wong Suzuki, Stability Amid Liability, RECORDER, Oct. 31, 1995, at 6 (describing SB 513).
resulting from another partner's negligence. First, a court may find that an
attorney has an affirmative duty to monitor the conduct of other partners within
the firm.\(^{35}\) Thus, an attorney could be held directly liable for breach of his or her
duty to detect and prevent another partner's negligence, rather than vicariously
liable for the other's negligence.\(^{36}\) Second, because of the courts' inherent power
to regulate the practice of law, a court may decide not to follow a statute limiting
a lawyer's liability.\(^{37}\) In First Bank & Trust Co. v. Zagoria,\(^{38}\) the Georgia
Supreme Court ruled that an attorney was personally liable for the negligence of
his peer despite a state statute limiting his liability.\(^{39}\) The court reasoned that the
judiciary, not the legislature, has the constitutional authority to decide the liability
of attorneys for breach of a duty to a client.\(^{40}\)

Julia A. Butcher

\(^{35}\) Susan S. Fortney, *Am I My Partner's Keeper*, 66 U. COLO. L. REV. 329, 331-32 (1995); *see id.* at
332 (examining the implications of banking regulators' asserting in lawsuits against attorneys involving the
failure of savings and loan institutions that attorneys owe a duty to the firm to monitor the conduct of other
partners).

\(^{36}\) *Id.* at 332-33.

\(^{37}\) *Developments in the Law; Lawyer's Responsibility and Lawyer's Responses*, 107 HARV. L. REV
1547, 1662-63 (1994).

\(^{38}\) 302 S.E.2d 674 (Ga. 1983).

\(^{39}\) *Id.* at 676; *see Developments in the Law; Lawyer's Responsibility and Lawyer's Responses*, *supra*
note 37 (discussing the court's refusal to follow the state's professional corporation statute and holding a
lawyer-shareholder personally liable for the professional wrongdoing of another lawyer).

\(^{40}\) *Zagoria*, 302 S.E.2d at 675; *see Developments in the Law; Lawyer's Responsibility and Lawyer's
Responses*, *supra* note 37 (citing *Zagoria* as an example of a court invoking its inherent power to regulate
the practice of law); Debra L. Thill, Comment, *The Inherent Powers Doctrine and Regulation of the Practice of
Law; Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies Be
Denied the Benefit of Statutory Liability Shields?*, 20 WM. MITCHELL L. REV. 1143 (1994) (analyzing whether
the Minnesota Supreme Court is likely to invoke the inherent powers doctrine to invalidate the Minnesota
professional corporation and limited liability company liability shields available to attorneys); *cf.* Beane v.
Paulsen, 21 Cal. App. 4th 89, 96 n.7, 26 Cal. Rptr. 2d 486, 490 n.7 (1993) (acknowledging that courts in other
jurisdictions have invoked their inherent power to regulate the practice of law and did not allow attorneys to
limit traditional liability for malpractice by incorporating).
Business Associations and Professions; merchandise pallets

Business and Professions Code §§ 22520, 22521 (repealed); § 22754 (new); §§ 22750, 22751, 22752, 22753 (amended).
AB 1208 (Hawkins); 1995 STAT. Ch. 456

Under existing law, it is illegal for any unauthorized person1 to possess a bakery tray or basket,2 or possess a beverage container or grocery pallet.3 Existing law also provides that destruction of any marking which identifies the owner of any of these items is punishable as theft.4 Chapter 456 expands these provisions by including all merchandise pallets,5 and further simplifies the law by

1. See CAL. BUS. & PROF. CODE § 22752 (amended by Chapter 456) (defining “unauthorized person” as anyone in possession of a specified pallet, except for the following: (1) the company owner; (2) any person in lawful possession of the pallet; and (3) any person in temporary possession of a pallet that has been given permission from the owner, or has possession of the pallet as a result of the purchase of products transported using the pallet).

2. See 1988 Cal. Stat. ch. 860, sec. 1, at 2783-84 (enacting CAL. BUS. & PROF. CODE § 22520 (1988) (current version at CAL. BUS. & PROF. CODE § 22750 (amended by Chapter 456))) (defining “bakery tray” or basket as a plastic or metal container that holds bread or other baked goods and is used by a distributor or retailer to transport, store, or carry those products, and which does the following: (1) identifies the company name of the owner, (2) notifies the public that it is illegal to have unauthorized possession of the item, and (3) lists an address or telephone number for returning the item to the owner).

3. CAL. BUS. & PROF. CODE § 22753(a) (amended by Chapter 456); see also 1991 Cal. Legis. Serv. ch. 642, sec. 1, at 2604 (enacting CAL. BUS. & PROF. CODE § 22750 (1991) (current version at CAL. BUS. & PROF. CODE § 22750(b) (amended by Chapter 456)) (defining “beverage container” or “grocery pallet” as a wooden or plastic carrier or container, approximately 48 inches by 40 inches with a four way forklift entry, used by a manufacturer or distributor to transport food or other items sold at grocery stores, other than alcoholic beverages, which does the following: (1) identifies the company name of the owner of the pallet, (2) notifies the public that unauthorized possession of the pallet is illegal, and (3) lists a telephone number or address for returning the pallet to the owner); cf. FLA. STAT. ANN. § 506.24(1) (West 1988) (stating that any unauthorized possession of pallets is a misdemeanor); N.M. STAT. ANN. § 57-12-3.1(A) (Supp. Pamphlet 1994) (providing that it is unlawful to remove, possess, alter, destroy, or tamper with pallets owned by another).

4. CAL. BUS. & PROF. CODE § 22753(b) (amended by Chapter 456); see id. § 22753 (amended by Chapter 456) (establishing that possession of pallets, or destruction of the owner’s markings are punishable under §§ 489 or 490 of the California Penal Code); see also CAL. PENAL CODE § 489(b) (West Supp. 1995) (setting the punishment for grand theft as imprisonment for not more than one year); id. § 490 (West 1988) (setting the punishment for petty theft as a fine not exceeding $1000 or by imprisonment of up to six months, or both); cf. FLA. STAT. ANN. § 506.25 (West 1988) (stating that any person who alters, changes, or destroys the markings on an item of pallet owner is guilty of a misdemeanor); 18 PA. CONS. STAT. § 6712(b)(3) (Purdon Supp. 1995) (stating that destroying or covering up a name or mark on a pallet is a prohibited action).

5. See CAL. BUS. & PROF. CODE § 22750(b) (amended by Chapter 456) (defining “merchandise pallets” as wooden or plastic carriers or containers, approximately 48 inches by 40 inches with a four way forklift entry, used by a manufacturer or distributor to transport merchandise to retail outlets, and which does the following: (1) identifies the company name of the owner of the pallet, (2) notifies the public that unauthorized possession is illegal, and (3) lists a telephone number or address for returning the pallet to the owner).
concentrating regulations regarding all pallets and transportation devices into one chapter of the California Business and Professions Code.  

Existing law also provides that any person who purchases or leases a beverage container or grocery pallet must retain a copy of the bill of sale or other evidence that supports the purchase. Chapter 456 imposes this same requirement on a person who purchases or leases a bakery tray or basket, or any other merchandise pallet.  

Existing law provides that in a lawsuit for conversion of goods, the remedy is the cost of attempting to recover the goods along with additional damages, if applicable. Chapter 456 provides that any unauthorized person who possesses one or more of these pallets is subject to civil action. Chapter 456 further provides any owner of pallets who has been awarded actual damages arising from a violation, with punitive damages and all costs associated with the judicial process from the convicted violator, if the violator has been convicted by clear and convincing evidence.

6. Id. §§ 22750, 22753 (amended by Chapter 456); see id. (providing that bakery trays, bakery baskets and all types of merchandising pallets are now protected by law).  

7. Id. § 22751 (amended by Chapter 456).  

8. Compare 1991 Cal. Legis. Serv. ch. 642, sec. 1, at 2604 (enacting CAL. BUS. & PROF. CODE § 22751) (stating that any person who purchases or leases a beverage container or grocery pallet must retain a copy of the bill of sale) with CAL. BUS. & PROF. CODE § 22751 (amended by Chapter 456) (specifying that any merchandise pallet is included in the group of containers that buyers or renters need to retain a copy of the bill of sale to prove valid ownership).  

9. CAL. CIV. CODE § 3336 (West 1970); see id. (listing the additional damages as (1) interest on the value of the converted goods or an amount sufficient to indemnify the party injured by the conversion for loss which is the natural and reasonable cause of the conversion, and (2) the cost for the time and money spent in pursuit of the converted property); see also In re Brian S., 130 Cal. App. 3d 523, 530, 181 Cal. Rptr. 778, 780-81 (1982) (holding that the indemnification portion of damages mentioned in California Civil Code § 3336 is to be used to determine damages only where the determination on the basis of value at the time of the conversion would be manifestly unjust); Oakes v. Suelynn Corp., 24 Cal. App. 3d 271, 279, 100 Cal. Rptr. 838, 843 (1972) (holding that the detriment caused by conversion is the value of the property at the time of conversion plus a fair compensation for the time and money spent in pursuit of the property). See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 88 (5th ed. 1984) (discussing the necessary elements for a valid cause of action in conversion).  

10. CAL. BUS. & PROF. CODE § 22754 (enacted by Chapter 456); cf. N.M. STAT. ANN. § 57-12-3.1(c) (Supp. Pamphlet 1994) (providing that no civil action shall be maintained against any person who returns to the owner within 60 days, after the passage of this New Mexico statute, the pallets or containers unlawfully in possession of that person).  

11. CAL. BUS. & PROF. CODE § 22754 (enacted by Chapter 456); see CAL. CIV. CODE § 3294(a) (West Supp. 1995) (stating that if it is proven by clear and convincing evidence that defendant has been guilty of oppression, fraud, or malice, then the plaintiff is entitled to exemplary, or punitive damages); Cyrus v. Haveson, 65 Cal. App. 3d 306, 316, 135 Cal. Rptr. 246, 253 (1976) (holding that a cause of action for conversion supports the award of exemplary, or punitive, damages). See generally 4 B.E. WRTIN, SUMMARY OF CALIFORNIA LAW, Punitive or Exemplary Damages § 849 (8th ed. 1974 & Supp. 1995) (discussing the awarding of punitive damages in California); Leslie E. John, Note, Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort, 74 CAL. L. REV. 2033 (1986) (discussing the awarding of punitive damages in tort actions, instead of by statute as required for actions in contract).

Selected 1995 Legislation 449
Chapter 456 was enacted to help protect large retailers from spending thousands of dollars to replace stolen pallets.\textsuperscript{12} The California Retailers Association claims that thieves steal pallets, paint over the retailer’s markings, sell the pallet to a pallet reseller, and then retailers end up buying their own pallets back.\textsuperscript{13}

The California Retailers Association has expressed that police and district attorneys have higher priorities than catching and prosecuting pallet thieves.\textsuperscript{14} The author of Chapter 456 believes that the Chapter’s additions to existing law should help to deter potential pallet thieves and thus not require additional intervention by law enforcement personnel.\textsuperscript{15} However, existing California case law makes it clear that punitive damages are not generally favored by California courts, and thus the deterrence sought by Chapter 456 may never be realized.\textsuperscript{16}

\textbf{Ralph J. Barry}

\footnotesize
\textsuperscript{12} ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1208, at 2 (May 22, 1995); \textit{see id.} (reporting that the large retailer, Home Depot, has lost thousands of dollars to pallets thieves); \textit{see also} Patrick Lee, \textit{Crime: Business is a Victim Too}, L.A. \textit{Times}, Apr. 3, 1994, at D1 (announcing that one small business owner must keep everything under lock and key; criminals even steal wood pallets); Douglas Schnabel, \textit{Supporting Thieves}, SACRAMENTO BEE, Jan. 17, 1993, at F5 (stating that one business which recycles pallets is being plagued by petty theft, with no help being provided by law enforcement personnel).

\textsuperscript{13} SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1208, at 2 (June 27, 1995); \textit{see id.} (stating that pallets cost an average of $75, and that they are resold by a pallet thief for about $20, and then the reseller sells them back to retailers for about $40); \textit{id.} (stating that the lower price of the stolen pallet insures a constant demand by retailers, and also a greater loss of not only the original $75 pallet, but also the additional $40 paid for the identical, stolen pallet); Telephone Interview with Rick VanNieuwburg, Legislative Consultant to Assemblymember Phil Hawkins on AB 1208 (Aug. 4, 1995) (notes on file with the Pacific Law Journal) (declaring that because of the high costs to replace a stolen pallet with a new pallet, retailers have no real option but to buy back their own stolen pallets from the pallet resellers at a significantly lower cost than would be charged for a new pallet); \textit{see also} Julie Fields, \textit{Thousand Oaks: 2 Charged with Theft of Wooden Pallets}, L.A. \textit{Times}, Aug. 25, 1993, at B3 (reporting that pallets sell for $75 when new, and that theft of pallets has become a widespread problem because they can easily be resold on the black market).

\textsuperscript{14} ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMICS, COMMITTEE ANALYSIS OF AB 1208, at 2 (Apr. 25, 1995); \textit{see Telephone Interview with Rick VanNieuwburg, supra} note 13 (stating that since law enforcement officials have very little time and personnel to spend on apprehending pallet thieves, large retailers need a system of justice, outside that of the criminal law in which they may receive some compensation for their stolen goods).

\textsuperscript{15} ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1208, at 2 (May 22, 1995); \textit{see id.} (arguing that the provisions for punitive damages and court costs should deter the pallet thieves); \textit{see also} Telephone Interview with Rick VanNieuwburg, \textit{supra} note 13 (stating that by giving retailers the means to bring a civil action against pallet thieves, and by awarding punitive damages and court costs, it should only take a few well reported cases of pallet thieves being subject to large monetary judgments to slow down the mass theft of pallets, and perhaps stop the cycle of stolen pallets altogether).

\textsuperscript{16} \textit{See Lewis v. Hayes}, 165 Cal. 527, 533, 132 P. 1022, 1024 (1913) (holding that a plaintiff is always entitled to compensatory damages, but even when punitive damages are permissible, the plaintiff is not automatically entitled to them; the jury has the sole authority to decide if punitive damages are called for in each particular case); Gombos v. Ashe, 158 Cal. App. 2d 517, 526, 322 P.2d 933, 939 (1958) (holding that punitive damages are not a favorite of the law, and that the granting of them should be done with the greatest of caution).
Business Associations and Professions; notaries public—journals

AB 1828 (Bustamante); 1995 STAT. Ch. 569

Under existing law, notaries public¹ are required to keep sequential journals² of all official acts performed in their official capacity.³ Under prior law, there was a pilot program in Los Angeles County, expiring on January 1, 1996 that required notaries public to obtain a thumbprint, for inclusion in their journals, from any individual signing a deed, quitclaim deed, or deed of trust affecting real property.⁴ Chapter 569 makes permanent the Los Angeles pilot program’s thumbprint⁵

1. See CAL. GOV’T CODE § 8200 (West 1992) (allowing the Secretary of State to appoint and commission notaries public as necessary for public convenience); see also id. §§ 8201-8201.1 (West 1992) (providing the qualifications needed to become a notary public); First Nat’l Bank of Riverside v. Merrill, 167 Cal. 392, 397, 139 P. 1066, 1068 (1914) (stating that notaries do not exercise judicial functions); Banbury v. Arnold, 91 Cal. 606, 610-11, 27 P. 934, 936 (1891) (declaring that the duties required by law of notaries public are purely ministerial); Bours v. Zachariah, 11 Cal. 281, 310 (1858) (announcing that notaries public derive their power from statute); Vanderhoof v. Prudential Sav. & Loan Ass’n, 46 Cal. App. 3d 507, 511, 120 Cal. Rptr. 207, 209 (1975) (holding that acknowledgments of the execution of written instruments by notaries public are ministerial acts devoid of the exercise of discretion); Roth v. B & L Enters., Inc., 420 So. 2d 1094, 1096 (La. 1982) (stating that the enumerated powers of notaries public are not discretionary like powers of brokers, intermediaries and attorneys at law). See generally CAL. GOV’T CODE §§ 8200-8230 (West 1992 & Supp. 1995) (establishing guidelines for notaries public); Bank of Am. Nat’l Trust & Sav. Ass’n v. Dowdy, 186 Cal. App. 2d 690, 693, 9 Cal. Rptr. 779, 782 (1960) (enumerating the duties of a notary public); 58 AM. JUR. 2D Notaries Public § 1 (1989) (defining a “notary public” as a public, civil, or ministerial officer, and an impartial agent of the state, who exercises a delegation of the state’s sovereign power, as in attesting the genuineness of any deeds or writings and attesting to the authenticity of signatures); id. §§ 27-28 (setting forth the general powers and duties of notaries public).

2. See CAL. GOV’T CODE § 8206(a) (amended by Chapter 569) (requiring the journal to contain (1) the date, time, and type of each official act; (2) the character of the document at issue; (3) the signature of each person whose signature is being notarized; (4) a statement whether the identity of the parties was based on personal knowledge or satisfactory evidence; (5) material regarding the identifying documents of witnesses if the person’s identity was ascertained by the oaths or affirmations of two credible witnesses; (6) the fee charged for the notarial services; and (7) if the document is a deed, quitclaim deed, or a deed of trust a thumbprint of the party signing the document must be placed in the journal); see also Bernd v. Fong Eu, 100 Cal. App. 3d 511, 519, 161 Cal. Rptr. 58, 63 (1979) (holding that a notary did not meet her obligation to keep a sequential journal by keeping and having access to photocopies of all the instruments she certified).

3. CAL. GOV’T CODE § 8206(a) (amended by Chapter 569); see id. § 8205(a), (b) (West 1992) (providing the duties of a notary public); cf. COLO. REV. STAT. § 12-55-111 (1991) (requiring that all notaries public keep a journal of every acknowledgment taken by them which affects title to real estate); MO. ANN. STAT. § 486.260 (Vernon 1987) (instructing each notary public to keep a paginated bound journal of his or her notarial acts); NEV. REV. STAT. ANN. § 240.120 (Michie 1993) (providing that each notary public must keep a journal containing the date of the services, the fees charged, the title of the matter, and the name of the person whose signature is being notarized).

4. 1992 Cal. Legis. Serv. ch. 815, sec. 1, at 3317 (amending CAL. GOV’T CODE § 8206(g)); see id. (explaining that the thumbprint requirement only applied to real estate transactions affecting Los Angeles County).

5. See CAL. GOV’T CODE § 8206(a)(7) (amended by Chapter 569) (providing that if the individual’s right thumb is not available, then the individual’s left thumb may be used and must be so indicated in the journal).
requirement and extends it statewide. Chapter 569 also requires notaries public to inform the Secretary of State if anything happens to their sequential journal. Chapter 569 specifies that the thumbprint requirement becomes operative on January 1, 1996.

**COMMENT**

Real estate fraud has become an immense problem in Los Angeles County according to Los Angeles County District Attorney Gil Garcetti, who estimated that Los Angeles County residents were cheated out of $131 million between July 1990 and November 1992. In 1993, in response to this problem, an anti-fraud pilot program was initiated in Los Angeles County to deter forgers and to inform homeowners of transactions involving their properties. Implementation of the pilot program's thumbprint requirement imposes no expense to the public and does not change any aspect of notarial practice. The Los Angeles County
program is strongly praised by law enforcement officials, homeowners, surety and title insurers, and notaries support the thumbprint requirement as it helps to shield them from liability.12

The purpose of Chapter 569 is to apply statewide, on a permanent basis, the pilot program that was instituted to combat real estate fraud in Los Angeles County in 1993.13 The goal of Chapter 569 is to reduce losses due to fraudulent signatures and forgeries, increase title protection, reduce monetary losses, deter crime, and provide ease in prosecuting wrongdoers.14 However, it is unclear whether requiring thumbprints has had a remedial effect on reducing the number of real estate fraud cases.15

Timothy J. Moroney

Business Associations and Professions; physician referrals

Business and Professions Code §§ 650.01,1 650.02 (amended).
AB 1864 (Morrow); 1995 STAT. Ch. 221

12. Id. at 8-17; see id. (providing testimonial support for the Los Angeles program by various law enforcement officials, homeowners, notaries, and surety and title insurers); see also id. at 13 (stating that notaries are subject to liability for intentional and unintentional misconduct and a thumbprint in a journal would protect them from lawsuits).

13. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1828, at 1 (May 3, 1995); see NATIONAL NOTARY ASS'N, supra note 10, at 18 (asserting that statewide implementation of the Los Angeles pilot program is necessary because professional forgers and real estate scam artists, frustrated by the tough Los Angeles barriers, will merely move their criminal activity to a new county).

14. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1828, at 3 (May 3, 1995); see SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1828, at 2 (July 11, 1995) (stating that the Association of California Surety Companies, the sponsor of AB 1828, which writes license bonds for notaries public, believes the thumbprint requirement and the notification to the Secretary of State of any lost journal will help reduce losses due to fraudulent signatures and unavailable records).

15. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1828, at 1 (May 3, 1995); see id. (noting data on the success of the anti-fraud program in Los Angeles County is not available). But see Corrie M. Anders, With Home Fraud Down, L.A. Project Getting Thumbs Up, SAN DIEGO UNION-TRIB., Jun. 4, 1995, at H14 (concluding that the three year pilot program has deterred real estate fraud with overwhelming success); NATIONAL NOTARY ASS'N, supra note 10, at 8 (finding that the Los Angeles pilot program was remarkably successful).

1. Section 650.01 of the California Business and Professions Code was amended by Chapter 749 (AB 1177) subsequent to the enactment of Chapter 221 (AB 1864); thus, the provision affected by Chapter 749 takes precedence over the changes made within Chapter 221. See CAL. GOV'T CODE § 9605 (West 1992) (explaining that when two or more statutes are enacted during the same session of the Legislature which affect the same code provision, the statute enacted last with a higher chapter number prevails over statutes enacted earlier). Because the changes to this section are minor, a full discussion of the differences is beyond the scope of this article. Compare 1995 Cal. Legis. Serv. ch. 221, sec. 1, at 653 (amending CAL. BUS. & PROF. CODE § 650.01) with 1995 Cal. Legis. Serv. ch. 749, sec. 1, at 4374 (amending CAL. BUS. & PROF. CODE § 650.01).
Existing law provides for the Physician Ownership and Referral Act of 1993. Under this act, a licensee is prohibited from referring a person for laboratory services, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, or diagnostic imaging goods or services if the licensee, or a member of his or her immediate family, has a financial interest with the person, or in the entity, that receives the

2. CAL. BUS. & PROF. CODE § 650.01 (amended by Chapter 749); id. § 650.02 (amended by Chapter 221); 1993 Cal. Legis. Serv. ch. 1237, sec. 2-3, at 5715-18 (enacting CAL. BUS. & PROF. CODE §§ 650.01, 650.02); see 1993 Cal. Legis. Serv. ch. 1237, sec. 1(b), at 5715 (recognizing that a referral by one health care provider to another provider of health care services in which the referring provider has an investment interest represents a potential conflict of interest); id. sec. 1(e), at 5715 (finding that these referral practices may hinder competitive alternatives in the health care market, may lead to overutilization of health care services, may increase costs to the health care system, and may adversely affect the quality of health care); id. sec. 1(d), at 5715 (observing that it may be appropriate for providers to refer patients to entities providing health care services that the providers own as long as certain safeguards are present); id. sec. 1(e), at 5715 (asserting that the Legislature intends to provide guidance to providers regarding prohibited patient referrals: between health care providers and entities providing health care services, and to protect California citizens from unnecessary and costly health care expenditures).

3. See CAL. BUS. & PROF. CODE § 650.01(b)(4) (amended by Chapter 749) (defining a "licensee" to mean a physician as defined in California Labor Code § 3209.3); see also CAL. LAB. CODE § 3209.3(a) (West Supp. 1995) (defining "physician" as including physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law).


5. See id. § 650.01(b)(1) (amended by Chapter 749) (defining "diagnostic imaging" as including, all X-ray, computed axial tomography, magnetic resonance imaging, nuclear medicine, positron emission tomography, mammography, and ultrasound goods and services).

6. See id. § 650.01(b)(3) (amended by Chapter 749) (defining "immediate family" as including the spouse, and spouses of the children of the licensee).

7. See id. § 650.01(b)(2) (amended by Chapter 749) (defining "financial interest" as including, but 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 California Business and Professions Code § 650.01(a)); id. (providing that a financial interest also exists if there is an indirect relationship between a licensee and the referral recipient, including, an arrangement in which a licensee has an ownership interest in an entity that leases property to the referral recipient); id. (providing that "any financial interest transferred by a licensee to" any person or entity for the purpose of avoiding this section) will include be declared to be a financial interest of the licensee); id. (stating that "direct or indirect payment" does not include "a royalty or consulting fee received by a physician and surgeon who has completed a recognized residency training program in orthopedics as a result of his or her research and development of medical devices and techniques for a manufacturer or distributor"); id. (providing further that for the purposes of California Business and Professions Code § 650.01(b)(2), "consulting fees are "fees paid by the manufacturer or distributor to a physician and surgeon 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").
referred. Existing law also provides for exceptions to the general prohibition against such referrals.

Specifically, a licensee may make referrals if the licensee's regular practice is located where there are no alternative providers in the immediate area. Chapter 221 clarifies this provision by specifying that, if an alternative provider begins to furnish the good or service for which the patient was referred, the licensee must cease such referrals within six months of the time at which the

---

8. Id. § 650.01(a) (amended by Chapter 749); see id. (specifying that such referrals are prohibited notwithstanding California Business and Professions Code § 650, or any other provision of law); see also id. § 650 (West Supp. 1995) (stating that, except as provided by specific provisions in the California Health and Safety Code, it is unlawful to accept any consideration for the referral of patients); id. § 650.01(c) (amended by Chapter 749) (providing that a licensee is prohibited from entering into an arrangement or scheme, such as a cross-referral arrangement, where the licensee knows, or should know, that a principal purpose of the arrangement is to ensure referrals by the licensee to a particular entity that, if the licensee directly made referrals to that entity, would be in violation of California Business and Professions Code § 650.01); id. § 650.01(d) (amended by Chapter 749) (stating that no claim for payment may be presented by an entity to any individual, third party payer, or other entity for goods or services furnished pursuant to a referral prohibited under California Business and Professions Code § 650.01); id. § 650.01(e) (amended by Chapter 749) (prohibiting insurers, self-insurers, and other payers from paying a charge or lien for any goods or services resulting from a referral in violation of California Business and Professions Code § 650.01); id. § 650.01(g) (amended by Chapter 749) (setting forth the penalties for violating provisions of the Physician Ownership and Referral Act; cf. 42 U.S.C.A. § 1395mn(a) (West Supp. 1995); PLA. STAT. ANN. § 455.236(4)(a) (West Supp. 1995); GA. CODE ANN. § 43-18-5(a) (Michie 1994); ILL. ANN. STAT. ch. 225, para. 4720(a) (Smith-Hurd Supp. 1995); ME. REV. STAT. ANN. tit. 22, § 2085(1) (West Supp. 1994); NEV. REV. STAT. § 439B.425(1) (Michie Supp. 1993); TENN CODE ANN. § 63-6-602(a) (Michie Supp. 1994); VA. CODE ANN. § 54.1-2411(A) (Michie 1994). See generally Comment, The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures, 73 N.C. L. REV. 293, 313 (1994) [hereinafter The Physician as Entrepreneur] (finding that as of September of 1994, 32 states had enacted legislation prohibiting self-referrals).

9. CAL. BUS. & PROF. CODE § 650.02(a)-(i) (amended by Chapter 221); see id. § 650.02(a) (amended by Chapter 221) (providing an exception to the general prohibition of patient referrals in situations where there are no alternative providers within a specified geographic distance); id. § 650.02(b) (amended by Chapter 221) (providing exceptions for specified business arrangements); id. § 650.02(c) (amended by Chapter 221) (providing exceptions for referrals to specified health facilities); id. § 650.02(c)(3) (amended by Chapter 221) (allowing referrals for emergency situations); id. § 650.02(d) (amended by Chapter 221) (listing exceptions for referrals to nonprofit corporations meeting specified criteria); id. § 650.02(e) (amended by Chapter 221) (providing exceptions for referrals by licensees employed or compensated by a university to a facility owned or operated by the university, or to another licensee employed by the university, provided that the university does not compensate for the referral); id. § 650.02(f) (amended by Chapter 221) (providing an exception for services performed within, and goods supplied by, a licensee's office); id. § 650.02(g) (amended by Chapter 221) (allowing referrals for cardiac rehabilitation services meeting the criteria for Medicare reimbursement); id. § 650.02(h) (amended by Chapter 221) (allowing referrals to a multispecialty clinic from a group practice office); id. § 650.02(i) (amended by Chapter 221) (allowing referrals for 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 (§§ 1340-1399.64 of the California Health and Safety Code)).

10. Id. § 650.02(a) (amended by Chapter 221); see id. (providing that a referral is exempt from the general referral prohibition of California Business and Professions Code § 650.01(a) 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); id. (requiring a licensee who refers to, or seeks consultation from, an organization in which the licensee has a financial interest under this subdivision to disclose this interest to the patient or the patient's parents or legal guardian in writing at the time of the referral).

Selected 1995 Legislation

455
licensee knew or should have known that the alternative provider is furnishing the good or service.¹¹

Existing law also permits a licensee to make referrals to another physician, person, or entity, even though the licensee has an investment interest with the person, or in the entity, if specified business arrangements exist.¹² Chapter 221 extends the applicability of these exceptions by applying them to situations in which a member of the licensee's immediate family is involved in one of the designated business arrangements.¹³

Additionally, Chapter 221 adds two more arrangements under which a licensee may make referrals even though the licensee, or a member of his or her immediate family, has a financial interest with the person, or in the entity, that receives the referral.¹⁴ Specifically, referrals are now allowed when either of the following arrangements exist: (1) ownership in shares in a regulated investment company; and (2) a one-time sale or transfer of a practice or property or other financial interest between a licensee and the recipient of the referral, under specified conditions.¹⁵

¹¹ Id.

¹² CAL. BUS. & PROF. CODE § 650.02(b)(1)-(3) (amended by Chapter 221); see id. § 650.02(b)(1) (amended by Chapter 221) (stating that a licensee is not prohibited from making referrals when there is a loan between the licensee 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); id. § 650.02(b)(2) (amended by Chapter 221) (stating that a licensee is not prohibited from making referrals when there is a lease of space or equipment between a licensee and the recipient of the referral, if the lease has commercially reasonable terms, has a fixed periodic rent payment, 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); id. § 650.02(b)(3) (amended by Chapter 221) (providing that 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, must not have profit distributions or other transfers of value based on the licensee's referral of persons to the corporation, and must not have a separate class or accounting for any persons or for any licensees who may refer persons to the corporation). Compare 1993 Cal. Legis. Serv. ch. 1237, sec. 3, at 5717 (enacting CAL. BUS. & PROF. CODE § 650.02(b)(3)) (requiring that ownership of corporate investment securities had to be in a corporation that had total gross assets in excess of $100,000,000 at the end of the corporation's most recent fiscal year) with CAL. BUS. & PROF. CODE § 650.02(b)(3) (amended by Chapter 221) (allowing ownership in a corporation that has, at the end of the corporation's most recent fiscal year, or on average during the previous three years, stockholder equity in excess of $75,000,000).

¹³ CAL. BUS. & PROF. CODE § 650.02(b) (amended by Chapter 221).

¹⁴ Id. § 650.02(b)(4), (5) (amended by Chapter 221).

¹⁵ Id.; see id. § 650.02(b)(4) (amended by Chapter 221) (providing that the ownership of shares must be in a regulated investment company as defined in Federal Internal Revenue Code § 851(a), and the company must have had, at the end of the company's most recent fiscal year, or on average during the previous three fiscal years, total assets in excess of $75,000,000); id. § 650.02(b)(5) (amended by Chapter 221) (providing that the one-time sale or transfer of a practice or property or other financial interest between a licensee and the recipient of the referral must be a sale or transfer that has commercially reasonable terms, and the consideration must not be affected by either party's referral of any person or the volume of services provided by either party).
Chapter 221 also revises the exception to the prohibition against referrals that governs health care service plans in California. It specifies that the exception applies to all services provided to an enrollee of a health care service plan, rather than applying to just the facilities used to serve plan enrollees.

Chapter 221 provides additional exceptions to the prohibition against referrals by allowing referrals where a licensee, or a member of his or her immediate family, has a financial interest with the person or in the entity that receives the referral in the following situations: (1) a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services; (2) a request by a radiologist for diagnostic radiology services, or (3) 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.

COMMENT

A potential conflict of interest arises when physicians refer patients to facilities in which they have investment interests. These self-referrals allegedly

---

16. See CAL. HEALTH & SAFETY CODE § 1345(f) (West Supp. 1995) (defining "health care service plan" as any person who undertakes to provide for health care services for any subscriber or enrollee, or any person who pays for or reimburses any part of the costs of health care services, in return for a prepaid or periodic charge by or on behalf of a subscriber or enrollee); id. § 1345(i) (West Supp. 1995) (defining "person" as any person, individual, firm, association, organization, partnership, business trust, foundation, labor organization, corporation, limited liability company, public agency, or political subdivision of the state); see also id. §1345(c) (West Supp. 1995) (defining "enrollee" as any person who is enrolled in a plan and who is a recipient of services from the plan); id. § 1345(n) (West Supp. 1995) (defining "specialized health care service plan contract" as "a contract for services in a single specialized area of health care, including dental care, for subscribers or enrollees, or which pays for or reimburses any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of the subscriber or enrollee"); id. § 1345(o) (West Supp. 1995) (defining "subscriber" as any person who is responsible for paying for a plan, or any person whose employment, or other status, excluding family dependency, is the basis for eligibility for membership in the plan); id. § 1345(p) (West Supp. 1995) (explaining that unless otherwise indicated, "plan" refers to both health care service plans and specialized health care service plans).

17. CAL. BUS. & PROF. CODE § 650.02(i) (amended by Chapter 221); see SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 1864, at 2 (July 10, 1995).

18. CAL. BUS. & PROF. CODE § 650.02(i) (amended by Chapter 221); see SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 1864, at 2 (July 10, 1995); ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1864, at 2 (May 9, 1995).

19. CAL. BUS. & PROF. CODE § 650.03(i) (amended by Chapter 221).

20. See Dennis F. Thompson, Understanding Financial Conflicts of Interest, 329 NEW ENG. J. MED. 573, 573 (1993) (explaining that a "conflict of interest" is a "set of conditions in which professional judgement concerning a primary interest (such as a patient's welfare or the validity of research) tends to be unduly influenced by a secondary interest (such as financial gain)"); see also id. at 574 (asserting that it is unethical when professionals fail to take reasonable precautions to avoid such conflicts).

result in higher medical costs and overutilization of medical services.\textsuperscript{23} In response to these concerns, the California legislature enacted the Physician Ownership and Referral Act in 1993.\textsuperscript{24} In enacting Chapter 221, which was sponsored by the California Medical Association, the Legislature intended to amend the Physician Ownership and Referral Act so that California law would better reflect the health care marketplace in California that is moving from a fee-

(asserting that a fundamental conflict of interest is present in a fee-for-service system, that improvements in medical technology further increase incentives to order more procedures, that advanced technology has increased the profits to be derived from self-referrals, and that self-referrals lead to overutilization of health care services, higher costs, and lower quality of care).

22. \textit{See} Baumgartner, supra note 21, at 314 (defining “self-referral” as “the practice by which physicians refer their patients to medical facilities in which they have a financial investment”).

23. \textit{Id.; see Consequences of Physician Joint Ventures, 1995: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means, 104th Cong., 1st Sess. (1995) (statement of Jean M. Mitchell, Economist, Georgetown University) [hereinafter Consequences of Physician Joint Ventures] (reporting the results of numerous studies documenting higher costs and increased utilization associated with physician self-referral arrangements); Physician Ownership and Referral, 1995: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means, 104th Cong., 1st Sess. (1995) (statement of Jerome Connolly, Senior Vice President for Health Policy and Practice, American Physical Therapy Association) (citing a 1992 study of the California Workers’ Compensation program which found that if injured workers were initially treated by physicians which had ownership interests in physical therapy services, the workers received a referral for physical therapy treatment 66\% of the time, but if injured workers received initial treatment from physicians with no ownership interest in physical therapy services, the workers were referred for physical therapy only 32\% of the time); see also Anne Bilodeau, \textit{Radiation Centers a Hot Spot in Divisive Self-Referral Battle}, 12 S. FLA. BUS. J. 3 (citing a study conducted by Florida’s Health Care Cost Containment Board which concluded that physician joint venture arrangements result in significantly higher utilization rates, especially in clinical laboratories, physical therapy, and diagnostic imaging services); David Brown, \textit{When Healing, Investing Overlap; ‘Physician Self-Referral’ Divides Medical Community}, \textit{WASH. POST}, Dec. 6, 1992, at A1 (reporting that a 1989 investigation conducted by the inspector general of the Department of Health and Human Services revealed that Medicare patients whose doctors owned an investment interest in clinical laboratories had 45\% more tests done than Medicare patients as a whole); Judy Greenwald, \textit{Self-Referrals Cost Millions; Physicians Inflate Work Comp Costs, Study Maintains}, \textit{Bus. Ins.}, Feb. 17, 1992, at 2 (reporting that physician self-referral arrangements cost California employers an estimated $356 million each year in unnecessary workers compensation costs); \textit{Id.} (reporting that in 78\% of all cases involving referrals for diagnostic imaging procedures in 1990 and 1991, the physician held an ownership interest). \textit{But see The Physician as Entrepreneur, supra note 8, at 301} (explaining that the various studies that have been conducted do not take into consideration the possibility of other causal factors such as doctors’ knowledge about tests and services; “doctors who own an interest in a particular facility may be more informed about the services performed there and for that reason refer patients there more frequently”); \textit{Id.} (reasoning that the studies do not take into account other important factors such as whether the increased utilization of early diagnostic procedures actually decreases overall health care costs); \textit{Conflicts of Interest, supra note 21 (reviewing the conclusions of the AMA’s Center for Health Policy Research and stating that the AMA found that the studies criticizing self-referrals had not considered the “appropriateness of the utilization levels of physicians who self-refer and those who refer to other sources”).

24. \textit{1993 Cal. Legis. Serv. ch. 1237, sec. 1-3, at 5714-18} (enacting \textit{CAL. BUS. & PROF. CODE §§ 650.01 & 650.02}); \textit{see SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 1291, at 4-5} (Aug. 17, 1993) (explaining that numerous studies indicate that physicians are profiting from referring patients to facilities in which they have an ownership interest, and that this practice “represents an inherent conflict of interest”); \textit{Id.} at 4 (explaining that it is the intent of the Legislature to eliminate the overuse of medical services and the unnecessary health costs that are associated with physician self-referrals).
for-service system to a prepaid, capitated managed-care system. In a managed-care system, an environment has been created where financial relationships exist among parties that inter-refer patients, but financial arrangements discourage rather than encourage referrals, so the potential for needless referrals and overutilization for profit is arguably absent. This change is quite significant in that it effectively results in removing all prohibitions against referrals in the context of health care service plans.

25. See Deven C. McGraw, Financial Incentives to Limit Services: Should Physicians Be Required to Disclose These to Patients?, 83 GEO. L.J. 1821, 1822 (1995) (explaining that under a fee-for-service system, physicians established the prices charged and were paid in full for their services).

26. See id. at 1824 (defining "capitation" as a compensation method whereby managed care plans pay primary care physicians a fixed amount for each enrollee each month); see also id. (explaining that the primary care physician must contain costs within this fixed amount or be responsible for any costs that exceed the specified amount).

27. See id. at 1825 (quoting Kathryn Langwell, Congressional Budget Office, The Effects of Managed Care on Use and Costs of Health Services 22 (1992)) (defining "managed care" as "[a]ny type of intervention in the delivery and financing of health care that is intended to eliminate unnecessary and inappropriate care and to reduce costs").

28. SENATE FLOOR, COMMITTEE REPORT TO THE RANKING MINORITY MEMBER, COMM. ON HEALTH AND THE ENVIRONMENT, COMM. ON COMMERCE, MAY 15, 1995, at 2 (1995); GARLAND J. 1821, 1822 (1995) (explaining that in managed care plans, financial incentive arrangements discourage primary care physicians from making unnecessary referrals for hospital care, specialists, and diagnostic tests when the services are unneeded); id. at 9 (asserting that although financial incentive arrangements ideally operate to limit unnecessary procedures, they have the potential effect of denying patients beneficial and necessary services); id. at 32 (explaining that under a system where physicians face capitation for both primary care and referral services, their compensation may be reduced by 100% of the cost of the referral service, so there is a strong incentive to deny referral services); id. (noting that under some capitation plans, a referral can result in the primary care physician being held responsible for the cost of all inpatient hospital care); id. at 33 (reporting that in 1987, financial incentives were used in 85% of HMOs, and that in 1988, 95% used financial incentives); McGraw, supra note 25, at 1826-28 (describing a variety of techniques that managed care plans use to control costs and limit referrals). But see Consequences of Physician Joint Ventures, supra note 23 (stating that there is no empirical evidence to support the proposition that managed care eliminates the risks of higher utilization rates and increased costs that are associated with physician self-referral arrangements). See generally Marc A. Rodwin, Conflicts in Managed Care, 332 NEW ENG. J. MED. 604 (1995) (reviewing a variety of techniques employed by managed-care organizations to "change the decisions of doctors and providers" in order to limit referrals and unnecessary utilization of medical services).

29. See also id. at 2-3 (quoting KATHRYN LANGWELL, CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF MANAGED CARE ON HEALTH AND COSTS OF HEALTH SERVICES 22 (1992)) (defining "managed care" as "[a]ny type of intervention in the delivery and financing of health care that is intended to eliminate unnecessary and inappropriate care and to reduce costs").

30. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE REPORT TO THE RANKING MINORITY MEMBER, COMM. ON HEALTH AND THE ENVIRONMENT, COMM. ON COMMERCE, MAY 15, 1995, at 2 (1995); ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE REPORT TO THE RANKING MINORITY MEMBER, COMM. ON COMMERCE, MAY 9, 1995. Compare 1993 Cal. Legis. Serv. ch. 1237, sec. 3, at 5718 (enacting CAL. BUS. & PROF. CODE § 650.02(i)) (stating that the prohibition of California Business and Professions Code § 650.01(a) does not apply to any facility when used to provide health care services to an enrollee of a health care service plan) with CAL. BUS. & PROF. CODE § 650.02(i) (amended by Chapter 221) (declaring that the statutory exemption applies to all health care services provided to an enrollee of a health care service plan).
Additionally Chapter 221 was enacted in order to clarify provisions of the Physician Ownership and Referral Act of 1993 and to conform some of its provisions to those of a similar federal law governing self-referrals.\(^3\)

*Angela M. Burdine*

**Business Associations and Professions; regulation of educational travel organizations**

Business and Professions Code §§ 17552, 17553, 17554, 17555, 17556, 17556.5 (new).

SB 142 (Boatwright); 1995 STAT. Ch. 772

Recently enacted existing law seeks to address problems peculiar to the travel industry by strengthening regulation of those who sell and promote travel and by creating a Travel Consumer Restitution Fund to reimburse consumers who sustain loss due to the financial or contractual failures of travel sellers.\(^1\) Chapter 772 expands on the recently enacted Sellers of Travel law\(^2\) and the Travel Consumer

---


32. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1864, at 2 (July 13, 1995); see CAL. BUS. & PROF. CODE § 650.02(b)(3) (amended by Chapter 221) (revising the provision to allow ownership of corporate investment securities 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 in excess of $75,000,000); id. § 650.02(b)(4) (amended by Chapter 221) (adding an exception for referrals for a licensee's ownership in a regulated investment company that has total assets in excess of $75,000,000 at the end of the company's most recent fiscal year, or on average during the previous three fiscal years); id. § 650.02(b)(5) (amended by Chapter 221) (adding an exception for referrals for a licensee's one-time sale or transfer of a practice, property, or other financial interest to the recipient of a referral, if the sale or transfer is for commercially reasonable terms and is not affected by either party's referral of any person or the volume of services provided by either party); id. § 650.02(k) (amended by Chapter 221) (revising the exception to clarify that it applies to referrals for services, rather than to a licensee or payer providing the services).

1. CAL. BUS. & PROF. CODE § 17550 (West Supp. 1995); see id. (declaring that the public welfare requires the regulation of sellers of travel to eliminate unfair advertising and business practices); see also id. § 17550.13 (West Supp. 1995) (requiring sellers of travel to provide consumers with written information concerning, among other things, cancellation conditions and the consumer's right to a refund); id. § 17550.14(a) (West Supp. 1995) (providing for the prompt return of money paid for services not provided); id. §§ 17550.15(b), (k) (West Supp. 1995) (requiring the seller of travel to deposit consumers' payments into a trust account until the seller's performance has been completed, or to maintain an adequate bond); id. § 17550.20(a),(b) (West Supp. 1995) (mandating registration, to be renewed annually, of any seller of travel doing business in California); id. §§ 17550.35-17550.59 (West Supp. 1995) (creating the Travel Consumer Restitution Fund and listing its functions and responsibilities).

2. See id. §§ 17550-.34 (West Supp. 1995).
Restitution Fund Plan law by creating special additional requirements for educational travel organizations. Such organizations are required to include specified information in mandated written contracts governing all transactions undertaken with educational institutions. False or misleading advertising and the making of any substantial misrepresentation in the conduct of an educational travel program are prohibited. Chapter 772 further provides both civil and criminal penalties for violations of its provisions. Should the Sellers of Travel law or the Travel Consumer Restitution Fund Plan law be repealed, Chapter 772 provides that such repeal will not affect any civil or criminal proceeding nor extinguish any civil or criminal liability or penalty arising out of a violation which occurred prior to the date of repeal.

COMMENT

While the existing Sellers of Travel law and Travel Consumer Restitution Fund Plan law provide new remedies for financially-injured travel consumers, the purpose of Chapter 772 is to proactively establish a mechanism to prevent the

3. See id. §§ 17550.35-.59 (West Supp. 1995).
4. Id. §§ 17552, 17553, 17554, 17555, 17556, 17556.5 (enacted by Chapter 772); see id. § 17552(a),(c) (enacted by Chapter 772) (defining "educational travel organization" as any entity which offers educational travel programs, defined as travel services arranged through an elementary or secondary school and represented as including an educational component, for California students from kindergarten through grade twelve); id. §17553 (enacted by Chapter 772) (specifying that the requirements of Chapter 772 are additional to the regulations governing sellers of travel in general by noting that nothing in Chapter 772 exempts educational travel programs from compliance with the Sellers of Travel law or the Travel Consumer Restitution Fund Plan law).
5. Id. §§ 17554 (enacted by Chapter 772); see id. (mandating, for any educational travel program, a written contract between the educational travel organization and the educational institution, and requiring that the contract include, among other things: (1) a provision for 24-hour emergency contact with the organization; (2) an itemized list of services and agreed costs; (3) mention of any additional costs to students; (4) information regarding the organization's insurance coverage, if any; (5) the qualifications, if any, of the organization's staff who will accompany students; (6) educational materials to be provided; (7) the number of times the organization has arranged the same or a substantially similar educational travel program; (8) a description of the length of time the organization has been offering educational travel or substantially similar programs; and (9) information as to whether any owner or principal of the organization, at any time during the preceding ten years, has entered a plea of nolo contendere, had a judgement entered against him or her, or been convicted of a crime in connection with the sale of travel services).
6. Id. § 17555 (enacted by Chapter 772).
7. Id. §§ 17556, 17556.5 (enacted by Chapter 772); see id. § 17556(a) (enacted by Chapter 772) (authorizing private actions for damages, injunctive relief, or both against educational travel organizations whose violation of Chapter 772 injures any consumer); id. § 17556(b) (enacted by Chapter 772) (entitling prevailing plaintiffs to attorney's fees and costs, and permitting the court discretion to award punitive as well as actual damages); id. § 17556.5 (enacted by Chapter 772) (providing that violations of Chapter 772 are misdemeanors punishable by imprisonment in county jail for not more than one year, by a fine of not more than $1000, or both, and allowing the court discretion to prohibit such persons from acting as educational travel organizations in California).
infliction of such injury on more vulnerable student travelers, and also to help ensure educational quality in such travel programs by requiring a heightened level of disclosure in the contracting practices within the educational travel industry.9

Opponents within the travel industry, including the California Coalition of Travel Organizations—sponsor of AB 918, the bill which enacted the Sellers of Travel law—expressed concern that Chapter 772 would impose an undue burden, especially on smaller companies, at a time when the new regulatory framework created by the Sellers of Travel law had not yet been fully implemented.10 Earlier versions of SB 142 included, among other provisions which did not survive to the final version, insurance and bonding requirements, evidence of which was to be kept on file with the Attorney General.11

Proponents pointed to recent growth in the marketing of educational travel, and to the special purposes of educational travel to argue that some additional regulation of this particular segment of the travel industry was warranted.12 For example, the special vulnerability of student travelers was highlighted in June, 1993, when California students were among thousands who lost both their summer travel opportunities and their money because American Leadership Study Groups abruptly ceased operations.13 The disclosure requirements which constitute the major thrust of the final version of Chapter 772 are intended to establish a degree of uniformity in contracting and quality control, which will

9. Telephone Interview with G. V. Ayers, Consultant to the Senate Business and Professions Committee (June 5, 1995) (notes on file with the Pacific Law Journal); see 1995 Cal. Stat. ch. 772, sec. 1, at 4691 (declaring that the vulnerability of student travelers requires that the integrity and professionalism of educational travel organizations be beyond reproach, and declaring that the intent of the Legislature in enacting Chapter 772 is to protect the welfare of student travelers, promote quality in educational travel experiences, encourage public confidence in educational travel, particularly among parents and schools, and assist educational travel organizations in complying with safe and reputable practices).

10. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 142, at 4 (May 18, 1995).

11. SB 142, Cal. 1995-96 Reg. Sess., as amended in Senate May 9, 1995 (copy on file with the Pacific Law Journal); see id. (proposing to enact CAL. BUS. & PROF. CODE §§ 17553, 17553.5, which set insurance and surety bond requirements).

12. Telephone Interview with G. V. Ayers, supra, note 9; see id. (opining that the 1993 incident, involving students from San Juan Unified School District in Sacramento, may have provided some impetus for the writing of SB 142, and opining also that the educational loss to students exceeded mere financial injury and justified preventive measures, such as the detailed contract requirements in SB 142, in addition to compensatory measures aimed at ensuring refunds); SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 142, at 2 (Apr. 3, 1995) (noting that educational travel currently involves more than 100,000 California students annually with an estimated $400 million changing hands); see also id. at 3 (noting that the sponsor of SB 142, Educational Field Studies, an educational travel organization, has stated explicitly that it does not seek to weaken the recently-enacted provisions of the Sellers of Travel Law, but rather to build upon it by focusing on the specific regulatory needs of a particular segment of the industry).

13. Alexei Barrionuevo, Travel Agency Closure Grounds Youths; Thousands Seeking Refimnds for Planned European Tours, DALLAS MORNING NEWS, July 4, 1993, at 37A (describing the consequences for as many as 5000 educational travelers from 38 states caused by the collapse of American Leadership Study Groups).
permit educators to make informed decisions for the protection and pedagogical benefit of students engaged in educational travel.\textsuperscript{14}

Dan Johannes

Business Associations and Professions; tourism—California Tourism Marketing Act

Government Code §§ 15372.60, 15372.61, 15372.65, 15372.66, 15372.70, 15372.71, 15372.72, 15372.73, 15372.74, 15372.75, 15372.76, 15372.77, 15372.78, 15372.85, 15372.86, 15372.87, 15372.88, 15372.89, 15372.90, 15372.91, 15372.92, 15372.93, 15372.100, 15372.101, 15372.102, 15372.103, 15372.104, 15372.105, 15372.106, 15372.107, 15372.108, 15372.109, 15372.110, 15372.111, 15372.112, 15372.113, 15372.114, 15372.115, 15372.116, 15372.117, 15372.118, 15372.120, 15372.121, 15372.122, 15372.123, 15372.124, 15372.125, 15372.126, 15372.127, 15372.128, 15372.129, 15372.130, 15372.131 (new); §§ 15364.51, 15364.52, 15364.53, 15364.54 (amended); Revenue and Taxation Code § 19559 (new).

SB 256 (Johnston); 1995 STAT. Ch. 871


AB 855 (Caldera); 1995 STAT. Ch. 868

Existing law requires the California Tourism Commission\textsuperscript{1} to adopt a marketing plan\textsuperscript{2} to encourage tourism in California.\textsuperscript{3} Chapter 871 makes the

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 142, at 3 (Sept. 1, 1995).

1. See CAL. GOV'T CODE § 15364.52(a) (amended by Chapter 871) (indicating that the California Tourism Commission consists of: (1) the Secretary of Trade and Commerce, who serves as the chairperson; (2) the Director of the Office of Tourism, who serves as the vice chairperson; (3) five members appointed by the Governor; (4) one ex officio member of the Senate; (5) one ex officio member of the Assembly; and (6) two members appointed by the Senate Rules Committee and the Speaker of the Assembly).

2. See id. § 15364.52(d) (amended by Chapter 871) (showing that the plan is to do all of the following: (1) serve as a guide; (2) assess the activities and accomplishments of the Office of Tourism; (3) outline the intended program of tourism promotion and visitor services activities for the upcoming year; (4) delineate the ways, means, and programs to promote tourism; (5) identify resources to accomplish these activities; (6) identify cooperative or shared cost programs with private entities; (7) identify licensing opportunities; and (8) contain other information related to marketing efforts).

3. Id. § 15364.52(a)-(d) (amended by Chapter 871).
California Tourism Commission inoperative while the California Tourism Marketing Commission is in existence.4

Under Chapter 871, the California Tourism Marketing Act5 requires the Governor to appoint a Tourism Selection Committee (selection committee) comprised of twenty-five members who represent various categories within the tourism industry in California.6 The selection committee must make certain findings7 and conduct an initial referendum8 to determine whether the state tourism industry wishes to assess itself for the purpose of creating a statewide marketing scheme.9

4. Id. § 15364.52(h) (amended by Chapter 871); id. § 15372.70(e) (enacted by Chapter 871); see id. § 15364.52(h) (amended by Chapter 871) (providing that the California Tourism Commission will resume operation when the California Tourism Marketing Commission terminates); id. § 15372.87(a) (enacted by Chapter 871) (permitting the California Marketing Commission to be terminated at any time after the initial four years of operation by referendum of the assessed businesses); see also id. § 15372.111(a) (enacted by Chapter 871) (allowing the California Marketing Commission to be terminated at any time if the state fails to appropriate $7,300,000).

5. See id. § 15372.60 (enacted by Chapter 871) (stating that California Government Code §§ 15372.60-15372.131 comprise the California Tourism Marketing Act).

6. Id. § 15372.66(a) (enacted by Chapter 871); see id. (requiring the Governor to appoint members based upon recommendations from established industry associations and requiring the committee to give recognition to the diversity within each industry category); id. § 15372.66(b) (enacted by Chapter 871) (providing that the selection committee will convene on or before March 1, 1996); see also id. § 15372.65(e) (enacted by Chapter 871) (defining "industry categories" to mean the following classifications within the tourism industry: (1) accommodations, (2) restaurants and retail, (3) attractions and recreation, and (4) transportation and travel services).

7. See id. § 15372.66(b) (enacted by Chapter 871) (requiring the selection committee to issue a report within 150 days after the first meeting and including in the report all of the following: (1) industry segments included in the assessment; (2) the percentage of funds to be levied against each industry category and segment; (3) the assessment methodology and rate of assessment within each industry segment; (4) types of businesses within a segment to be assessed at a reduced rate, which may be set at zero, on the basis that they do not sufficiently benefit from travel and tourism; and (5) an initial slate of proposed elected commissioners); id. § 15372.66(c) (enacted by Chapter 871) (permitting the selection committee to set the assessment rate for a business at a reduced rate due to unique circumstances); see also id. § 15372.65(f) (enacted by Chapter 871) (defining "industry segment" to mean a portion of an industry category).

8. See id. § 15372.65(i) (enacted by Chapter 871) (defining the "initial referendum" as a vote by mailed ballot of measures contained in the selection committee report); id. § 15372.100(g) (enacted by Chapter 871) (requiring the Secretary of Trade and Commerce to call the initial referendum, if possible, within 180 days after the Governor receives the selection committee report, if possible); id. § 15372.101(a) (enacted by Chapter 871) (providing for the costs of the initial referendum).

9. Id. § 15372.66 (enacted by Chapter 871); see id. § 15372.66(c) (enacted by Chapter 871) (disallowing a business with a zero assessment rate from participating in the initial referendum); id. § 15372.66(d) (enacted by Chapter 871) (requiring a committee member for each industry category to prepare a recommendation for the entire committee on how the items listed in the report should be determined for the industry segments within their industry category); id. § 15372.66(e) (enacted by Chapter 871) (requiring an industry segment to be defined with sufficient clarity in order to be assessed); id. § 15372.66(f) (enacted by Chapter 871) (requiring the Office of Tourism within the Trade and Commerce Agency to advertise widely the selection committee process and to schedule public meetings for potential assessed businesses to provide input to the selection committee); id. § 15372.66(g) (enacted by Chapter 871) (exempting the selection committee process and report from the Administrative Procedure Act); id. § 15372.101(a) (enacted by Chapter 871) (authorizing subsequent attempts to pass the initial referendum if it fails the first time).
If the initial referendum is approved by the tourism industry, Chapter 871 provides for the establishment of a private nonprofit corporation, designated the California Tourism Marketing Commission (Commission), to manage assessed funds and to conduct marketing. The Commission will be directed by a board of thirty-seven elected commissioners and administered by an executive director. The Commission will prepare an annual report and make this report available to assessed businesses. Utilizing the advice and recommendations of

10. Id. §§ 15372.70(a), 15372.71, 15372.75(a), 15372.111(c) (enacted by Chapter 871); see id. § 15372.72(a) (enacted by Chapter 871) (indicating that the Commission is not part of state government and that the Commission's staff are not state employees); see also id. § 15372.61(h) (enacted by Chapter 871) (showing that the Legislature intends for most of the Commission's budget to be spent on bringing tourists into the state and that 15% or less be spent on promoting travel within the state); id. § 15372.70(k) (enacted by Chapter 871) (designating the Commission to be the official state representative of tourism).

11. See id. § 15372.70(b) (enacted by Chapter 871) (providing that the board of commissioners be comprised of the following: the Secretary of Trade and Commerce, who serves as chairperson; 12 members appointed by the Governor who are professionally active in the tourism industry and who represent each of the 12 designated regions and diverse elements of the industry; and 24 elected commissioners); id. § 15372.70(d) (enacted by Chapter 871) (providing the following: (1) a nominee is elected commissioner when he or she receives the most weighted votes in a referendum from assessed businesses within one industry category, and (2) the number of commissioners from each industry category will be determined by the weighted percentage of assessments from that category); id. § 15372.70(e) (enacted by Chapter 871) (authorizing the Secretary of Trade and Commerce to remove any elected commissioner for abuse of office or moral turpitude); id. § 15372.70(f), (g) (enacted by Chapter 871) (requiring the commissioners to serve staggered four-year terms and prohibiting a commissioner, other than the Secretary of Trade and Commerce, from serving more than two consecutive terms); id. § 15372.70(h) (enacted by Chapter 871) (requiring the selection committee to determine the initial slate of candidates for elected commissioners and then obligating the commissioners to nominate a slate of candidates for the remaining elections); id. § 15372.70(m) (enacted by Chapter 871) (disallowing commissioners from receiving compensation as a commissioner but authorizing reimbursement for reasonable expenses incurred by a commissioner while on authorized commission business); id. § 15372.70(n) (enacted by Chapter 871) (permitting assessed businesses to vote only for commissioners who represent their industry category).

12. Id. §§ 15372.70(a), 15372.73(a) (enacted by Chapter 871); see id. § 15372.70(k) (enacted by Chapter 871) (requiring all Commission meetings to be held in California); id. § 15372.70(n) (enacted by Chapter 871) (obligating the commissioners to comply with the Fair Political Practices Act); id. § 15372.70(p) (enacted by Chapter 871) (mandating that the Commission meetings comply with the Bagley-Keene Open Meeting Act); id. § 15372.73(a) (enacted by Chapter 871) (requiring the executive director to be a professional within the tourism marketing industry who has been recommended by the commissioners and approved by the Governor and who is to serve at the pleasure of both); id. § 15372.73(b) (enacted by Chapter 871) (requiring the executive director to implement the marketing plan and to receive overall guidance from the Commission); id. § 15372.73(c) (enacted by Chapter 871) (making the executive director an exempt state employee who is to simultaneously serve as director of the Office of Tourism); id. § 15372.76 (enacted by Chapter 871) (proclaiming that the commissioners and employees of the commission are not individually liable for any good faith activities of the commission).

13. See id. § 15372.74 (enacted by Chapter 871) (including in the report the following information: (1) commission income and expenses, (2) the fund balance of the Commission, (3) a summary of the tourism marketing plan, (4) a progress report, (5) a percentage assessment allocation between industry categories and industry segments, and (6) the reasons and methodology used for the allocations).

14. Id. § 15372.65(b) (enacted by Chapter 871); see id. (defining an "assessed business" as a person who is required to pay an assessment pursuant to this act and until the first assessment is levied, any person authorized to vote for the initial referendum); id. § 15372.104(b) (enacted by Chapter 871) (indicating that each assessed business is part of one industry category and one industry segment and that a business with revenue
industry marketing advisory committees, the Commission will construct an annual marketing plan to advance tourism opportunities in California. After the initial four years of operation, the Commission may be terminated at any time.

Chapter 871 grants the Secretary of Trade and Commerce (Secretary) specified powers and responsibilities. In carrying out his or her duties, Chapter 871 authorizes the Secretary to collect information concerning assessed businesses that is pertinent to the referenda and assessments.

---

15. See id. § 15372.75(b) (enacted by Chapter 871) (including in the marketing plan the following information: (1) an evaluation of the previous year’s budget and activities; (2) a review of California tourism trends, conditions, and opportunities; (3) target audiences for tourism marketing expenditures; (4) marketing strategies, objectives, and targets; and (5) a budget for the current year).

16. Id. § 15372.75(a) (enacted by Chapter 871); see id. § 15372.61(g)(1) (enacted by Chapter 871) (showing that the Legislature intends the Commission, in the course of developing the plan, to seek advice and recommendations from all segments of California’s travel and tourism industry and from all geographic regions of the state); id. § 15372.75(c) (enacted by Chapter 871) (obligating the commission to provide notice of the proposed marketing plan and an opportunity for its review); id. § 15372.77(a) (enacted by Chapter 871) (requiring the Commission to create one or more industry marketing advisory committees that represent every geographic region and every segment of the travel and tourism industry in order to receive advice and recommendations concerning the marketing plan).

17. Id. 15372.87(a) (enacted by Chapter 871); see id. § 15372.87(d) (enacted by Chapter 871) (providing that the California Tourism Commission will resume upon termination of the California Tourism Marketing Commission).

18. Id. § 15372.86(a), (b) (enacted by Chapter 871); see id. (empowering the Secretary to do the following: (1) call referenda and certify results; (2) collect and deposit assessments; (3) exercise police powers; (4) pursue actions and penalties connected with assessments; and (5) maintain veto authority related to travel and expense costs, conflict of interest standards, use of state funds, and contracts between the commission and any commissioner).

19. Id. §§ 15372.88, 15372.90, 15372.108 (enacted by Chapter 871) (authorizing the Secretary to inspect portions of books and records of assessed businesses); Id. § 15372.89 (enacted by Chapter 871) (providing that the information obtained by the Secretary is confidential and is exempt from the California Public Records Act); id. § 15372.90 (enacted by Chapter 871) (allowing the Secretary to hold hearings, take testimony, administer oaths, subpoena witnesses, and issue subpoenas for the production of books, records, or documents of any kind); id. § 15372.91 (enacted by Chapter 871) (indicating that no person is excused from producing evidence pursuant to a subpoena on grounds that the evidence is self-incriminating and providing that a natural person will not be prosecuted for the evidence he or she must produce, but warning that a natural person could be prosecuted for perjury in presenting the evidence); Id. § 15372.108 (enacted by Chapter 871) (authorizing the Secretary to use records held by the state to create a list of businesses to be assessed which may include information necessary to determine the amount of assessment owed by a business); CAL. REV. & TAX. CODE § 19559(a) (enacted by Chapter 871) (allowing the Franchise Tax Board to provide the Secretary with names, addresses, and financial data from tax returns).
Pursuant to Chapter 871, the Secretary must call a referendum every two years. Commencing with the third referendum, the Commission may adopt a resolution regarding assessment levels and must adopt a resolution for the election of commissioners for the assessed businesses to vote upon. Beginning with the third referendum, assessed businesses may include additional candidates or different assessment levels on the referendum ballot. In every referendum, each assessed business is entitled to a weighted vote that is equal to the relative assessment paid by that business.

Chapter 871 stipulates that funding for the Commission is a cooperative venture in which the state will contribute $7,300,000 and the tourism industry will raise $25,000,000 through self-assessment. The Office of Tourism will calculate the assessments due by each assessed business and the assessed funds

20. See CAL. GOV'T CODE § 15372.65(f) (enacted by Chapter 871) (defining "referendum" to mean any vote by mailed ballot of measures recommended by the Commission and approved by the Secretary).

21. Id. §§ 15372.86(a)(1), 15372.100(a) (enacted by Chapter 871); see id. § 15372.100(b) (enacted by Chapter 871) (indicating that the first referendum following the initial referendum is for the sole purpose of determining the new set of commissioners); id. § 15372.100(h) (enacted by Chapter 871) (permitting the remaining referendums to cover one or more of the following subjects: (1) assessment level, based upon specified assessment formulae; (2) amended industry segment allocation formula; (3) percentage allocation of assessments between industry categories and segments; (4) election of commissioners; and (5) termination of the commission); id. § 15372.103(a) (enacted by Chapter 871) (determining the length of time a referendum can be held).

22. See id. § 15372.100(b) (enacted by Chapter 871) (defining "assessment level" to mean "the estimated gross dollar amount received by assessment from all assessed businesses on an annual basis"); id. § 15372.100(c) (enacted by Chapter 871) (permitting a referendum to include up to three possible assessment levels, from which the assessed businesses will select one assessment level by plurality weighted vote); id. § 15372.100(f) (enacted by Chapter 871) (providing that if the referendum includes more than one possible assessment rate, the rate with the plurality of weighted votes will be adopted).

23. Id. § 15372.100(c) (enacted by Chapter 871); see id. § 15372.103(b) (enacted by Chapter 871) (obligating the Secretary to establish a deadline for the Commission to adopt a resolution and authorizing at least 10% of assessed businesses to present a slate of candidates to the Secretary within 60 days if the Commission fails to meet the deadline established by the Secretary); id. § 15372.103(c) (enacted by Chapter 871) (authorizing the Secretary to select a slate of commissioners for the referendum in the event that the Commission fails to meet the deadline and the assessed businesses do not present their own slate of candidates within 60 days).

24. Id. § 15372.102(a) (enacted by Chapter 871); see id. § 15372.102(b) (enacted by Chapter 871) (requiring at least 20% of assessed businesses to sign agreement to add a different assessment level to a referendum); id. § 15372.102(c) (enacted by Chapter 871) (requiring an agreement by at least 10% of assessed businesses to place additional candidates on a referendum).

25. Id. § 15372.104(a) (enacted by Chapter 871); see id. (explaining that an assessed business paying $900 in annual assessments has three times the weighted vote of a business paying $300); id. § 15362.104(c) (enacted by Chapter 871) (permitting an assessed business to vote for each item on the referendum, except an assessed business can only vote for a commissioner representing its industry category and only for an industry segment formulae for its industry segment); id. § 15372.104(d) (enacted by Chapter 871) (prohibiting an assessed business that has not paid its assessments from voting).

26. Id. §§ 15372.106, 15372.111 (enacted by Chapter 871); see id. § 15372.111 (enacted by Chapter 871) (providing that if the state fails to appropriate the required amount, the industry may terminate the Commission at any time and if the industry fails to target its annual assessment level at the required amount, the state may decide not to appropriate funds for the Commission).
will be audited annually. 27 The Secretary will collect the assessments and deposit the funds into a separate account controlled by the Commission. 28 The Secretary may exercise police powers to enforce payment of an assessment. 29 If the assessment is incorrect, an assessed business may appeal to the Secretary. 30 Travel agencies and tour operators may be exempt from the assessments. 31

Under Chapter 871, providing false information concerning an assessment is a misdemeanor. 32 Furthermore, a person who files such false information will be civilly liable in an amount not exceeding $10,000 plus the amount owed as the assessment. 33

On a smaller scale, Chapter 868 creates a marketing structure similar to that enumerated in Chapter 871 with the purpose of promoting tourism in Los Angeles County. 34

27. Id. §§ 15372.105(d), 15372.111(b) (enacted by Chapter 871); see id. § 15372.105(d) (enacted by Chapter 871) (mandating that the amount of assessment or weighted votes of an assessed business must not be disclosed except as part of an assessment action); id. § 15372.105(f) (enacted by Chapter 871) (indicating that an assessment levied is not part of gross receipts or gross revenue for any purpose except for income and franchise taxes); id. § 15372.110(c) (enacted by Chapter 871) (providing that the Office of Tourism will establish regulations setting forth the procedures for assessment collection subject to approval by the Commission).

28. Id. § 15372.109(a), (b) (enacted by Chapter 871); see id. § 15372.111(c) (enacted by Chapter 871) (requiring the Commission to spend the funds consistent with Commission policies and the tourism marketing plan, and indicating that the state has no interest in the funds).

29. Id. § 15372.109(a) (enacted by Chapter 871); see id. § 15372.112 (enacted by Chapter 871) (allowing the Secretary to file a complaint against a person in a state court to collect the assessment if the assessment is overdue); id. § 15372.113 (enacted by Chapter 871) (providing for penalty costs for an unpaid assessment and authorizing the Secretary to add an additional amount to the unpaid assessment to defray enforcement costs). See generally id. § 15372.123 (enacted by Chapter 871) (governing procedures and proceedings for deficient assessments).

30. Id. § 15372.105(e) (enacted by Chapter 871); see id. (warning that if an incorrect assessment is due to the failure of a business to provide information in a timely manner, the Secretary may fine the business as a condition of correcting the assessment); id. § 15372.110(b) (enacted by Chapter 871) (indicating that if a business fails to provide information in a timely manner, it will be assessed at an amount representing the upper assessment level for that segment).

31. Id. § 15372.118 (enacted by Chapter 871); see id. (providing that a travel agency or a tour operator is exempt if the business derives less than 20% of its gross revenue from tourism, but allowing such businesses to pay an assessment if they choose).

32. Id. § 15372.121 (enacted by Chapter 871); see id. (indicating the penalty to be a fine between $1000 and $10,000, imprisonment for 10 days to 6 months, or by both fine and imprisonment).

33. Id. § 15372.122 (enacted by Chapter 871); see id. § 15372.120 (enacted by Chapter 871) (providing the statute of limitations to be three years from the date of the alleged violation).

34. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 855, at 2 (Sept. 11, 1995); see id. (declaring that AB 855 is modeled after SB 256 and that it is intended to help in the development of a unified tourism marketing and advertising campaign for Los Angeles County); see also CAL. GOV'T CODE § 15372.202(b) (enacted by Chapter 868) (requiring the Los Angeles County Board of Supervisors to appoint 24 members to the Los Angeles County Tourism Selection Committee); id. § 15372.203 (enacted by Chapter 868) (providing by referendum, for the establishment of the Los Angeles County Tourism Marketing Commission to be comprised of 24 county commissioners elected by industry categories); id. § 15372.213(d) (enacted by Chapter 868) (requiring the county treasurer/tax collector to calculate assessments due for each assessed business); id. § 15372.218 (enacted by Chapter 868) (mandating that the county commission contract separately with the Los
COMMENT

Tourism is a vital component of California’s economy. Chapter 871 is designed to encourage tourism through expansion of the tourism industry by combining state or county funds with a private-sector financing mechanism. In 1993, Governor Pete Wilson created a task force to investigate alternative methods employed by other states to finance statewide marketing for the tourism industry. According to a report issued by this task force, California has been losing tourists since 1986, and the market share of the state tourism industry has been in decline. The task force recommended the establishment of a tourism

Angeles Convention and Visitor’s Bureau to serve as its administrative contractor in the promotion, implementation, and administration of the marketing plan adopted by the county commission; id. § 15372.221 (enacted by Chapter 868) (indicating that Chapter 868 will only become operative upon adoption of a resolution by the Los Angeles County Board of Supervisors); 1995 Cal. Legis. Serv. ch. 868, sec. 2, at 5140 (enacting Cal. Gov’t Code §§ 15372.200-15372.221) (stating that the Legislature finds that due to unique circumstances of the tourism industry in Los Angeles County, a special statute, rather than a general statute, is necessary). See generally Cal. Gov’t Code §§ 15372.200-15372.221 (enacted by Chapter 868) (creating a tourism marketing order for Los Angeles County).

35. Senate Floor, Committee Analysis of SB 256, at 4 (May 31, 1995); see id. (indicating that tourism is California’s third largest export and that California has the largest travel industry in the United States); see also Assembly Floor, Committee Analysis of AB 855, at 3 (Sept. 15, 1995) (indicating that the Los Angeles tourism industry yields $8.25 billion in direct revenue and supports the jobs of 437,000 city and county residents).

36. Cal. Gov’t Code § 15372.61(d) (enacted by Chapter 871); see id. § 15372.61(a)-(e) (enacted by Chapter 871) (declaring the legislative intent behind Chapter 871 as the following: (1) Tourism is among California’s biggest industry; (2) in order to retain and expand the tourism industry in California, it is necessary to market travel to and within California; (3) state funding, while an important component of marketing, has been unable to generate sufficient funds to meet the threshold levels of funding necessary to reverse recent losses of California’s tourism market share; (4) an industry-approved assessment provides a private-sector financing mechanism necessary to increase tourism expenditures within California; and (5) the goal of the assessments is to assess the least amount per business, in the least intrusive manner, spread across the greatest practical number of tourism industry segments).

37. See The Governor’s Task Force on Tourism Funding, Report to the Governor, Nov. 12, 1993, at 17-23 (copy on file with the Pacific Law Journal) (identifying the following funding methods from other states: (1) the general fund; (2) lodging taxes; (3) rental car taxes; (4) sales tax; (5) industry contribution and membership; (6) lottery; (7) motor vehicle and transportation department revenues; (8) cooperative promotions, federal grants, interagency cooperative efforts, licensing and merchandise sales, advertising in tourism publications, brochure distribution, retail sales, concession fees, and advertising boards; and (9) grant programs).

38. Senate Floor, Committee Analysis of SB 256, at 4 (May 31, 1995); see Governor’s Task Force on Tourism Funding, supra note 37, at 2 (indicating that the task force consisted of California’s most senior tourism leaders).

39. Governor’s Task Force on Tourism Funding, supra note 37, at 13; see id. (reporting that California has lost $1.5 billion in travel spending, $57.2 million in state tax revenues, $27.9 million in local tax revenues, and 20,300 jobs due to an 8% decline in domestic leisure-market share between 1989-1991); id. at 15 (listing three principal factors leading to the decline: (1) increased competition from other states; (2) insufficiently funded existing state marketing efforts; and (3) damage to California’s desirability as a tourist attraction due to natural disasters, civil unrest, and crime); see also Senate Floor, Committee Analysis of SB 256, at 5 (Sept. 15, 1995) (indicating that California ranks 16th in the United States for tourism funding); Facsimile Transmission from Ross Sargent, Legislative Consultant to Senator Patrick Johnston (Aug. 25, 1995) (copy

Selected 1995 Legislation 469
marketing order modeled after the marketing order used by California’s agricultural industry.\textsuperscript{40} Chapter 871 implements the recommendations made by the task force.\textsuperscript{41}

Chapter 871 merely enables California’s tourism industry to vote to join together to privately fund tourism promotion and it defines how it might do so.\textsuperscript{42} If the industry chooses to assess itself, Chapter 871 establishes the authority to collect assessments, and provides guidelines to assure that assessed funds are managed in a professional and responsible manner consistent with the desires of the assessed businesses.\textsuperscript{43}

\textit{Julia A. Butcher}

\textsuperscript{40} Governor’s Task Force on Tourism Funding, \textit{supra} note 37, at 27; see \textit{Senate Floor, Committee Analysis of SB 256}, at 5 (Sept. 15, 1995) (citing proponents as maintaining that a “marketing order” for the tourism industry would be similar to the long-standing state Agricultural Marketing Act used to promote such products as cheese, eggs, and raisins). \textit{See generally CAL. FOOD \\& AGRIC. CODE §§ 58601-59293} (West 1986 \& Supp. 1995) (setting forth the provisions of the California Marketing Act of 1937 establishing a state agricultural marketing order).

\textsuperscript{41} \textit{Senate Floor, Committee Analysis of SB 256}, at 4 (May 31, 1995); see Governor’s Task Force on Tourism Funding, \textit{supra} note 37, at 27-41 (delineating the details of the recommendations made by the task force).

\textsuperscript{42} \textit{Senate Floor, Committee Analysis of SB 256}, at 5 (Sept. 15, 1995).

\textsuperscript{43} Facsimile Transmission from Ross Sargent, \textit{supra} note 39.