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Business Associations and Professions

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Acupuncture—Stricter Standards for Those Performing Acupuncture

Erin M. Stepno

Code Sections Affected
Business and Professions Code § 730 (new); § 4935 (amended).
AB 174 (Napolitano); 1997 STAT. Ch. 400

I. INTRODUCTION

"Acupuncture" is the practice of inserting needles to a point or points on or near the surface of the body in order to create stimulation preventing or modifying the perception of pain. Acupuncture may also be used to normalize physiological functions, including pain control, in order to treat bodily disease and disfunction.

Acupuncture has gained popularity in recent years because many patients have become frustrated with the side effects associated with synthetic drugs. Over fifty medical schools, including Harvard and Columbia, have recognized this trend and now offer courses or divisions in alternative medicine. Despite the satisfaction that many patients find in acupuncture, insurers and mainstream doctors are reluctant to advocate such unconventional therapy. These healthcare providers argue that there is insufficient scientific evidence as to the efficacy of such treatments.

II. LACK OF CURRENT REGULATION

Under existing law, The Medical Board of California licenses and regulates the practice of acupuncture through the Acupuncture Committee. Existing law also provides that if any person practices, holds himself out as practicing, or engages in acupuncture without possessing an acupuncturist’s license, then that person is guilty

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2. See id. (listing situations when acupuncture may be used, and specifying that the techniques of electro-acupuncture, cupping, and moxibustion are included).
5. Id.
6. Id.
7. See generally CAL. BUS. & PROF. CODE §§ 4925-4949 (West 1990) (setting forth criteria of the Acupuncture Licensure Act which includes the establishment of an Acupuncture Committee, the committee members’ necessary qualifications, and, among other things, the terms of appointment for committee members).
of a misdemeanor. However, these laws do not prevent licensed dentists, podiatrists, or physicians from practicing acupuncture within the scope of their licenses if they have completed an approved acupuncture course, or if they have completed an acupuncture course and utilized acupuncture in their practice prior to July 1, 1982.

III. QUALIFYING AS AN ACUPUNCTURIST IN CALIFORNIA

California was one of the first states to enact licensing for acupuncturists and has the largest number of practicing acupuncturists in the country. The acupuncture licensing exam in California is regarded as being one of the most difficult nationwide. There has recently been a radical increase in the number of applications for acupuncturist licenses, yet the passage rate for the clinical portion of the exam has dropped dramatically in the past three years. In June of 1996, 110 students that had taken the California Acupuncture Committee's clinical exam were informed that they had not passed. These students appealed their grades to the committee and argued that the exam was unfair and invalid on the grounds that fifteen of the points they were to locate on the exam model were actually incorrectly marked by the proctors, making correct responses erroneously marked incorrect. In addition, the applicants argued that the adhesive stickers they were given to mark the fifteen points were not suitable for the exam. They claimed that the stickers fell off or slid on the model, and thus, when it came time to evaluate the given responses, the stickers no longer were located where the applicants had placed them. Certain protesting students felt that the failing grades were an attempt by both practicing acupuncturists and doctors to curb the popularity of acupuncture and to limit the number of acupuncturists throughout California. These contentions

8. Id. § 4935(a) (West 1990); see id. § 4935(b) (West 1990) (clarifying that one holds himself out as engaging in the practice of acupuncture by the use of the following words, "acupuncture," "acupuncturist," "licensed acupuncturist," or "oriental medicine," in any title or description of the services offered, or by representing that he is trained, experienced, or an expert in the fields of Chinese medicine, oriental medicine, or acupuncture).

9. Id. § 4947(b) (West 1990).


11. Id.


13. Id. (stating that the passage rate was 82% from 1990 to 1993, yet is only 60% for the past three years).

14. Id.

15. Id.

16. Id.

17. Id.

were refuted by the president of the State Council of Acupuncture and Oriental Medicine Association, yet the appeal process continues.  

IV. HEALTHCARE PROVIDERS AND ACUPUNCTURE

Despite the controversies surrounding the practice of acupuncture and the problems associated with the acupuncture licensing procedures, over 100 insurance plans nationwide now cover some aspect of alternative care. Kaiser Permanente, the largest health maintenance organization [HMO] in California, is sponsoring a pilot project at its hospitals in Vallejo. The project is ongoing and proceeding in a logical fashion—offering acupuncture alone, with the possibility of studying and dispensing herbs in conjunction with the acupuncture at a later date. In addition, the Sacramento County Board of Supervisors in March of 1996 approved a plan to allocate $25,000 of federal money on acupuncture for treatment of 445 drug addicts over an eighteen month period.

More recently, the independent healthcare company, Acupuncture Plus, announced on June 30, 1997, that it was the first to obtain licensing from the state of California for an alternative acupuncture and Chinese medicine healthcare plan. The Acupuncture Plus program is a flexible and comprehensive program that offers alternative treatment for over forty medical conditions, ranging from the common cold to arthritis and diabetes. These services are offered at a price of approximately $5 more than the average patient's medical coverage per month.

V. THE CREATION OF CHAPTER 400

The California Society of Oriental Medicine [CSOM] became aware that the Kaiser Permanente health maintenance organization was utilizing nurse practitioners to perform acupuncture while under the direction and supervision of a licensed physician. Kaiser began this practice in light of an opinion released in 1994 by the Department of Consumer Affairs which stated that a registered nurse

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19. See id. (commenting that the president of the association feels there are not enough licensed acupuncturists in California, and that three or four times the current number would be needed to satisfy the demand).
21. Id.
22. Id.
25. Id.
26. Id.
27. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 174, at 4 (July 11, 1997).
could perform acupuncture under the supervision of a licensed physician, provided that both the physician and the nurse were skilled in the practice of acupuncture.\textsuperscript{28} The CSOM determined this situation presented two problems to the acupuncture profession: First, possible danger arises when an unqualified physician directs or supervises an equally unqualified nurse to perform acupuncture; and second, danger exists if an unqualified nurse acts outside of his scope of practice under the direction or supervision of an unqualified physician.\textsuperscript{29} The CSOM, the northern chapter of the California Chinese Medicine Association, the United California Practitioners of Chinese Medicine, and others worried that existing law compromised and potentially endangered the safety of patients.\textsuperscript{30}

To remedy what these organizations considered dangerous practices, the CSOM sponsored Chapter 400\textsuperscript{31} which makes it a misdemeanor for any person, other than licensed dentists, podiatrists, or physicians, to practice acupuncture.\textsuperscript{32} In addition, Chapter 400 makes it unprofessional conduct for a physician, osteopathic physician, dentist, or podiatrist to direct or supervise the administering of acupuncture on a patient by a healing arts practitioner that is not licensed under the Acupuncture Licensure Act.\textsuperscript{33} It is also unprofessional conduct under Chapter 400 for one licensed as a healing arts practitioner, but not as an acupuncturist, to perform acupuncture at the direction of or under the supervision of a physician, osteopathic physician, dentist, or podiatrist.\textsuperscript{34}

Opponents of Chapter 400, among them the American Nurses Association, believe that Chapter 400 will limit Californians' access to health care services.\textsuperscript{35} The opponents note that for years registered nurses have performed acupuncture while working closely with physicians.\textsuperscript{36} The California Medical Association (CMA) reaffirmed the nurses' information by stating that physicians often use staff to assist them in various aspects of patient treatment, and when supervised by a physician, the practice is both safe and effective.\textsuperscript{37} The CMA also noted a disparity in Chapter 400 in that it prohibits physicians, dentists, podiatrists, and osteopaths from supervising or directing aides from performing acupuncture, yet licensed acupuncturists would be able to perform such activities.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 3.
\item \textsuperscript{29} Letter from Steven L. English, Executive Director of the California Society for Oriental Medicine, to Senator Hunt (July 24, 1997) (copy on file with the McGeorge Law Review).
\item \textsuperscript{30} \textit{SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 174, at 4 (July 11, 1997)}.
\item \textsuperscript{31} \textit{Id.} at 3.
\item \textsuperscript{32} \textit{CAL. BUS. \\& PROF. CODE} § 4935(b) (amended by Chapter 400).
\item \textsuperscript{33} \textit{Id.} § 730(a) (added by Chapter 400); \textit{Id.} § 4935(b) (amended by Chapter 400).
\item \textsuperscript{34} \textit{Id.} § 730(b) (added by Chapter 400); \textit{Id.} § 4935(b) (amended by Chapter 400).
\item \textsuperscript{35} \textit{SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 174, at 4 (July 11, 1997)}.
\item \textsuperscript{36} \textit{See id.} (noting that there has never been a charge of injury or misconduct brought before the Board of Registered Nursing with respect to the nurses' practices).
\item \textsuperscript{37} \textit{See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 174, at 3 (Apr. 22, 1997)} (noting that the CMA is not aware of any existing problem with respect to acupuncture performed by physicians' aides).
\item \textsuperscript{38} \textit{Id.}
\end{itemize}
VI. CONCLUSION

In recent years the American public has voiced its frustration with conventional modes of Healthcare. 39 Patients have explored alternative forms of treatment and have found that many may indeed prove helpful. 40 Acupuncture is one such alternative and has garnered approval by not only the public, but also esteemed medical schools, Healthcare systems, and other organizations. 41 California is among the leaders in exploring and experimenting with acupuncture. 42 Chapter 400 is a preventative measure that aims only to ensure that as the field of acupuncture grows, it does so in a safe manner, and is an appropriate compliment to the trendsetting steps that California has already taken.

39. See supra note 3 and accompanying text.
40. Id.
41. See supra notes 4, 20 and accompanying text.
42. See supra note 10 and accompanying text.
Cheers! California Loosens up Alcohol Licensing for Non-Profit Organizations and Golf Courses

Cassandra Ferrannini

Code Sections Affected

Business and Professions Code § 24043.15 (amended).
SB 509 (Thompson); 1997 STAT. Ch. 383
Business and Professions Code § 24045.16 (new).
AB 710 (Kuehl); 1997 STAT. Ch. 20
Business and Professions Code § 25608 (amended).
SB 572 (Maddy); 1997 STAT. Ch. 90
Business and Professions Code § 23399.7 (new); § 23433.5 (repealed).
AB 114 (Battin); 1997 STAT. Ch. 21

I. ALCOHOL REGULATIONS IN CALIFORNIA

California’s broad power to regulate the sale, transport and use of alcohol within the state is derived from the Twenty-First Amendment to the U.S. Constitution.1

The State has granted to the Department of Alcoholic Beverage Control (ABC) the exclusive authority to license and regulate the manufacture, sale, purchase, and possession of alcohol in the State.2 Current law allows the ABC to issue various general, special,3 and temporary4 licenses for the sale5 of alcohol.6 Chapters 20, 90, and 383 authorize the ABC to issue specific licenses for the sale of alcohol.

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1. U.S. CONST. amend. XXI; see Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1514 (1996) (noting that the Twenty-First Amendment delegates power to the states to prohibit the use of or commerce in alcoholic beverages).
2. See CAL. CONST. art. XX, § 22 (authorizing the legislature to establish the Department of Alcoholic Beverage Control); see also CAL. BUS. & PROF. CODE § 23049 (West 1997) (establishing the Department of Alcoholic Beverage Control, as well as delineating its powers and administrative procedures).
3. See CAL. BUS. & PROF. CODE §§ 24045.4-24045.14 (West 1997) (authorizing various special licenses for television stations, women’s educational organizations, non-profit corporations, non-profit theater companies, vessels in San Diego County, bed and breakfast inns, catering businesses, and non-profit maritime museum associations).
4. See id. § 24045 (West 1997) (authorizing annual, seasonal, or temporary licenses).
5. See id. § 23025 (West 1997) (defining a “sale” as a transaction where title to alcoholic beverages is transferred in exchange for consideration.).
6. See id. § 23320 (West 1997) (detailing the various licenses available for issue by the department, as well as the fee schedule for each license); see also SENATE FLOOR, ANALYSIS OF AB 710, at 1 (May 14, 1997) (explaining that the ABC is authorized to issue various licenses).
II. LICENSING FOR VITICULTURAL ASSOCIATIONS

Chapter 383 authorizes the ABC to issue, on an annual basis, a temporary, 60-day on-or-off sale license to any non-profit corporation having an agricultural purpose. The primary benefactors of this legislation are California's Viticultural Associations. This license would entitle the viticultural association to sell wine donated or sold by member winegrowers via direct mail, telephone, or the Internet for fundraising purposes.

The Bureau of Alcohol Tobacco and Firearms (BATF), under the authority of the Federal Alcohol Administration Act, regulates viticultural labeling and advertising. In this role, the BATF has promulgated a system known as American Viticultural Areas (AVA), which defines geographical boundaries for specified wine growing regions, and allows the wines bottled in those areas to use the appel-
This system is loosely based on the French system of “appellations d'origine contrôlée,” which restricts the production of specified wines and cheeses to the specific geographic region in which they originated. The theory behind the appellation systems is that climate, soil, and in the French system, regional culture, combine to give products from a specific area a distinct character and flavor.

There are currently 130 regions in the United States designated by the BATF as AVAs. In California, winegrowers sharing a common appellation have banded together to form non-profit corporations, or “viticultural associations,” for the purposes of research, education, and marketing to enhance consumer awareness, as well as the quality, of their product. Currently there are four non-profit appellation associations in the Napa Valley. Chapter 383 allows these associations to use the BATF's AVA as the appellation of origin on wines sold by the associations if the non-profit corporations' name includes the designation of an American Viticultural Area, and a majority of the winegrowers located in the named AVA are members of the non-profit corporations.

16. See 27 C.F.R. § 4.25(a) (1996) (requiring that a wine meet the following parameters to be entitled to use an appellation of origin: (1) 75% of the fruit must be grown in the appellation; (2) the wine must be fully finished in the State in which the appellation is located; and (3) the wine must conform to the regulations of the named appellation).


18. See Chen, supra note 17, at 31, 44-45 (comparing the BATF requirements to the factors considered by the French in designating an appellation).


20. See SENATE FLOOR, ANALYSIS OF SB 509, at 2 (May 6, 1997) (explaining the goals of the winegrower associations); see also Letter from Nancy Bialek, Executive Director, Stags Leap District Winegrower's Association, to Senator Ralph Dills, Chairman, California Senate Governmental Organization Committee (Mar. 25, 1997) (copy on file with McGeorge Law Review) (delineating the goals of the Stags Leap District Winegrower's Association).


Existing law prohibits vintners from selling the wines of competitors. This precludes vintners from selling mixed cases, in which a few bottles from several different vineyards are combined to make up one case. Chapter 383 would allow the association, using wine donated or sold to it by its members, to sell mixed cases as a fundraising device for a 60-day period each year. Additionally, each wine sold must come from within the appellation. Member winegrowers are limited to a contribution of 75 cases per year, and the licensee may sell a maximum of 1,000 cases per year.

The non-profit associations that support this legislation assert that this is a unique opportunity to raise funds to support their activities, while at the same time promoting consumer awareness about the unique qualities of their appellation. Opponents of the legislation, however, feel that Chapter 383 creates the potential for trademark infringement. They also worry that the associations' shipments of wine to private citizens in other states will erode the integrity of the three tiered system of reciprocal trade agreements reached with those states.

24. Compare CAL. BUS. & PROF. CODE § 23356 (West 1997) (authorizing holders of a manufacturer's or winegrower's license to sell only alcoholic beverages produced by or for himself), with id.§ 23358 (West 1997) (allowing winegrowers to possess alcohol manufactured by others for use at either private events or bona fide eating places on the premises). See id. § 23028 (West 1997) (defining a "bona fide public eating place" as a "place which is regularly and in a bona fide manner used and kept open for the serving of meals"); see also Hammond v. McDonald, 49 Cal. App. 2d 671, 685, 122 P.2d 332, 340 (1942) (explaining that where the principal business of the restaurant becomes the service of intoxicating liquors, and the serving of meals becomes an incidental matter, the place is no longer a "bona fide" restaurant); Covert v. State Board of Equalization, 29 Cal. 2d 125, 134, 173 P.2d 545, 549-50 (1946) (determining that there must be actual and substantial sales of food to qualify as a "bona fide public eating place," and that a restaurant operated as a subterfuge in order to obtain the right to sell liquor is not "bona fide").

25. Telephone Interview with Nancy Bialek, Executive Director, Stags Leap District Winegrower's Association (July 17, 1997) [hereinafter Bialek Interview] (notes on file with McGeorge Law Review).

26. CAL. BUS. & PROF. CODE § 24045.15 (enacted by Chapter 383); see Bialek Interview, supra note 25 (explaining the association's purpose in sponsoring the legislation).

27. CAL. BUS. & PROF. CODE § 24045.15 (enacted by Chapter 383).

28. Id.; see also Letter from California State Senator Mike Thompson, to Agustin Huneeus, Vintner-President, Franciscan Estate Selections Ltd. (July 1, 1997) [hereinafter Thompson Letter] (explaining changes in the legislation designed to address the concern of opponents).

29. SENATE FLOOR, ANALYSIS OF SB 509, at 2-3 (May 6, 1997).

30. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 509 at 2-3 (July 7, 1997). See Taylor Interview, supra note 21 (commenting on the infringement and destruction of fragile trade agreements).

31. See SENATE FLOOR, ANALYSIS OF SB 509, at 3 (May 6, 1997) (commenting on the opposition to exceptions to the three-tier marketing system); see also Scott Ferguson, Bill Would Allow Non-Profits to Sell Wines by Direct Mail, ST. HELENA STAR, Mar. 6, 1997, at 1-14 (explaining the three-tier system as the system of wholesalers and distributors).

32. See ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 509, at 2 (July 7, 1997) (delineating Stag's Leap Cellars' fears of trademark infringement).
A. Trademark Infringement Concerns

A trademark is defined as "any word, name, symbol, device, or combination thereof used in commerce to identify and distinguish one merchant's goods from those of another as well as to identify the source of the goods." Trademark rights can only arise or be infringed upon through use of the mark in commerce. There is a federal registry of trademarks, but in order to register a mark, it must either be currently in use, or the applicant must verify his bona fide intention to use the mark in commerce. The Principle National Registry of Trademarks is analogous to the recording system of deeds for real property, by which constructive notice of ownership is served to subsequent purchasers. If a mark is not recorded, it will only be protected in the geographic area in which it is used. Additionally, even if a recorded mark is "incontestable," it may still be challenged under certain circumstances.

Chapter 383 does not directly authorize an association to use a name for the organization that would infringe upon established trade-names. However, because of the similarity between BATF appellation names used by established associations and the tradenames of some vintners, the legislation, by facilitating wine sales by the associations, creates the potential for trademark violation that did not previously exist. Opponents to Chapter 383 allege that because an association is a "non-producer," the BATF may not have the authority to supervise the labels used by the association.


34. See 15 U.S.C.A. § 1114(1) (West 1963 & Supp. 1997) (enumerating various practices considered to be trademark infringement); see also CAL. BUS. & PROF. CODE § 14209 (describing methods of trademark use in California); see also Tillamook County Creamery Ass'n v. Tillamook Cheese and Dairy Ass'n, 345 F.2d 158, 160 (9th Cir. 1965) (stating that the right to a trademark stems from prior appropriation and use).


36. See Lawrence E. Evans, Jr., A Primer on Trademarks and Service Marks, 18 ST. MARY'S L.J. 137, 144 (1986) (explaining the advantages of federal registration of trademarks).

37. Id.


39. See id. § 1115(b) (setting forth exceptions that allow an incontestable mark to be attacked).

40. See Letter from Bion M. Gregory, Legislative Counsel of California, to Senator Mike Thompson, California State Senate (May 7, 1997) (copy on file with the McGeorge Law Review) (giving legislative counsel's opinion regarding the construction of SB 509 with state and federal trademark laws).

41. See 27 U.S.C.A. § 205 (West 1927 & Supp. 1997) (requiring producers, blenders, and wholesalers of wine, as well as proprietors of bonded wine storerooms, to apply for and obtain a certificate of label approval from the Secretary of the Treasury); see also Taylor Interview, supra note 21 (objecting to the lack of BATF oversight of labeling by non-producers).
An example of the problems that may arise is illustrated by the potential conflict over usage of the name “Stag’s Leap.” Stag’s Leap Wine Cellars is renowned for their Cabernet Sauvignon. The name Stags Leap is derived from a geological formation of rocks on the eastern slope of Napa Valley, and two vineyards use variations on the name, as does the BATF in designating the appellation. Owners of Stag’s Leap Wine Cellars fear that the use of the appellation “Stags Leap District” by the association on marketing materials and “crack and peel” labels placed on the bottles within the association’s mixed cases, will dilute the effect of the “Stag’s Leap” trade-name and confuse consumers. In the case of Stag’s Leap, a private winery’s use of the “Stags Leap” designation was previously litigated; It was determined in a settlement agreement that Stags Leap was a geographic name and not a trademark.

This problem is not unique to Stag’s Leap, as many vineyards share their name with the BATF appellation applied to their region. For example, Chalone Vineyards, Chalk Hill Winery, Alexander Valley Vineyard and Wild Horse Winery all share their names with a BATF appellation. The majority of these appellations, however, have not formed non-profit associations. The use of a geographic name as a trademark is very risky because the courts generally prohibit words which are descriptive of the place where goods are produced from being monopolized as a

43. See ROBERT M. PARKER JR., PARKER’S WINE BUYERS GUIDE 982-984 (Simon & Schuster, 1993) (giving consistently high marks to Stag’s Leap Cellars, Cask 23 Proprietary Red Wine); see also Dan Morain, A Leap of Faith, L.A. TIMES, May 20, 1988, at B4 (noting that Stag’s Leap Wine Cellars 1973 Cabernet stomped the wine world by winning a tasting in Paris over the world’s finest Bordeaux); Taylor Interview, supra note 21 (stating that because the 1973 tasting provided American winemakers an in-road to the international marketplace, the Smithsonian Institution maintains a permanent display of Stag’s Leap Cellars’ wines).

44. See 27 C.F.R. § 9.117 (1996) (listing “Stags Leap District,” no apostrophe, as a BATF approved Viticultural Area, and defining that area’s boundaries); see also Morain, supra note 43, at B4 (explaining the origin of the name “Stag’s Leap, and the origin of the use of the name by both Stag’s Leap Wine Cellars, which places the apostrophe before the “s” in “Stags,” and Stags’ Leap Winery, which places the apostrophe after the “s”).

45. See Taylor Interview, supra note 21 (explaining that “crack and peel” labels have a plastic backing which is removed, exposing an adhesive surface which may be used to affix the label to an object).

46. See ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 509, July 7, 1997, at 2-3 (explaining the trademark concerns of several Napa Valley vintners); see also Taylor Interview, supra note 21 (expressing the specific concerns of Stag’s Leap Wine Cellars).

47. See Morain, supra note 43, at B4 (commenting on previous conflicts over the “Stag’s Leap” name).


However, if a mark attains a secondary significance which is associated in the minds of consumers with the product, the mark will be protected.

In an effort to minimize the trademark problems created by Chapter 383, Chapter 774 was enacted later in the legislative session. Chapter 774 mandates that the wine sold by the associations bear the brand name of the producing winery. It also requires that the association include its identity and a roster of its members with any advertising or solicitation materials it uses to promote the sale of wine.

B. Interference With Reciprocal Trade Agreements

Opponents of Chapter 383 are also concerned that the associations' plans to "target" consumers in other states via direct mail will compromise fragile trade agreements. The associations plan to use the customer lists of its member vintners for the direct-mail campaign. At the time Chapter 383 was enacted, California had reciprocal agreements with 12 states allowing direct mail sales of wine.

Understandably, many states are concerned about shipments of alcohol from out of state to private citizens within their borders, and twenty-four states ban direct shipments. Generally, these laws are loosely enforced, but three states have recently made such shipments felonies. Opponents of direct shipments are concerned that shipping directly to the consumer allows the producer to evade state

50. See Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665, 673 (1901) (holding that since "Elgin" is a city in Chicago, and therefore a geographical name, it could not be employed as a trademark); see also North Am. Aircoach Sys., Inc. v. North Am. Aviation, 231 F.2d 205, 210 (9th Cir. 1955), cert. denied, 351 U.S. 920 (1956) (noting that names indicating the place of manufacture are in the public domain and may be used in a trademark by manufacturers from that area). But see California Cooler v. Loretto Winery, 774 F.2d 1451, 1455 (9th Cir. 1985) (rejecting the contention that the geographical nature of the name "California Cooler" cooler provides a defense to trademark infringement on the grounds that it is a composite name and should therefore be considered as a whole).

51. See North Am. Aircoach Sys., Inc., 231 F.2d at 210-11 (holding that "North American" had become so associated with the Plaintiff in the mind of the public that it had acquired secondary meaning beyond its geographical reference and would therefore be afforded protection as a trademark).


53. Id. at 4185.

54. Id. at 4185-86.

55. See Taylor Interview, supra note 21.

56. Id.

57. See Ferguson, supra note 31, at 1-14 (explaining the reciprocal agreements between the states concerning direct-mail marketing).


59. Id.; see FLA. STAT. ANN. § 561.545 (West 1997) (prohibiting direct out of state shipments to Florida consumers); see also GA. CODE ANN. § 3-3-32 (1997) (outlawing similar shipments to Georgia consumers); see also KY. REV. STAT. ANN. § 244.165 (Banks-Baldwin 1997) (making such shipments a felony in Kentucky); California's Wineries Sour on Florida Law, TAMPA TRIB., May 31, 1997, at 2 (explaining the consternation of California winemakers with a new law making it a felony to directly ship alcohol to consumers in Florida).
excise taxes and county dry laws. Producers counter that the anti-shipping laws protect wholesalers who have a monopoly on in-state distribution. They argue that ultimately this law cheats consumers, who are forced to pay inflated prices for unique vintages.

Indeed, vintners are also concerned that allowing the associations to become retailers for sixty days out of the year will irritate California retailers and restauranteurs who are relied upon by the wineries as integral parts of the product delivery system. During the drafting stage of Chapter 383, the provisions limiting time periods and quantities sold were added to address these concerns, and retailers in California appear to be satisfied with the results.

III. LICENSING FOR CHARITABLE ARTS TRUSTS

Another non-profit group receiving the legislature’s alcohol licensing largess are charitable arts trusts. Chapter 20 authorizes the ABC to issue an on-sale general bona fide public eating place license to a non-profit charitable arts trust. The legislation also requires that the arts trust qualify for exemption from taxation under the Internal Revenue Code. While a general on-sale license only allows the sale of alcohol, this new special license for arts trusts also allows the trust to supply alcohol without charge. This provision will allow a trust to dispense alcohol at fund raising and other charitable events held on the property.

60. See Kim, supra note 58, at A4 (exploring arguments that direct shipping allows producers to evade taxes and dry laws as well as creating a risk of sales to minors); see also California’s Wineries Soured on Florida Law, supra note 59, at 2 (discussing the legislative thinking behind making shipments a felony in Florida).

61. Kim, supra note 58, at A4.

62. Id.

63. Taylor Interview, supra note 21.

64. CAL. BUS. & PROF. CODE § 24045.15 (enacted by Chapter 383); see Thompson Letter, supra note 28 (indicating changes to the bill); see also Letter from Fred Reno, President, The Henry Wine Group, to Jim McDermott, President, Wine & Spirits Wholesalers of California (May 21, 1997) (copy on file with the McGeorge Law Review) (indicating that the interests of wholesalers are protected).

65. See CAL. BUS. & PROF. CODE § 24045.16 (enacted by Chapter 20) (authorizing issuance of licenses for charitable arts trusts).

66. See id. § 24045.16 (enacted by Chapter 20) (defining an “arts trust” as an entity: (1) devoted to the arts and humanities; (2) operating two or more museums; and (3) one of the museums is located in Los Angeles County, on a site of at least 100 acres and within a facility of not less than 450,000 square feet); see SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 710, at 1 (May 13, 1997) (explaining the legislative intent of AB 710).

67. CAL. BUS. & PROF. CODE § 24045.16 (enacted by Chapter 20); see I.R.C.§ 501(c)(3) (1986) (exempting from taxation certain organizations operated exclusively for charitable, religious, educational, and other specified purposes).

68. SENATE FLOOR, ANALYSIS OF AB 710, at 2 (May 14, 1997).

69. Id. at 1.
This legislation has been narrowly drafted to apply only to the Getty Trust. The trust operates the J. Paul Getty Museum in Malibu and the Getty Center in Los Angeles.

IV. LICENSING FOR BAKERSFIELD COLLEGE STADIUM

Another narrowly drafted bill related to alcohol licensing was enacted this year. Chapter 90 authorizes the possession and use of alcoholic beverages during non-profit fundraising events, held at college-owned or operated stadiums with a capacity of over 18,900. The enactment only applies to events held at the Memorial Stadium on the Bakersfield College Campus.

Under existing law, it is a crime to possess, consume or sell an alcoholic beverage on the grounds of a public school or university. Chapter 90 is not unique in providing an exception to this rule, as several legislative exceptions exist.

In addition to the statutory restraints imposed upon the possession and sale of alcohol, the ABC also has the discretionary power to deny a license, where such

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70. ASSEMBLY FLOOR, ANALYSIS OF AB 710, at 1 (Apr. 9, 1997).

71. See Patricia Beach Smith, LA’s Huge New Getty Center: It’s a Masterpiece, SACRAMENTO BEE, June 19, 1997, at T1 (describing the Getty Center, which opened in December of 1997 at a cost of $800 million, as a site housing a vast collection of artworks, a research institute for the history of art and the humanities, several cafes and a restaurant).

72. CAL. BUS. & PROF. CODE § 25608 (amended by Chapter 90).

73. See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 572, at 1-2 (May 13, 1997) (expressing the legislative intent that the definition of “events” is not to include football games or athletic contests, but may include country western concerts); see also ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 572, at 1 (June 23, 1997) (expressing the intent that the bill not apply to athletic events).

74. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 572, at 1 (June 23, 1997).

75. See id.

76. See CAL. BUS. & PROF. CODE § 25608 (amended by Chapter 90) (making it a misdemeanor to possess, consume, sell, or use any alcoholic beverage in the grounds of a public school house).

77. See CAL. PENAL CODE § 172a (West 1988) (prohibiting sales of alcohol within 1/2 miles of a university); id. § 172.9 (West 1988) (defining a “university” as an “institution which has the authority to grant an academic graduate degree”).

78. See CAL. BUS. & PROF. CODE § 25608 (West 1997) (enumerating exceptions for: (a) alcohol used in connection with a course of instruction; (b) civic organizations leasing the property; (c) veteran's stadiums with a capacity over 12,000 people; (d) performing arts facilities; (e) sacramental wine; (f) community center events; (g) community college viticultural events; and (h) minor league baseball games); see also CAL. PENAL CODE § 172a-c (1988) (providing various exceptions to the prohibition against alcohol sales within 1/2 miles of a university); Scott Mem'l Baptist Church v. Department of Alcoholic Beverage Control, 260 Cal. App. 2d 100, 102, 66 Cal. Rptr. 878 (1968) (holding that the operation of the exception described in California Penal Code § 172h extends beyond the specific colleges named within the statute); Harris v. Alcoholic Beverage Control Appeals Bd., 201 Cal. App. 2d 567, 571-72, 20 Cal. Rptr. 227, 568-69 (1962) (discussing the scope of the public eating place exception offered by California Penal Code § 172(c)).
licensing would be contrary to public welfare or morals. This discretionary power of the Board remains intact under Chapter 90, because each event will still require a special temporary license from the department.

V. SALE OF ALCOHOL FROM GOLF CARTS

Chapter 21 provides that any license issued to a golf course facility or any license issued to a licensee operating a golf course facility, authorizes the facility or a licensee to sell alcoholic beverages from a golf cart. This chapter was enacted to repeal prior legislation that inadvertently applied only to the state's private golf courses. The 1996 enactment defined the authorized facilities as "golf clubs." This phrase has a specific meaning throughout the code, and a special license designation. Other courses, which do not fit the specific definition of "golf clubs," are able to obtain other types of liquor licenses, but these licenses were not included within the ambit of the 1996 legislation. Thus, 458 public courses were denied the privilege of selling alcohol from roving golf carts.

Prior to the 1996 legislation, many course owners used golf carts to dispense alcoholic drinks and were unaware that the practice was illegal. The ABC's policy
at that time was to allow sales from carts, if certain guidelines were followed. Courses abiding by the ABC guidelines began to complain to the ABC about non-complying competitors' carts. This, in turn, caused those courses to push for legislation clarifying the issue. The resulting prior legislation removed the ABC guidelines altogether and allowed carts to roam and to dispense whatever liquor the golfing facility was licensed to sell. Chapter 21 preserves these rights and expands this privilege to all California golf courses.

VI. CONCLUSION

Chapters 383 and 90 as enacted, allow Internal Revenue Code section 501(c)(5) and section 501(c)(3) non-profits to enjoy privileges available to other non-profit entities. Chapter 383 may be problematic, however, because it creates the potential for trademark violations. This potential may grow as the vintners of other appellations form associations to take advantage of the Chapter's provisions.

It is also interesting to note that Chapter 20 further erodes the law prohibiting alcohol sales in close proximity to school campuses. However, since each event requires a separate temporary license, the ABC retains the discretion to deny a license where it would be contrary to the public welfare or morals. Thus, the erosion of the rule and the problem of drinking on school campuses may be inhibited by the discretion of the ABC.

90. ASSEMBLY FLOOR, ANALYSIS OF AB 2278, at 1 (Apr. 10, 1996) (explaining the prior ABC guidelines as follows: (1) Non-alcoholic beverages and snacks must also be sold from the cart; (2) the carts must remain stationary for four hours, and only moved for re-stocking; (3) carts are limited to two sites per 18 holes; and (4) dispensing distilled spirits requires duplicate license at each site where spirits are dispensed); cf. CAL. BUS. & PROF. CODE § 23005 (West 1997) (defining “distilled spirits” as “alcoholic beverages obtained through the distillation of fermented agricultural products, to include all mixtures thereof”).

91. See Flynn, supra note 89, at B1 (detailing the complaints as well as the fact that enforcement of the law was difficult because in some cases investigators would have been required to play a $300 round of golf).

92. Id.

93. Id.

94. See supra note 9 and accompanying text (explaining license availability for other Internal Revenue Code non-profit corporations).

95. See supra notes 33-51 and accompanying text (outlining possible problems with trademark infringement).

96. See supra note 78 and accompanying text (illustrating legislative exceptions to the general rule).

97. See supra note 79 and accompanying text (elucidating the ABC's discretionary powers).
Public Access to Physicians' History and Background

Wendy Gable

Code Sections Affected
Business and Professions Code 2027 (new); §§ 801, 802, 803, 803.1, 803.2, 805 (amended).
AB 103 (Figueroa); 1997 STAT. Ch. 359

I. INTRODUCTION

Consumers face the threat of medical practitioners who are unlicensed or who provide substandard treatment.1 Doctors practicing beyond their credentials or without a license often make the news when the effects of their actions are detrimental to patients.2 According to Consumer Reports, five percent of physicians applying for a job with a particular Health Maintenance Organization (HMO) listed phony credentials.3 Moreover, twelve percent of all “specialists” advertising in a Connecticut phone book were not “board certified”4 for their listed specialization.5 While such statistics provide cause for concern within the medical community, it is unknown how many “doctors” are practicing medicine without a proper license.6

1. See Louise Kertesz, Horror Stories Aside, HMOs May be Curbing Malpractice, MOD. HEALTHCARE, Aug. 5, 1996, at 56 (quoting an executive of the Federation of Medical Boards as saying the nation’s health is being threatened by a “rapidly growing pool of unlicensed and unlicensable people”); see also Barry R. Furrow, Incentivizing Medical Practice: What (If Anything) Happens to Professionalism, 1 WIDENER L. SYMP. J. 1, 22 (1996) (citing a study that found approximately 1% of all hospital patients suffered a negligent medical injury, and that the intensive care patients studied suffered an average of 1.7 errors per day, per patient).
2. See Valerie Q. Carino, Tampa Police Accuse Man of Posing as Doctor, ST. PETERSBURG TIMES, June 6, 1997, at 8B (stating that a man who is not a doctor treated patients for months, dispensing drugs, writing prescriptions, and conducting medical exams); see also Home Surgery Patient Dies, SACRAMENTO BEE, June 11, 1997, at A6 (reporting that a woman died after undergoing a fat reduction surgery in her home by an unlicensed doctor); Pamela Martineau, Ex-Doctor Faces Patient-Molestation Trial, SACRAMENTO BEE, May 14, 1997, at B1 (noting that a former doctor is facing charges of practicing medicine without a license and of molesting two former patients).
4. See Medical Update; Unqualified Specialists, CONSUMER REP. ON HEALTH, Oct. 1993, at 114 (stating that a physician becomes “board certified” when he completes a residency and sometimes a fellowship, in his or her specialty and passing written and oral exams).
5. See id. (citing a study published in the New England Journal of Medicine showing that while many physicians claim to be experts in a specialty, not all of them have specialized training).
6. See Kertesz, supra note 1, at 56 (reporting that one medical industry executive says there is no hard data on how many unlicensed individuals are acting as doctors).
The California Medical Board estimates that approximately two percent of licensed physicians are under discipline or investigation at any one time. Armed with stories about phony doctors when public distrust of physicians is at an all time high, consumers are seeking more meaningful information about physicians to assist them when choosing a doctor. Accordingly, California enacted legislation similar to a law recently passed in Massachusetts so information about physicians is more readily available to consumers.

II. LEGAL BACKGROUND

A. Our Changing System of Health Care

The way in which health care is delivered in America has changed dramatically in the past two decades. We are moving from a system of solo-practitioners to a system of integrated delivery. Managed care systems such as HMOs and Preferred Provider Organizations (PPOs) are more prevalent because the public seeks more
efficient methods of health care delivery. As the method of delivering health care changes, so does the patient’s relationship with his or her physician.

Familiarity with a doctor based on prior experience is a major factor considered by individuals when choosing a medical practitioner. However, with the advent of health care reform and the availability of multiple health plan choices, consumers now consider the cost of service when choosing their medical provider. Information concerning a physician’s history, including his or her training, licensing, disciplinary actions and malpractice record, is important to consumers who wish to make informed decisions when choosing health care providers.

B. Services That Provide Information About Physicians To Consumers

1. Physician Credentials

In response to consumer demand for access to more complete information about health care practitioners, new services have been developed to provide this infor-

13. See Thomas William Malone & Deborah Haas Thaler, Managed Health Care: A Plaintiff’s Perspective, 32 TORT & INS. L.J. 123, 125 (1996) (stating that an estimated 65% of insured people receive their health care through some sort of managed care arrangement); see also Ila S. Rothschild et al., Recent Developments in Managed Care, 32 TORT & INS. L.J. 463, 463 (1997) (observing that managed care systems of health care delivery seek to transform the medical reimbursement system from one unconcerned with expense to one concerned with good results achieved while lowering expenses); id. at 465 (characterizing a “health maintenance organization” as one that acts as both insurer and provider of care, generally at a fixed cost to the consumer regardless of services rendered; a “preferred provider organization” as a panel of medical service providers which a consumer is encouraged to use in return for a reduced cost of service, though they may use their own physician at a higher cost if that physician is not on the panel).

14. See Flaherty, supra note 11, at 107 (opining that as patients are expected to have a greater role in deciding their course of medical treatment, their relationships with medical practitioners will change); see also David M. Joseph, The Role of Health Care ADR in Reducing Legal Fees; Alternative Dispute Resolution, 21 PHYSICIAN EXECUTIVE 26 (1995) (noting that HMOs have eroded the doctor-patient relationship by imposing limitation on treatments to keep costs down, thus decreasing patient rapport and loyalty); Kertesz, supra note 1, at 56 (charging that the deteriorating relationship between patients and doctors leads to malpractice suits by patients).

15. See Scott MacStravic, Patient Loyalty to Physicians, 14 J. HEALTH CARE MARKETING 53 (1995) (noting that achieving such familiarity is tough to accomplish when emotions run high and contact with the service provider is infrequent, as is the case with most doctor-patient relationships).

16. See Flaherty, supra note 11, at 114-15 (asserting that in light of reforms in health care delivery, people—not their employers—will choose their health insurance plans).

17. See MacStravic, supra note 15, at 53 (reporting that at least 35% of the patients responding to one study said they check prices before selecting a physician). Half the patients replying to one survey said they would not pay any additional out-of-pocket expense to keep their current doctor. Id.

18. See Marcia Myers, Online Doctor Profiles Likely to Go On, BALTIMORE SUN, Mar. 28, 1997, at B1 (reflecting the opinion of the executive director of the Maryland-Delaware-D.C. Press Association that the need for public access to information about doctors’ history is greater than ever because people no longer have the traditional family doctor).

19. See supra note 9 and accompanying text (documenting the demand by consumers for background information about physicians).
information.\textsuperscript{20} For example, the American Medical Association (AMA) provides on the Internet, information concerning credentials of doctors that practice in the United States.\textsuperscript{21} Information accessible on the Internet includes the medical school attended, where the doctor did his or her residency, and any areas of special practice in which the physician may engage.\textsuperscript{22}

2. Disciplinary Actions

Unfortunately, the information available from the AMA will not satisfy all of a consumer's needs because the AMA does not provide negative information about doctors.\textsuperscript{23} For the consumer who desires negative data about a particular doctor, a firm called Medi-Net will compile a history that includes information from the AMA database augmented with details of disciplinary actions taken by governmental agencies.\textsuperscript{24} However, the information provided by Medi-Net is also incomplete because it does not include details about whether a state’s medical board has filed disciplinary charges against a physician unless such charges have resulted in disciplinary action.\textsuperscript{25} Recently, the California Medical Board made available on the Internet, limited information about disciplinary actions taken against California doctors.\textsuperscript{26} Although this is a step toward providing easier access to information, consumers receive no greater access to information than what is available by calling a consumer hotline.\textsuperscript{27}

3. Malpractice Claims

Neither the information provided by the AMA, nor the information provided by Medi-Net, includes information on whether a doctor has been sued for mal-

\textsuperscript{20} See Greene, supra note 9, at 61 (highlighting resources for consumers who want to obtain information about physicians); see also Checking Up On Your Doctor, supra note 3, at 62 (reporting that the information age has spawned new services that allow one to research a physician’s credentials and history); Tom Philp, Now You Can Check Up On State’s Doctors Via Internet, SACRAMENTO BEE, May 2, 1997, at B3 (announcing that the California Medical Board has made some disciplinary information about doctors available to the public on the Internet).

\textsuperscript{21} See Checking Up On Your Doctor, supra note 3, at 62 (providing that access to this information is free at the following World Wide Web address: http://www.ama-assn.org).

\textsuperscript{22} Id.

\textsuperscript{23} See id. at 62 (cautioning that as consumers seek more negative information about physicians, such information becomes more difficult and expensive to procure).

\textsuperscript{24} See id. (detailing the information that can be obtained Medi-Net, which may be ordered by calling 888-275-6354); see also Greene, supra note 9 (describing the services provided by Medi-Net).

\textsuperscript{25} See Checking Up On Your Doctor, supra note 3, at 62 (reporting that the most thorough information collected about problem doctors is done by the government and is off-limits to the public).

\textsuperscript{26} See Philp, supra note 20, at B3 (announcing that consumers may research limited aspects of a doctor’s disciplinary history in California at the following World Wide Web address: http://www.medbd.ca.gov).

\textsuperscript{27} See id. (noting that the consumer hotline for the Medical Board of California may be reached by calling (916) 263-2382 from 8:00 a.m. to 5:00 p.m., Monday through Friday).
practice. While the Federal government collects facts about malpractice claims against doctors, concerns about the confidentiality of such information have prevented the information from being made public. Prior to the enactment of Chapter 359, Californians could learn from the California Medical Board Internet site whether a doctor had a malpractice judgment of over $30,000 awarded against him by a jury. However, the database did not tell consumers about settled malpractice cases or cases where less than $30,000 was awarded by a jury. Thus, consumer groups have been anxious to consolidate these scattered bits of information about a doctor’s education, license, disciplinary actions and malpractice claims so that details are available to consumers from a single source.

C. The Massachusetts Model

Massachusetts recently enacted landmark legislation that provides extremely comprehensive public access to information about physicians. Massachusetts law requires the State Medical Board to issue a physician “report card” which lists pertinent background data on doctors. The report card includes information on a physician’s educational background, criminal history, malpractice history, awards, and appointments to medical school faculties. Although Massachusetts law initially made the information available from the State Board of Registration through a toll-free phone line, access to the information is now available on the Internet.

The Massachusetts program receives tremendous public response. When the program first began, the State Board received 700 to 1,000 calls a day on the toll-

28. See Greene, supra note 9, at 61 (explaining that because malpractice information has the potential to be misconstrued, Medi-Net will not release malpractice information any time soon); see also Checking Up On Your Doctor, supra note 3, at 62 (explaining that the AMA is concerned that the public will misinterpret malpractice data and therefore the AMA will not release such data).

29. See Checking Up On Your Doctor, supra note 3, at 62 (noting that the federal government collects malpractice claims information in a closed database called the National Practitioner Data Bank).

30. See id. (commenting that efforts to open the National Practitioner Data Bank database to the public have been unsuccessful).

31. See Greene, supra note 9, at 61 (pointing out flaws and gaps in California’s previous disclosure laws).

32. Id.

33. See Greene, supra note 9, at 61 (reporting that Alana Bame, a consumer specialist, feels it would be better for consumers to get physician information from one accurate source).


35. See Checking Up On Your Doctor, supra note 3, at 62 (explaining that report cards are comprehensive profiles of physicians, including data such as credentials, specialties practiced, malpractice history).

36. See Alex Pham, Weld Expected to Sign Bill Making Doctors’ “Report Cards” Available, BOSTON GLOBE, July 26, 1996, at E2 (describing the information that will be included in the physician profiles).

37. See William Carlsen, Physicians’ Files Could Be Unsealed, S.F. CHRON., May 5, 1997, at A1 (documenting that the program began with a telephone hotline, and expanded to include Internet access in May, 1997).

38. See infra notes 39-43 and accompanying text (documenting the success of the Massachusetts program).
free phone line. Although the program presently receives approximately 200 calls a day on the toll-free phone line, the Internet Web site receives an enormous amount of "hits." Consequently, Massachusetts released 52,000 report cards on physicians between November 1996 and May 1997. The Director of the Massachusetts program has described the program as more than successful in providing information to consumers.

D. California Law

Chapter 359 is the California Legislature’s response to public desire for greater access to information about physicians. Chapter 359 requires reporting of more information about health care providers by insurers, physicians, and court clerks to State authorities. Furthermore it requires public dissemination of this information. Chapter 359 also includes a requirement that certain information be accessible to consumers over the Internet.

Specifically, Chapter 359 requires that any malpractice claim that is arbitrated or that results in a judgment in a court of law be reported to the appropriate medical board, regardless of the dollar amount awarded to the plaintiff. Any claim settled for $30,000 or more must also be reported. In turn, the Medical Board must

40. Id.
41. See Carlsen, supra note 37, at A1 (reporting that on the first day that the information was available on the Internet, the Web site recorded 35,000 hits). See Julie Chao, Internet “Hits” Miss Mark as Accurate User Counts, WALLST. J., Aug. 7, 1997, at G4 (stating that "hits" to a Web site are commonly understood as the number of times that Web site is accessed or viewed).
42. Carlsen, supra note 37, at A1.
43. See id. (noting that response to the program is “phenomenal”).
44. See ASSEMBLY FLOOR, ANALYSIS OF AB 103, at 2 (May 22, 1997) (reflecting the position of the Center for Public Interest Law that it is a high priority for information about physicians to be made available to patients so that they may avoid doctors who are “incompetent, impaired or dishonest”).
45. See infra notes 47-48 and accompanying text (detailing the malpractice information that must be reported to the appropriate medical boards).
46. See ASSEMBLY FLOOR, ANALYSIS OF AB 103, at 2 (May 22, 1997) (stating that Chapter 359 increases reporting and dissemination of information about health care providers).
47. CAL. BUS. & PROF. CODE § 2027 (enacted by Chapter 359).
48. Id. §§ 801(b), 802(b), 803(a)(b), 803(2) (amended by Chapter 359), See id. § 801(b) (amended by Chapter 359) (requiring that an insurer report details of any arbitration award to the appropriate medical board within 30 days of the service of such award on the parties); see also id. § 802(b) (amended by Chapter 359) (requiring physicians who do not carry malpractice insurance to self-report arbitration agreements within 30 days of the service of such agreement on the parties); id. § 803(a)(b) (amended by Chapter 359) (specifying that court clerks shall report the outcomes of certain types of court proceedings to the appropriate medical board); id. § 803(2) (amended by Chapter 359) (requiring reporting to the appropriate medical board by an employer of a physician any judgment or arbitration paid by that employer and not by the licensee himself or herself).
49. Id. §§ 801(b), 803.2 (amended by Chapter 359). See id. § 801(b) (amended by Chapter 359) (requiring insurers to report to the appropriate medical board any settlements in excess of $30,000 made on behalf of their insured doctors); see also id. § 803.2 (amended by Chapter 359) (requiring that any settlement over $30,000 entered against or paid by a doctor’s employer because of the actions of the doctor be reported to the appropriate board).
disclose this information to consumers upon request.\textsuperscript{50} The inquiring public previously enjoyed the right to receive details about the status of a physician's license and any enforcement actions taken against the physician.\textsuperscript{51} Now the public will also have a right to obtain summaries of hospital disciplinary actions that result in termination or revocation of hospital staff privileges.\textsuperscript{52} All of this information about physicians will be available from the California Medical Board's Internet Web site.\textsuperscript{53}

III. WHAT PHYSICIANS DON'T WANT THE PUBLIC TO KNOW AND WHY THE PUBLIC WANTS TO KNOW IT

A. Malpractice Data

Proponents of Chapter 359 believe that full disclosure of all malpractice settlements against physicians is necessary because over ninety-five percent of all malpractice suits reported to the National Practitioner Data Bank (NPDB) were settled out of court.\textsuperscript{54} Since only three percent of all malpractice cases go before a jury,\textsuperscript{55} ninety-seven percent are shielded from consumers when all settled claims are not disclosed.\textsuperscript{56} Although disclosure of all settlements would provide consumers with the information which they are demanding, physicians object to full disclosure of all settlements because such resolutions are not findings of fault; rather, settlements are attempts by insurers to close malpractice cases without the expense of protracted litigation.\textsuperscript{57}

Those opposing disclosure of malpractice claims say such claims are not a measure of competency because those physicians who practice high-risk specialties,
such as obstetrics or neurology, necessarily generate more claims. Furthermore, lines between bad outcomes and medical malpractice are becoming blurred. Proponents of Chapter 359 argue that patients file few nuisance suits because of the monetary limits placed on malpractice claims in California. Thus, proponents of Chapter 359 insist that malpractice claims are valid indicators of a physician’s performance.

An additional concern of health care professionals is that dissemination of information about malpractice claims is dangerous because it may be inaccurate, incomplete and misinterpreted. California already has a problem producing accurate information about adjudicated malpractice claims. The executive director of the California Medical Board recently estimated that as many as three-quarters of the malpractice judgments which should be recorded may be missing from public records. Blame has been placed with court clerks who fail to report malpractice judgments to the medical board, pursuant to California law. Since all judgments must now be reported, perhaps it will become routine for court clerks to file the required paperwork.

58. Shuit, supra note 7, at A1. See Jon Opelt, Can’t Blame Negligence Alone, HOUSTON CHRON., May 22, 1994, at 3 (allowing that high risk procedures and extreme medical conditions produce a greater number of bad outcomes).

59. See Opelt, supra note 58, at 3 (stating that the public has a changing view of bad medical practice and may be more prone to lawsuits when medical outcomes are different than expected).

60. See Joseph, supra note 14, at 26 (citing studies on the motive of plaintiffs who file malpractice claims show only 16% wanted compensation; 40% felt humiliated by their doctors; over 50% felt betrayed by their doctors; 20% felt court was the only way to find out what happened; and 19% wanted to punish the doctor); see also Ruth Gastel, Medical Malpractice, 1997 INS. INFO. INST. REP., available in LEXIS, Insure Library, lipts File, (attributing claims against doctors in part to loss of an intimate relationship between doctors and their patients, to the use of expert witnesses from outside the locale and to the fact that people have become more litigious).

61. See CAL. CIV. CODE § 3333.2 (West Supp. 1997) (providing that non-economic losses in medical malpractice cases are capped at $250,000 and are offset by collateral sources of compensation payments); see also Carlsen, supra note 37, at A1 (reporting the opinion of Chapter 359 supporters that by capping non-economic losses at $250,000, California eliminated all but the most serious malpractice cases).


63. See Bruce Bryant-Friedland, Doctor’s Don’t Like Such Public Records, FLA. TIMES UNION, Mar. 10, 1997, at B5 (reflecting the negative response of Florida Medical Association President Richard Bugby to plans to make such information available to consumers, calling the information “dangerous”); see also Michael Preston, Malpractice Claims Don’t Belong in Online Listings, THE CAP. (Annapolis, Md.), Feb. 23, 1997, at A11 (asserting that eight out of ten malpractice claims filed result in no payment because the claims are groundless).

64. See Shuit, supra note 7, at A1 (highlighting deficiencies in the California system, which was designed to bring information about malpractice judgments to the public).

65. Id.

66. See id. (reporting that failure to submit malpractice judgments to proper authorities is the fault of court clerks); see also CAL. BUS. & PROF. CODE § 5590 (West 1990 & Supp. 1997) (requiring court clerks to report judgments to the appropriate board within 10 days of the judgment ).
In other states where malpractice data has been made available to consumers,\textsuperscript{67} the information has been presented in a manner that satisfies concerns of physicians.\textsuperscript{68} For example, in Massachusetts information is presented in terms of whether a claim is above or below average payouts for similar claims.\textsuperscript{69} Physicians feel that when information is presented in this manner, rather than simply reported as a specific dollar amount, consumers are less likely to misconstrue it because it is being presented in a context that is meaningful.\textsuperscript{70} Furthermore, a disclaimer included with the malpractice data advises the public that malpractice settlements may be made for reasons other than a doctor’s competence.\textsuperscript{71} Chapter 359 includes similar provisions, allowing regulations to be drafted controlling the manner in which this information will be disseminated.\textsuperscript{72} Thus, the California Medical Board is likely to be more amenable to the release of malpractice data.\textsuperscript{73}

B. Peer Review Data

Another concern is that Chapter 359 will diminish the confidentiality of the peer review process.\textsuperscript{74} The peer review process has been the center of controversy before.\textsuperscript{75} During the mid-1980s, physicians were wary of participating in the review

\textsuperscript{67} See Carlsen, supra note 37, at A19 (discussing the Massachusetts program which makes malpractice data available to consumers); see also Kennedy, supra note 8, at A1 (detailing Florida’s report on physician malpractice history which is available to the public).

\textsuperscript{68} See Carlsen, supra note 37, at A19 (reporting that the highly popular Massachusetts program was drafted by physicians in that state); see also Kennedy, supra note 8, at A1 (confirming that the Florida Medical Association was less reluctant to make public doctor malpractice data after the state tempered the information to be released).

\textsuperscript{69} See Carlsen, supra note 37, at A1 (reporting that the manner in which malpractice information in Massachusetts will be released to the public was determined after a fight in the legislature, and was developed in conjunction with Massachusetts doctors).

\textsuperscript{70} See id. (stating that it is believed settlement data should be disseminated to the public in context because claims may be more frequent due to the higher risk associated with practicing within a certain specialty).

\textsuperscript{71} See MASS. GEN. LAWS ch.112, § 5(f) (1996) (requiring the following wording to be disseminated along with any settlement data released to the public: “Settlement of a claim may occur for a variety of reasons which do not necessarily reflect negatively on the professional competence or conduct of the physician. A payment in the settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred”).

\textsuperscript{72} See CAL. BUS. & PROF. CODE § 803.1(c) (amended by Chapter 359) (granting medical boards latitude to formulate disclaimers or explanatory statements in order to present malpractice information in context. Also, information deemed unreliable or unrelated to a physician’s professional practice may be kept from disclosure requirements).

\textsuperscript{73} See Carlsen, supra note 37, at A19 (presenting the position of the California Medical Association as agreeable to disclosure of malpractice data when the information is presented in context).

\textsuperscript{74} See ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF A'103, at 3-4 (May 6, 1997) (revealing that the California Society of Anesthesiologists feels that Chapter 359 will adversely impact the medical peer review process). Cf. Jeanne Darricades, Comment, Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986? 18 J. CONTEMP. L. 263, 270 (1990) (defining peer review as “the evaluation and monitoring of the qualifications and skills of physicians by their colleagues with whom they practice in a particular health care facility”).

\textsuperscript{75} See infra notes 76-77 and accompanying text (providing an overview of the problems associated with peer review in the mid-1980s).
of their compatriots because physicians who were sanctioned sued the peer review committee.\textsuperscript{76} Censured physicians faced the prospect of professional devastation when the sanctions imposed included restriction or curtailment of their privileges at a hospital.\textsuperscript{77} In order to encourage doctors to participate fully in evaluating their peers, the legislature enacted laws to provide qualified immunity from litigation.\textsuperscript{78}

In 1986, Congress enacted the Health Care Quality Information Act (HCQIA) to encourage the peer review process.\textsuperscript{79} California opted out of the HCQIA by enacting its own qualified immunity law.\textsuperscript{80} The California statute requires that a censured physician show that the peer review committee acted with malice in order for the committee members to be stripped of their immunity from liability.\textsuperscript{81} Thus, the California statute encourages peer review.\textsuperscript{82}

Peer review may be the most accurate indicator of a physician's performance because it is based on the observation of other professionals.\textsuperscript{83} The object is that a physician who is aware of a deficient pattern of care by another physician comes forward voluntarily with his or her observations, so that action can be taken to correct the substandard performance.\textsuperscript{84} Thus, allegations of substandard care by a

\textsuperscript{76} See Susan L. Homer, The Health Care Quality Improvement Act of 1986: Its History, Provisions, Applications and Implications, 16 AM. J. L. & MED. 453, 461 (1990) (itemizing the following legal theories used by physicians when faced with the loss of their livelihood and the embarrassment of peer censure: defamation, antitrust violation, interference with business advantage, refusal to deal, and violation of civil rights or due process).

\textsuperscript{77} See id. at 461 (explaining that a physician could no longer properly care for his patients because when a physician lost his hospital privileges, he could no longer admit or care for patients at that hospital, nor could he use that hospital's technology or equipment).

\textsuperscript{78} See Horner, supra note 76, at 462 (commenting that Congress passed the Health Care Quality Improvement Act so that peers who act in the reasonable belief that their action was in furtherance of quality health care when censuring fellow physicians would be granted a presumption of immunity from anti-trust actions).


\textsuperscript{80} See CAL. BUS. & PROF. Code § 809 (West 1990 & Supp. 1997) (stating the purpose of the HCQIA is to "encourage physicians to engage in effective professional peer review" but giving states the ability to "opt out" of some portions of the federal act); id. (expressing California's decision to opt out of the federal legislation and enact its own peer review procedures).

\textsuperscript{81} See id. (stating a peer review committee is immune to liability for its actions "if a member of the commission acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he or she acts in a reasonable belief that the action taken by him or her is warranted by the facts known to him or her after the reasonable effort to obtain the facts").

\textsuperscript{82} See Rosen, supra note 12, at 363 (asserting that California's statutes which provide limited immunity for peer review committee members encourage their participation in the process).

\textsuperscript{83} See Christopher S. Morter, Note, The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?, 74 VA. L. REV 1115, 1115 (1990) (citing proponents of peer review, who feel that medical practitioners are the only people qualified to judge the performance of other medical professionals because of the specialized nature of what they do); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 103, at 3 (May 22, 1997) (noting that the Center for Public Interest Law asserts that peer review is perhaps the most relevant data about a doctor's ability to safely practice medicine).

\textsuperscript{84} See Paul L. Scibetta, Note, Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review, 51 U. PITT. L. R. 1025, 1033 (1990) (indicating that there are often discovery battles for the information that is gleaned during peer review sessions).
Physician are made by those who have the specialized knowledge necessary to make a meaningful evaluation of their peers.  

Physicians oppose public access to peer review data for a variety of reasons. In addition to the fear of lawsuits from colleagues who are the subject of peer review, physicians are concerned that a breach of confidentiality might be a bonanza for potential plaintiffs who could discover documents from the peer review process to use in their own lawsuit against a physician. Because California law is vague with respect to what peer review materials are immune from discovery, plaintiffs receive a broad opportunity to access peer review information for such purposes. Perhaps in the future, more specific guidelines can be drafted about what information produced in the course of the peer review process is discoverable in order to allay the fears of those who oppose public access to this information.

IV. CONCLUSION

America's system of health care is evolving from solo practice—where doctors and patients know each other well—to managed care systems where patients may be treated by doctors with whom they have no familiarity. Patients want a way to verify the legitimacy and credentials of those who will treat them. Chapter 359 attempts to balance the demands of consumers who want more data about physicians with the concerns of physicians that such data will be misunderstood by

85. See Morter, supra note 83, at 1118 (noting that the use of lay people to judge the performance of medical professionals is undesirable because of the general public's ignorance of medical jargon and procedures).
86. See Patrick v. Burget, 486 U.S. 94, 105 (1988) (holding valid a lawsuit brought on an anti-trust theory by a plaintiff who was the subject of an adverse peer review proceeding); see also Jack R. Bierig, The Health Care Quality Improvement Act of 1986, 32 ST. LOUS. U. L.J. 977, 981 (1988) (asserting that reluctance to report in the peer review context is due to the threat of retaliatory litigation). Cf. supra note 76 and accompanying text (noting the legal theories upon which a censured physician might file suit against his peers).
87. See Morter, supra note 83, at 1134 (noting that the potential of plaintiffs to discover peer review documents may chill physician candor during the peer review process).
88. Compare CAL. EVID. CODE § 1157 (West 1995) (granting privilege to "proceedings and records" of peer review committees, without providing further definition or clarification), with IDAHO CODE § 39-1392b (1987) (stating that what is explicitly privileged is "all written records of interviews, all reports, statements, minutes, memoranda, charts, and the contents thereof, and all physical materials relating to research, discipline or medical study of any in-hospital medical staff committees or medical society").
89. See Morter, supra note 83, at 1134-38 (exposing concerns of physicians that courts will be left to decide what constitutes "proceedings and records" for purposes of discovery of peer review proceedings where evidence laws are vague in defining these terms).
90. See supra notes 10-15 and accompanying text (providing a brief overview of how America's health care system has changed in the past 20 years).
91. See supra notes 16-29 and accompanying text (reviewing alternative methods available to people who want to check on the background of a prospective medical provider).
lay persons. If response to a similar law recently passed in Massachusetts is any indicator, Chapter 359 will enjoy a positive response from California citizens.

92. See supra notes 40-77 and accompanying text (discussing California’s law that requires the release of more information about physicians to the public, and the apprehension of physicians in light of the dissemination of this data).
The Sport of Kings Gambles on California Breeding Incentives

Cassandra Ferrannini

Code Sections Affected

- Business and Professions Code § 19568 (amended).
- SB 26 (Maddy); 1997 STAT. Ch. 65
- Business and Professions Code §§ 19605.7, 19614.4, 19617, 19617.2 (amended).
- SB 20 (Maddy); 1997 STAT. Ch. 2
- Business and Professions Code § 19533.5 (amended).
- SB 127 (Ayala); 1997 STAT. Ch. 108

California's forty billion dollar horse racing industry is in decline due to a lack of attendance at racetracks and a lack of interest from younger gamblers. Additionally, racing aficionados have complained that many California races have a "short field," and tracks have been forced to run fewer weekday races due to a lack of competitive horses. Because racing fans prefer to bet on races with a larger field, this decline translates into lower purses, a reduction in breeding, and a threat to an industry that provides California with 52,000 jobs. Since 1986, the number of thoroughbred breeders in California has dropped by half, and only one California stallion in 1995 ranked within the top 75% of racehorses in national earnings. While other states facing a similar dilemma have resorted to an expansion of

1. See ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 141, at 2 (July 14, 1997) (describing the situation oxymoronically as a period of "stagnant growth"); see also Mary Lynne Vellinga, Horse Racing Bets on Legislature to Reverse its Fortunes, SACRAMENTO BEE, June 22, 1997, at A1 (exploring 1997 legislation proposed in an attempt to bolster the industry); see Carlos Alcalá, Horse Racers Try to Harness New Audience, SACRAMENTO BEE, July 2, 1997, at B1 (offering that national attendance at harness racing events is down from 28 million in 1975 to 9 million in 1996).
2. See Telephone Interview with John Reagan, Senior Management Auditor, California Horse Racing Board (Jan. 6, 1998) (notes on file with the McGeorge Law Review) (defining a "Short Field" as "a race in which the number of horses running is significantly less than the average, which is eight horses per race"). The negative consequence of a short field is that the public has fewer opportunities to make combination bets, such as exactas and quinteas. Id. Additionally, with a short field, there is more likely to be a stand out favorite horse, and the odds on all of the horses are generally lower, thereby lowering the potential payoff for bettors. Id.
3. See Jay Richards, Nevada Singled Out by California, LAS VEGAS REV. J., Jan. 19, 1997, at C16 (discussing the decline of California racing from the perspective of the Nevada racebooks).
5. York, supra note 4, at IB16; Bruckner, supra note 4, at C1.
gambling within their state, California has chosen to implement breeder and owner incentives. This year, Chapters 26 and 20 were enacted to strengthen provisions regarding breeding incentives contained in 1996 legislation and to promote horse breeding in the state. Chapter 108 allows mixed races consisting of appaloosas and paint horses, which creates opportunities that otherwise might not exist for these horses to race within the state.

I. BREEDING INCENTIVES

In 1959, the Legislature enacted the Horse Racing Law in order to allow pari-mutuel wagering on horse races, while promoting both the breeding of horses in California and the expansion of horse racing opportunities in the state. At the same time, the Legislature also authorized the California Horse Racing Board to supervise pari-mutuel horse racing within the state. The "pari-mutuel" method of wagering occurs when all bets on the outcome of a horse race, the "handle," are pooled. Usually, about 85% of the handle is paid to winning bettors, and the other 15% is distributed as license fees, purses, commission, breakage, and awards. "Purses" are the portion of the handle distributed to the first five finishing horses as prize money.

To encourage breeding in California, owners of either California-bred (Cal-bred) horses or their offspring receive an "owner's premium" if their horses win

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6. Compare Steven Braun, Iowa County Hits Jackpot with Casino Gambling: Government-Owned Facility is Boon to Taxpayers, But Will They Have to Cash in Their Chips?, L.A. TIMES, July 21, 1997, at A1 (describing Iowa's decision to allow racetracks to add slot machines to increase revenue), and Guy Coates, Senate Does an About-Face on Horse Track Slots, ASSOCIATED PRESS, June 3, 1997 (detailing Louisiana's plans to supplement purses with video poker and slot machines), with SENATE FLOOR, ANALYSIS OF SB 20, at 2 (Jan. 29, 1997) (explaining that the California-Bred Incentives Awards program is designed to improve the quality and value of California horses by making payments to breeders and owners based on racing performance), and ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 127, at 1 (June 30, 1997) (stating that the bill is intended to create more racing opportunities for Appaloosa's and paint horses).

7. SENATE FLOOR, ANALYSIS OF SB 20, at 2 (Jan. 29, 1997); SENATE FLOOR, ANALYSIS OF SB 26, at 1 (June 18, 1997).

8. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 127, at 1 (June 30, 1997).


10. See id. § 19401 (West 1997) (expressing the legislative intent of the Horse Racing Law).

11. See id. § 19420-19423 (West 1997) (granting the California Horse Racing Board jurisdiction and supervisory power over all horse racing meetings in the state, during which wagering is conducted).


13. See CAL. BUS. & PROF. CODE § 19411 (West 1997) (defining "pari-mutuel wagering" for the purposes of the California Horse Racing Law); see also Horsemen's Benevolent and Protective Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538, 1546, 6 Cal. Rptr. 2d 698, 701 (1992) (describing the pari-mutuel system of wagering) (certified for partial publication).

14. Horsemen's Benevolent & Protective Ass'n, 4 Cal. App. 4th at 1546, 6 Cal. Rptr. 2d at 701.

15. See CAL. BUS. & PROF. CODE § 19406(a) (West 1997) (defining a "California-bred horse" as "a foal conceived and dropped by a mare in California that remains in California until it is weaned").
races.\textsuperscript{16} As an additional breeding incentive, existing law mandates that each track must provide for at least one "Cal Bred Race"\textsuperscript{17} each racing day.\textsuperscript{18} However, if there is insufficient competition among Cal-bred horses on any one day, the race may be canceled.\textsuperscript{19} In 1996, Chapter 393\textsuperscript{20} sought to increase breeding incentives by revising the distribution of owner’s premiums, and encouraging racing associations to provide more purse money for Cal-bred races.\textsuperscript{21} This year, Chapter 2 corrects deficiencies in the provisions of last year’s legislation.\textsuperscript{22}

A. Chapter 2—Breeding Incentives and Fund Distribution

When the prior law was enacted in 1996, it contained several ambiguities.\textsuperscript{23} Chapter 2 was enacted in 1997 to remedy these errors related to both the distribution of owners premiums for Cal-bred Races, and to the redistribution of funds remaining in the Cal-bred race account at the end of the year.\textsuperscript{24} It also makes technical changes designed to conform distribution of satellite wagering funds from the Northern Zone to those from the Southern Zone.\textsuperscript{25}

The 1996 legislation required that a percentage of the total advertised purse for an open race be distributed as owner’s premiums, should a Cal-bred thoroughbred stallion finish first.\textsuperscript{26} Under existing law, if the winning horse was conceived by a

\textsuperscript{16} See Senate Floor, Analysis of SB 1373, at 2 (July 9, 1996) (discussing the full import of the provisions of Chapter 373).

\textsuperscript{17} See Cal. Bus. & Prof. Code § 19568(a) (amended by Chapter 26) (defining a Cal-bred race as a race limited to California-bred horses).

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} 1996 Cal. Legis. Serv. ch. 393, sec. 1-12, at 2143-53 (West) (amending Cal. Bus. & Prof CODE §§ 19568, 19602, 19605.7, 19605.71, 19614.4, 19616, 19617.8, 19617.2; and enacting Cal. Bus. & Prof. Code §19617.3).

\textsuperscript{21} See 1996 Cal. Legis. Serv. ch. 393, sec. Digest, at 2143 (West) (amending Cal. Bus. & Prof. CODE §§ 19568, 19602, 19605.7, 19605.71, 19614.4, 19616, 19617.8, 19617.2; and enacting Cal. Bus. & Prof. Code § 19617.3) (enumerating the effects of Chapter 393); see also Senate Floor, Analysis of SB 1373, at 4-5, (July 15, 1996) (expressing legislative intent that SB 1373 encourage breeding in California by, among other things, simplifying owner premium distribution scheme and diverting purse monies to Cal-bred races).

\textsuperscript{22} See Senate Committee on Governmental Organization, Committee Analysis of SB 20, at 2 (Jan. 27, 1997) (explaining that SB 20 is intended to clean up ambiguities created by the passage of Chapter 393 in 1996).

\textsuperscript{23} Id.

\textsuperscript{24} See id. at 1 (enumerating the effects of Chapter 2); see also Cal. Bus. & Prof. Code § 19614.4 (amended by Chapter 2) (discussing the distribution of owner’s premiums for Cal-bred horses).

\textsuperscript{25} See Cal. Bus. & Prof. Code § 19530.5 (West 1997) (defining the counties that comprise the Southern, Central and Northern Zones for the purposes of the Horseracing Act); Senate Committee on Governmental Organization, Committee Analysis of SB 20, at 2 (Jan. 28, 1997).

registered eligible thoroughbred stallion, a premium of 20% is to be paid. If the horse was not conceived by a registered eligible thoroughbred stallion, the premium is only 10%. The language of the prior law, mistakenly distributed a percentage of the total purse. This resulted in the California Thoroughbred Breeders Association (CTBA) paying inflated owners premiums, forcing them to divert funds from other breeder award programs. In January of 1997, the CTBA had to pay out $141,550 in extra funds due to this error. Chapter 2 remedies this error by requiring that these premiums be funded as a percentage of the winner’s purse in a qualifying race, rather than the total purse of an open race. Chapter 2 also requires the official registering agency, the CTBA, to adopt a policy which will govern the premium distribution in the event that two Cal-bred horses finish first in a dead heat.

In addition to clarifying the drafting errors of Chapter 393, Chapter 2 also clarifies fund distribution for Cal-bred Races. Existing law requires that racing associations deposit certain percentages of their total handle with the official registering agency which, for thoroughbred racing, is the CTBA. After deducting administrative costs, the CTBA then distributes this money to; (1) breeding funds, from which breeder awards are paid; (2) stallion funds, from which stallion awards

27. See CAL. BUS. & PROF. CODE § 19617(d) (amended by Chapter 2) (defining a “registered eligible thoroughbred stallion” as one which was continuously present in the state from February 1 to June 15 of the calendar year in which the qualifying race was conducted).
28. Id. § 19614.4(a) (amended by Chapter 2).
29. Id. § 19614.4(b) (amended by Chapter 2).
30. See id. § 19614.4 (West 1997) (illustrating the language of the statute as previously codified); see also 1996 Cal. Legis. Serv. ch 393, sec. 8, at 2150 (West) (adding CAL. BUS. & PROF. CODE § 19614.4); see id. (mandating a 20% distribution of the total purse); see ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 20, at 1-2 (Feb 20, 1997) (describing the drafting error).
31. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 20, at 2 (Feb. 20, 1997).
32. Id.
33. See CAL. BUS. & PROF. CODE § 19617(b)(2) (amended by Chapter 2) (defining the meaning of “qualifying race” for the purposes of owner’s premium as “certain claiming races and all allowance races including maiden special weights”). Cf. id. § 19617(b)(4) (amended by Chapter 2) (defining “certain claiming races” as “those in the central and southern zone in which the total purse exceeds the daily average purse distributed in purses at that meeting during the prior year, or in the northern zone where the total purse exceeds 125% of the daily average for the prior year”).
34. Id. § 19614.4 (amended by Chapter 2).
35. See id. § 19627(e) (amended by Chapter 2) (defining the “official registering agency” as “the California Thoroughbred Breeders Association”).
36. Id. § 19614.4(c) (amended by Chapter 2).
37. See id. § 19617.2(b)(1) (amended by Chapter 2) (describing the distribution of funds from the Cal-bred race fund).
38. See id. § 19617(e) (amended by Chapter 2) (proclaiming the California Thoroughbred Breeders Association to be the official registering agency); see also Letter from Bion M. Gregory, Legislative Counsel of California, to California State Senator Ken Maddy, at 3 (Feb. 29, 1996) [hereinafter Gregory Letter] (copy on file with McGeorge Law Review) (indicating that the CTBA is only the official registering agency for thoroughbred racing).
are paid; and (3) for the purpose of promoting Cal-bred races. Chapter 2 requires that any funds remaining in the CTBA Cal-bred race fund at the end of the year must be redistributed to the breeder fund and the stallion fund.

Chapter 2 also makes technical changes regarding the distribution of the take-out at satellite wagering facilities. Satellite wagering occurs when bets are placed "off-track," at places other than where the actual race is being run. When this occurs, a live audiovisual signal of the race may be transmitted, via satellite, to a television screen in the off-track location so that off-track bettors may watch the race. Prior to the enactment of Chapter 2, the statutory provision concerning the distribution of funds to the official registering agency for Arabian horses in the northern zone, did not conform to the provision governing the southern zone. Chapter 2 makes the language of the two sections identical.

B. Chapter 65—Purse Supplements for Cal-bred Races

While the breeder awards benefit producers of horses, purses benefit both owners and trainers. Another way in which Chapter 393 benefited owners of Cal-bred Horses was to increase the amount of money available for purses in "Cal-bred Races." Of the 15 percent of the handle that is not paid to bettors, after deducting state license fees and other requirements, 45% of the balance is paid to purses. Additional funds are added to this amount from the exotic pari-mutuel pool. Like

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39. See CAL. BUS. & PROF. CODE § 19617.2 (amended by Chapter 2) (describing the distribution of these funds in detail).
40. Id. § 19617.2(b)(1) (amended by Chapter 2).
41. See Gregory Letter, supra note 38, at 2 (defining "takeout" as the fifteen percent of the handle which is not distributed to winning bettors); see also supra notes 12-14 and accompanying text (discussing the distribution of the handle).
42. SENATE FLOOR, ANALYSIS OF SB 20, at 1 (Feb. 26, 1997).
44. CAL. BUS. & PROF. CODE § 19608 (West 1997).
45. Compare id. § 19605.7(b) (West 1997) (instructing that the percentage in the northern zone "be distributed as breeders' awards to breeders of Arabians") (emphasis added), with id. § 19605.71(b) (West 1997) (instructing that in the southern zone the percentage is to "be deposited with the official registering agency pursuant to section 19617.8") (emphasis added). See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 20, at 1 (Jan. 28, 1997) (explaining that one purpose of Chapter 2 is to bring the provisions for the northern zone into conformance with those of the southern zone).
46. CAL. BUS. & PROF. CODE § 19605.7 (amended by Chapter 2).
47. Bruckner, supra note 4, at Cl.
48. See CAL. BUS. & PROF. CODE § 19568 (West 1997) (authorizing Cal-bred races and illustrating the purse distribution scheme in place prior to the passage of Chapter 65); see also 1996 Cal. Legis. Serv. ch. 393, sec. 1, at 2144 (West) (amending CAL. BUS. & PROF. CODE § 19568); see id. (highlighting the changes made to the existing purse distribution scheme in 1996); see id. SENATE FLOOR, ANALYSIS OF SB 1373, at 2 (July 15, 1996) (illustrating the 1996 legislative intent that 10% of all stakes purses was to go to payoff winning Cal-bred horses).
49. CAL. BUS. & PROF. CODE § 19611 (West 1997).
50. See id. § 19611.5 (West 1997) (authorizing racing associations to deduct 3% of their exotic pool and distribute 50% as purses). Cf. id.§ 19412(b) (West 1997) (defining the exotic parimutuel pool as the total wagers on the finishing positions of two or more horses in a particular race, such as quinella or exacta wagers). See
the owner awards, purse supplements for these restricted races are withdrawn from
the handle and distributed via the CTBA.\footnote{51} In 1995, more than $15 million in
purses were distributed to Cal-bred owners in restricted races.\footnote{52}

Prior law suggested that the racing associations set a goal of allocating 10% of
their total stakes\footnote{53} purses for the racing meeting, to be distributed as purses for the
Cal-bred races.\footnote{54} Prior law also required that the associations submit a report
detailing their efforts in this direction.\footnote{55}

As illustrated by the required report, this goal was not met by the racing
associations in the year since prior law was enacted.\footnote{56} Chapter 26 was enacted this
in 1997 to change the 10% distribution from a recommended action into a man-
datory requirement for the racing associations.\footnote{57}

II. MIXED BREED RACING

Chapters 2 and 26 seek to enhance the quality and quantity of race horses by
luring owners and breeders to the state with monetary incentives for owners of Cal-
bred horses that win races.\footnote{58} Chapter 108 seeks to solve the problem of short fields
by employing a more pragmatic approach—allowing racing associations to combine
Appaloosas\footnote{59} and Paint horses\footnote{60} in a mixed race.\footnote{61} Generally, existing law requires
that a racing license authorize only one type of horse racing.\footnote{62} However, the
California Horse Racing Board has discretionary power to authorize thoroughbreds,
Appaloosas and Arabians to enter quarter horse races if certain conditions are met
and consent of the horseman’s association is obtained.\footnote{63} Chapter 108 allows paint

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\begin{footnotes}
\footnote{51}{CAL. BUS. & PROF. CODE § 19617.2(b) (West 1997).}
\footnote{52}{ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 26, at 1 (June
16, 1997).}
\footnote{53}{See CAL. BUS. & PROF. CODE § 19408.3 (West 1997) (explaining that a stake race requires an entrance
fee as a prerequisite to participation); see also Horsemens’s Benevolent and Protective Ass’n v. Valley Racing Ass’n,
4 Cal. App. 4th 1538, 1546, 6 Cal. Rptr. 2d 698, 701 (1992) (distinguishing a stake race from an overnight race)
certified for partial publication).}
\footnote{54}{CAL. BUS. & PROF. CODE § 19568(b) (amended by Chapter 26); see 1996 Cal. Legis. Serv. ch. 393, sec.
1, at 2144 (West) (enacting CAL. BUS. & PROF. CODE § 19568(b)).}
\footnote{55}{CAL. BUS. & PROF. CODE § 19568(c) (amended by Chapter 26).}
\footnote{56}{SENATE FLOOR, ANALYSIS OF SB 26, at 2 (Apr. 17, 1997).}
\footnote{57}{CAL. BUS. & PROF. CODE § 19568 (amended by Chapter 26).}
\footnote{58}{See supra note 7 and accompanying text (identifying the purposes of Chapters 2 and 20).}
\footnote{59}{See CAL. BUS & PROF. CODE § 19416.5 (West 1997) (defining an “Appaloosa horse” as “one which
meets the requirements of and is registered by the Appaloosa Horse Club”).}
\footnote{60}{See id. § 19416.7 (West 1997) (defining a “paint horse” as “any horse meeting the requirements of and
registered by the American Paint Horse Association”).}
\footnote{61}{Id. §§ 19533.5 (amended by Chapter 108); see SENATE FLOOR, ANALYSIS OF SB 127, at 2 (July 3, 1997)
(indicating that the bill was designed to solve the problem of short fields for Appaloosas by allowing mixed races).}
\footnote{62}{CAL. BUS. & PROF. CODE § 19533(a) (West 1997).}
\footnote{63}{See id. § 19533.5 (amended by Chapter 108) (granting the board the discretion to authorize specified
mixed breed races notwithstanding the provisions of section 19533).}
\end{footnotes}
horses to race with both Appaloosas and Quarter horses in the same event.64 A Quarter horse race with seven or more entries may not be replaced by a race including Paint horses without the consent of the association representing the Quarter horsemen.65

Races involving paint horses exclusively are unrealistic because there are only a small number of this breed.66 Prior to Chapter 108, Californians who owned these horses were forced to look for races outside the state.67 Appaloosa owners faced a similar problem with the number of horses available to race and often Appaloosa races had to be canceled.68 Chapter 108 remedies these problems by allowing both breeds to enter mixed races.69 At the same time, by diversifying the varieties of breeds which may enter a single race, Chapter 108 may also help remedy California’s problem with short fields, because a larger number of horses will have the opportunity to participate in each race.70

III. CONCLUSION

The problems faced by the horse racing industry are not unique to California. Other states have used a variety of methods to lure breeders, owners, and fans to participate in their horseracing.71 Though measures were introduced that would expand gambling in the state, the California Legislature instead is focusing on the quality of the sport.72 By creating monetary incentives and opening up racing opportunities for under-populated breeds, the legislature may help to improve horseracing and return California to its reputation as national leader in the horseracing industry.

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64. Id. § 19533.5 (amended by Chapter 108).
65. Id.
66. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 127, at 1 (June 30, 1997).
67. SENATE FLOOR, ANALYSIS OF SB 127, at 2 (July 3, 1997).
68. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 127, at 1 (June 30, 1997).
69. CAL. BUS. & PROF. CODE § 19533.5 (amended by Chapter 108).
70. SENATE FLOOR, ANALYSIS OF SB 127, at 2 (July 3, 1997).
71. See supra note 6 and accompanying text (discussing some of the strategies other states are using to bolster their failing horseracing industries).
72. See Vellinga, supra note 1, at A1 (reporting on SB 141, a bill that would allow California tracks to accept Internet telephone wagers from outside the state); see also SENATE FLOOR, ANALYSIS OF SB 20, at 1 (Jan. 29, 1997) (indicating that the purpose of the legislation is to improve the quality and value of California bred horses).