

**Second Regular Session
Sixty-sixth General Assembly
STATE OF COLORADO**

INTRODUCED

LLS NO. 08-0834.01 Kate Meyer

SENATE BILL 08-138

SENATE SPONSORSHIP

Johnson, Bacon, Boyd, Keller, Kester, Penry, Tapia, Tochtrop, Williams, and Windels

HOUSE SPONSORSHIP

McGihon, Borodkin, Carroll M., Casso, Fischer, Frangas, Hodge, Kefalas, Labuda, Levy, McNulty, Peniston, Roberts, Solano, Soper, Todd, and White

Senate Committees

Health and Human Services

House Committees

A BILL FOR AN ACT

101 **CONCERNING FULL DISCLOSURE OF PHYSICIAN DESIGNATIONS MADE BY**
102 **HEALTH CARE ENTITIES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Creates the "Physician Designation Disclosure Act" to address the practice of health care entities (entities) making physician designations. Describes acceptable criteria for entities to use in making physician designations and requires a disclaimer to accompany any designation. Mandates that entities disclose all data and methodologies used in formulating designations if such information is requested by the designated physician or the commissioner of insurance. Entitles

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

physicians to challenge designations and describes the processes by which physicians may challenge designations.

Makes violations of the act unfair and deceptive trade practices under insurance laws. Authorizes private rights of action as an enforcement mechanism.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** Title 25, Colorado Revised Statutes, is amended BY
3 THE ADDITION OF A NEW ARTICLE to read:

4 **ARTICLE 38**

5 **Physician Designation and Disclosure**

6 **25-38-101. Short title.** THIS ARTICLE SHALL BE KNOWN AND MAY
7 BE CITED AS THE "PHYSICIAN DESIGNATION DISCLOSURE ACT".

8 **25-38-102. Legislative declaration.** (1) THE GENERAL
9 ASSEMBLY HEREBY FINDS AND DECLARES THAT:

10 (a) HEALTH CARE ENTITIES, INCLUDING HEALTH INSURANCE
11 CARRIERS, HAVE INSTITUTED OR ARE INSTITUTING QUANTITATIVE AND
12 QUALITATIVE DESIGNATIONS OF PHYSICIANS;

13 (b) PHYSICIAN DESIGNATIONS ARE DISCLOSED AND REPRESENTED
14 TO THE PUBLIC, HEALTH CARE CONSUMERS, PURCHASERS OF HEALTH CARE
15 INSURANCE PLANS, AND OTHERS AS PART OF MARKETING, SALES, AND
16 OTHER EFFORTS, AND SUCH DESIGNATIONS MAY BE USED BY CONSUMERS
17 OR PATIENTS IN SELECTING THE PHYSICIANS FROM WHOM THEY RECEIVE
18 CARE;

19 (c) DESIGNATIONS AND EVALUATIONS ARE BASED ON CLAIMS
20 DATA, PRACTICE CRITERIA OR GUIDELINES, AND OTHER CRITERIA, NOT ALL
21 OF WHICH ARE MADE KNOWN TO CONSUMERS OR TO THE PHYSICIANS
22 DESIGNATED;

23 (d) HEALTH INSURANCE CARRIERS AND OTHER ENTITIES DIFFER IN

1 THE EXTENT TO WHICH THEY PROVIDE ACCESS TO SOME OR ALL OF THE
2 DATA, CRITERIA, AND METHODOLOGIES;

3 (e) REGULATORY AGENCIES IN OTHER STATES HAVE TAKEN ACTION
4 AGAINST DESIGNATING CARRIERS, REQUIRING DISCLOSURE OF
5 DESIGNATION INFORMATION, AND SETTING CERTAIN CRITERIA BY WHICH
6 DESIGNATIONS MAY BE USED;

7 (f) FOR THE PROTECTION OF CONSUMERS AND PHYSICIANS AND TO
8 AVOID IMPROPER PROFILING OF PHYSICIANS, HEALTH CARE ENTITIES MUST
9 ENSURE THAT THEY ARE USING DESIGNATIONS THAT ARE FAIR AND
10 ACCURATE AND MUST ACCORD PHYSICIANS RIGHTS TO CHALLENGE AND
11 CORRECT ERRONEOUS DESIGNATIONS, DATA, AND METHODOLOGIES; AND

12 (g) FULL DISCLOSURE OF THE DATA AND METHODOLOGIES BY
13 WHICH PHYSICIANS ARE DESIGNATED WILL ENCOURAGE, TO THE FULLEST
14 EXTENT POSSIBLE, THE ACCURACY, FAIRNESS, AND USEFULNESS OF SUCH
15 DESIGNATIONS. DISCLOSURES WILL HELP KEEP PATIENTS FROM BEING
16 EXPOSED TO INACCURATE, MISLEADING, AND INCORRECT INFORMATION
17 ABOUT THE NATURE AND QUALITY OF THE CARE OF PHYSICIANS. THE
18 DISCLOSURE REQUIRED BY THIS ARTICLE WILL ENCOURAGE THE USE OF
19 GUIDELINES AND CRITERIA FROM WELL-RECOGNIZED PROFESSIONAL
20 SOCIETIES AND GROUPS USING EVIDENCE-BASED AND CONSENSUS
21 PRACTICE RECOMMENDATIONS. DISCLOSURE WILL ALLOW HEALTH CARE
22 CONSUMERS AND PHYSICIANS AN OPPORTUNITY TO BETTER UNDERSTAND
23 THE CRITERIA, BASIS, AND METHODS BY WHICH PHYSICIANS ARE
24 EVALUATED AND DISCLOSURE WILL FOSTER COMPETITION AMONG
25 CARRIERS TO IMPROVE THE WAY IN WHICH DESIGNATIONS ARE USED.
26 ACCORDINGLY, THE GENERAL ASSEMBLY FINDS THAT FULL DISCLOSURE OF
27 DESIGNATION DATA AND METHODOLOGIES, AND SETTING CERTAIN

1 MINIMUM STANDARDS FOR MAKING SUCH DESIGNATIONS, WILL HELP
2 IMPROVE THE QUALITY AND EFFICIENCY OF HEALTH CARE DELIVERED IN
3 COLORADO.

4 **25-38-103. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
5 CONTEXT OTHERWISE REQUIRES:

6 (1) "CARRIER" SHALL HAVE THE SAME MEANING AS SET FORTH IN
7 SECTION 10-16-102.

8 (2) "COMMISSIONER" SHALL HAVE THE SAME MEANING AS SET
9 FORTH IN SECTION 10-16-102.

10 (3) "DESIGNATION" MEANS AN AWARD, ASSIGNMENT,
11 CHARACTERIZATION, OR REPRESENTATION OF THE COST EFFICIENCY,
12 QUALITY, OR OTHER ASSESSMENT OF CARE OF ANY PHYSICIAN THAT IS
13 DISCLOSED OR INTENDED FOR DISCLOSURE TO THE PUBLIC OR PERSONS
14 ACTUALLY OR POTENTIALLY COVERED BY A HEALTH PLAN, BY USE OF A
15 GRADE, STAR, TIER, PANEL STATUS, APPROVAL STATUS, RATING, PROFILE,
16 OR ANY OTHER FORM OF DESIGNATION. "DESIGNATION" DOES NOT
17 INCLUDE:

18 (a) THE FAILURE TO INCLUDE A PHYSICIAN FROM A PROVIDER
19 DIRECTORY, NETWORK, OR SIMILAR LIST DUE TO AN ABSENCE OF NEED IN
20 THAT DIRECTORY, NETWORK, OR LIST OR DUE TO A LACK OF
21 QUALIFICATION SUCH AS EXPERIENCE, TRAINING, CERTIFICATION, OR
22 LICENSE; OR

23 (b) THE ESTIMATE OF A PHYSICIAN'S ROUTINE FEES OR COSTS.

24 (4) "HEALTH CARE ENTITY" MEANS ANY CARRIER OR OTHER
25 HEALTH CARE ENTITY THAT PROVIDES A PLAN OF HEALTH CARE COVERAGE
26 TO BENEFICIARIES UNDER A PLAN.

27 (5) "METHODOLOGY" MEANS THE METHOD BY WHICH A

1 DESIGNATION IS DETERMINED, INCLUDING, BUT NOT LIMITED TO, THE USE
2 OF ALGORITHMS OR STUDIES, EVALUATION OF DATA, APPLICATION OF
3 GUIDELINES OR PERFORMANCE MEASURES, AND PROGRAMMING.

4 (6) "PHYSICIAN" MEANS ANY PHYSICIAN LICENSED UNDER THE
5 "COLORADO MEDICAL PRACTICE ACT", ARTICLE 36 OF TITLE 12, C.R.S.

6 **25-38-104. Minimum requirements for designations -**
7 **disclaimer required.** (1) ANY DESIGNATION OF A PHYSICIAN SHALL
8 INCLUDE, AT A MINIMUM, THE FOLLOWING:

9 (a) A QUALITY OF CARE COMPONENT AND A CLEAR
10 REPRESENTATION OF THE WEIGHT GIVEN TO QUALITY OF CARE IN
11 COMPARISON WITH OTHER DESIGNATION FACTORS.

12 (b) STATISTICALLY VALID ANALYSES THAT INCLUDE APPROPRIATE
13 RISK ADJUSTMENTS TO ACCOUNT FOR THE PATIENT POPULATION, CASE MIX,
14 SEVERITY OF PATIENT CONDITION, CO-MORBIDITY, OUTLIER EVENTS,
15 PATIENT PREFERENCE, PATIENT NONCOMPLIANCE, AND OTHER STATISTICAL
16 ANOMALIES.

17 (c) A PERIOD OF ASSESSMENT OF DATA, PERTINENT TO THE
18 DESIGNATION, THAT SHALL BE UPDATED BY THE HEALTH CARE ENTITY AT
19 APPROPRIATE INTERVALS.

20 (d) IF CLAIMS DATA ARE USED IN THE DESIGNATION PROCESS, THE
21 HEALTH CARE ENTITY SHALL EMPLOY ACCURATE CLAIMS DATA
22 APPROPRIATELY ATTRIBUTED TO THE PHYSICIAN, AND, TO THE GREATEST
23 EXTENT POSSIBLE, THE HEALTH CARE ENTITY SHALL USE AGGREGATED
24 DATA TO SUPPLEMENT ITS OWN CLAIMS DATA.

25 (e) THE PHYSICIAN'S RESPONSIBILITY FOR HEALTH CARE DECISIONS
26 AND THE FINANCIAL CONSEQUENCES OF THOSE DECISIONS SHALL BE
27 FAIRLY AND ACCURATELY ATTRIBUTED TO THE PHYSICIAN.

1 (f) IF PRACTICE GUIDELINES OR PERFORMANCE MEASURES ARE
2 USED IN THE DESIGNATION, THEY SHALL BE:

3 (I) PROMULGATED OR ENDORSED BY NATIONALLY RECOGNIZED
4 HEALTH CARE ORGANIZATIONS THAT ESTABLISH OR PROMOTE GUIDELINES
5 AND PERFORMANCE MEASURES EMPHASIZING QUALITY OF HEALTH CARE,
6 INCLUDING BUT NOT LIMITED TO THE NATIONAL QUALITY FORUM, THE
7 AMBULATORY QUALITY ALLIANCE, THE COLORADO CLINICAL GUIDELINES
8 COLLABORATIVE, AND OTHER SUCH NATIONAL PHYSICIAN SPECIALTY
9 ORGANIZATIONS;

10 (II) STANDARDIZED ACROSS CARRIERS, WHENEVER POSSIBLE;

11 (III) EVIDENCE-BASED, WHENEVER POSSIBLE;

12 (IV) CONSENSUS-BASED, WHENEVER POSSIBLE; AND

13 (V) PERTINENT TO THE AREA OF PRACTICE, LOCATION, AND
14 CHARACTERISTICS OF THE PATIENT POPULATION OF THE PHYSICIAN BEING
15 DESIGNATED.

16 (2) (a) ANY DISCLOSURE OF A DESIGNATION TO A PHYSICIAN,
17 CONSUMER, PATIENT, POTENTIAL CONSUMER, OR THE PUBLIC SHALL BE
18 ACCOMPANIED BY A CONSPICUOUS DISCLAIMER WRITTEN IN BOLD-FACED
19 TYPE. THE DISCLAIMER SHALL STATE THAT DESIGNATIONS ARE INTENDED
20 ONLY AS A GUIDE TO CHOOSING A PHYSICIAN, THAT DESIGNATIONS SHOULD
21 NOT BE THE SOLE FACTOR IN SELECTING A PHYSICIAN, THAT DESIGNATIONS
22 HAVE A RISK OF ERROR, AND THAT CONSUMERS SHOULD DISCUSS
23 DESIGNATIONS WITH THEIR DOCTORS BEFORE MAKING A MEDICAL
24 DECISION.

25 (b) FAILURE TO INCLUDE THE DISCLAIMER MAKES THE USE OF THE
26 DESIGNATION A MISREPRESENTATION.

27 **25-38-105. Disclosure required upon request - information not**

1 **proprietary.** (1) UPON REQUEST BY OR ON BEHALF OF THE DESIGNATED
2 PHYSICIAN OR THE COMMISSIONER, A HEALTH CARE ENTITY SHALL
3 DISCLOSE TO THE REQUESTING PERSON THE COMPLETE METHODOLOGY
4 AND ALL DATA UPON WHICH THE DESIGNATION WAS BASED WITHIN THIRTY
5 DAYS OF RECEIVING THE REQUEST.

6 (2) ANY INFORMATION USED IN MAKING THE DESIGNATION SHALL
7 NOT BE PROPRIETARY UNDER THE "UNIFORM TRADE SECRETS ACT",
8 ARTICLE 74 OF TITLE 7, C.R.S., OR ANY OTHER STATUTE OR COMMON LAW.

9 **25-38-106. Notice of use or change of designation required -**
10 **appeal process.** (1) FORTY-FIVE DAYS BEFORE USING OR CHANGING A
11 DESIGNATION, A HEALTH CARE ENTITY SHALL PROVIDE THE PHYSICIAN
12 WITH WRITTEN NOTICE OF THE DESIGNATION OR CHANGE IN DESIGNATION.
13 THE WRITTEN NOTICE SHALL ALSO DESCRIBE THE PROCEDURES BY WHICH
14 THE PHYSICIAN MAY APPEAL THE DESIGNATION OR CHANGE IN
15 DESIGNATION.

16 (2) (a) A PHYSICIAN WISHING TO CHALLENGE THE DESIGNATION OR
17 CHANGE IN DESIGNATION SHALL REQUEST AN APPEAL FROM THE
18 DESIGNATING HEALTH CARE ENTITY NO LATER THAN THIRTY DAYS AFTER
19 THE DATE THE PHYSICIAN RECEIVED THE NOTICE DESCRIBED IN
20 SUBSECTION (1) OF THIS SECTION.

21 (b) AFTER RECEIVING A REQUEST FOR APPEAL FROM THE
22 DESIGNATED PHYSICIAN, THE HEALTH CARE ENTITY MAY USE INTERNAL
23 PROCEDURES TO REVIEW THE DESIGNATION THAT THE PHYSICIAN BELIEVES
24 IS INACCURATE. IF, AS A RESULT OF THE INTERNAL REVIEW, THE HEALTH
25 CARE ENTITY CHANGES THE DESIGNATION TO THE SATISFACTION OF THE
26 PHYSICIAN, THE PHYSICIAN MAY WITHDRAW THE APPEAL.

27 (3) (a) APPEALS OF DESIGNATIONS SHALL BE ADJUDICATED AFTER

1 A HEARING CONDUCTED BY AN INDEPENDENT REVIEWER OR REVIEWING
2 COMMITTEE, THE EXPENSES OF WHICH, IF ANY, SHALL BE BORNE BY THE
3 DESIGNATING HEALTH CARE ENTITY.

4 (b) IF A SINGLE REVIEWER PRESIDES OVER THE HEARING, THAT
5 REVIEWER SHALL BE AN INDEPENDENT THIRD-PARTY PHYSICIAN WITH THE
6 SAME OR SIMILAR PRACTICE AREA AS THE DESIGNATED PHYSICIAN. IF A
7 REVIEWING COMMITTEE HEARS THE DESIGNATION APPEAL, A MAJORITY OF
8 THE MEMBERS SHALL BE INDEPENDENT THIRD-PARTY PHYSICIANS WITH
9 THE SAME OR SIMILAR PRACTICE AREA AS THE DESIGNATED PHYSICIAN.

10 (c) NO DESIGNATION SHALL BE REVIEWED BY ANY PERSON WHO:

11 (I) IS AN EMPLOYEE OF THE HEALTH CARE ENTITY;

12 (II) HAS BEEN PREVIOUSLY INVOLVED IN THE APPEALING
13 PHYSICIAN'S DESIGNATION OR APPEAL; OR

14 (III) HAS ANY DIRECT FINANCIAL INTEREST IN THE OUTCOME OF
15 THE APPEAL.

16 (4) THE PHYSICIAN SHALL HAVE THE RIGHT TO:

17 (a) BE PRESENT AT THE HEARING;

18 (b) RECORD THE HEARING BY AUDIO, VIDEO, OR STENOGRAPHIC
19 MEANS;

20 (c) BE REPRESENTED BY COUNSEL OR OTHER ADVOCATE;

21 (d) RECEIVE AND REVIEW THE DATA AND METHODOLOGY UPON
22 WHICH THE DESIGNATION WAS MADE; AND

23 (e) PRESENT EVIDENCE TO SUPPLEMENT THE HEALTH CARE
24 ENTITY'S INFORMATION WITH THE PHYSICIAN'S OWN DATA AND
25 RATIONALE.

26 (5) AFTER THE HEARING, THE INDEPENDENT AUTHORITY SHALL
27 DETERMINE WHETHER THE DESIGNATION IS ACCURATE OR WHETHER THE

1 DESIGNATION SHOULD BE MODIFIED OR REVOKED. THE DETERMINATION
2 OF THE INDEPENDENT AUTHORITY SHALL BE FINAL AND BINDING ON THE
3 HEALTH CARE ENTITY AND CHALLENGING PHYSICIAN.

4 (6) UNLESS OTHERWISE AGREED TO BY ALL PARTIES TO THE
5 APPEAL, THE HEARING SHALL BE CONDUCTED AND THE DETERMINATION
6 MADE BY THE INDEPENDENT AUTHORITY NO LATER THAN FORTY-FIVE
7 DAYS AFTER THE PHYSICIAN REQUESTED THE APPEAL. HOWEVER, IF THE
8 PHYSICIAN REQUESTS FULL DISCLOSURE FROM THE HEALTH CARE ENTITY
9 PURSUANT TO SECTION 25-38-105 (1) SUBSEQUENT TO THE PHYSICIAN'S
10 APPEAL REQUEST, THE FORTY-FIVE DAY PERIOD WILL NOT BEGIN TO RUN
11 UNTIL FULL DISCLOSURE HAS BEEN RECEIVED BY THE PHYSICIAN.

12 (7) NO APPEALED DESIGNATION SHALL BE IMPLEMENTED OR USED
13 BY THE HEALTH CARE ENTITY UNTIL THE APPEAL PROCESS HAS
14 CONCLUDED AND THE INDEPENDENT AUTHORITY HAS DECIDED THAT SUCH
15 DESIGNATION IS ACCURATE.

16 **25-38-107. Enforcement.** (1) NO HEALTH CARE ENTITY SHALL
17 LIMIT, BY CONTRACT OR OTHER MEANS, THE RIGHT OF A PHYSICIAN TO
18 ENFORCE THIS ARTICLE.

19 (2) THIS ARTICLE MAY BE ENFORCED IN A CIVIL ACTION AND ANY
20 REMEDIES AT LAW AND IN EQUITY SHALL BE AVAILABLE.

21 (3) A VIOLATION OF THIS ARTICLE BY A HEALTH CARE ENTITY
22 SHALL CONSTITUTE AN UNFAIR OR DECEPTIVE ACT OR PRACTICE UNDER
23 PART 11 OF ARTICLE 3 OF TITLE 10, C.R.S.

24 **SECTION 2.** 10-3-1104 (1), Colorado Revised Statutes, is
25 amended BY THE ADDITION OF A NEW PARAGRAPH to read:

26 **10-3-1104. Unfair methods of competition and unfair or**
27 **deceptive acts or practices.** (1) The following are defined as unfair

1 methods of competition and unfair or deceptive acts or practices in the
2 business of insurance:

3 (ff) VIOLATION OF THE "PHYSICIAN DESIGNATION DISCLOSURE
4 ACT", ARTICLE 38 OF TITLE 25, C.R.S.

5 **SECTION 3. Effective date.** This act shall take effect at 12:01
6 a.m. on the day following the expiration of the ninety-day period after
7 final adjournment of the general assembly that is allowed for submitting
8 a referendum petition pursuant to article V, section 1 (3) of the state
9 constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008);
10 except that, if a referendum petition is filed against this act or an item,
11 section, or part of this act within such period, then the act, item, section,
12 or part, if approved by the people, shall take effect on the date of the
13 official declaration of the vote thereon by proclamation of the governor.