

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

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

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, DETERMINES, AND DECLARES THAT:**

10 **(a) HEALTH CARE ENTITIES HAVE INSTITUTED OR ARE INSTITUTING**
11 **QUANTITATIVE AND QUALITATIVE DESIGNATIONS OF PHYSICIANS;**

12 **(b) PHYSICIAN DESIGNATIONS ARE DISCLOSED AND REPRESENTED**
13 **TO CONSUMERS AND OTHERS AS PART OF MARKETING, SALES, AND OTHER**
14 **EFFORTS, AND SUCH DESIGNATIONS MAY BE USED BY CONSUMERS IN**
15 **SELECTING THE PHYSICIANS FROM WHOM THEY RECEIVE CARE;**

16 **(c) DESIGNATIONS ARE BASED ON CLAIMS DATA, PRACTICE**
17 **CRITERIA OR GUIDELINES, AND OTHER CRITERIA, NOT ALL OF WHICH ARE**
18 **MADE KNOWN TO CONSUMERS OR TO THE PHYSICIANS DESIGNATED;**

19 **(d) HEALTH CARE ENTITIES DIFFER IN THE EXTENT TO WHICH THEY**
20 **PROVIDE ACCESS TO SOME OR ALL OF THE DATA, CRITERIA, AND**
21 **METHODOLOGIES;**

22 **(e) REGULATORY AGENCIES IN OTHER STATES HAVE TAKEN ACTION**
23 **AGAINST HEALTH CARE ENTITIES TO REQUIRE DISCLOSURE OF DESIGNATION**

1 INFORMATION AND TO SET CERTAIN CRITERIA BY WHICH DESIGNATIONS
2 MAY BE USED;

3 (f) FOR THE PROTECTION OF CONSUMERS AND PHYSICIANS AND TO
4 AVOID IMPROPER PROFILING OF PHYSICIANS, HEALTH CARE ENTITIES MUST
5 ENSURE THAT THEY ARE USING DESIGNATIONS THAT ARE FAIR AND
6 ACCURATE AND MUST ACCORD PHYSICIANS THE RIGHT TO CHALLENGE AND
7 CORRECT ERRONEOUS DESIGNATIONS, DATA, AND METHODOLOGIES; AND

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

27 **25-38-103. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE

1 CONTEXT OTHERWISE REQUIRES:

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

4 (2) "COMMISSIONER" MEANS THE COMMISSIONER OF INSURANCE.

5 (3) "CONSUMER" INCLUDES MEMBERS OF THE PUBLIC, HEALTH
6 CARE CONSUMERS AND POTENTIAL HEALTH CARE CONSUMERS,
7 PURCHASERS OF HEALTH INSURANCE PLANS, OR PATIENTS.

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

16 (a) INFORMATION THAT IS DERIVED SOLELY FROM HEALTH PLAN
17 MEMBER FEEDBACK SUCH AS SATISFACTION RATINGS; OR

18 (b) INFORMATION FOR PROGRAMS DESIGNED TO ASSIST HEALTH
19 PLAN MEMBERS WITH ESTIMATING A PHYSICIAN'S ROUTINE FEES OR COSTS.

20 (5) "HEALTH CARE ENTITY" MEANS ANY CARRIER OR OTHER
21 ENTITY THAT PROVIDES A PLAN OF HEALTH CARE COVERAGE TO
22 BENEFICIARIES UNDER A PLAN.

23 (6) "METHODOLOGY" MEANS THE METHOD BY WHICH A
24 DESIGNATION IS DETERMINED, INCLUDING, BUT NOT LIMITED TO, THE USE
25 OF ALGORITHMS OR STUDIES, EVALUATION OF DATA, APPLICATION OF
26 GUIDELINES, OR PERFORMANCE MEASURES.

27 (7) "PHYSICIAN" MEANS ANY PHYSICIAN LICENSED UNDER THE

1 "COLORADO MEDICAL PRACTICE ACT", ARTICLE 36 OF TITLE 12, C.R.S.

2 **25-38-104. Minimum requirements for designations -**

3 **disclaimer required. (1) ANY DESIGNATION OF A PHYSICIAN SHALL**

4 INCLUDE, AT A MINIMUM, THE FOLLOWING:

5 (a) A QUALITY OF CARE COMPONENT AND A CLEAR

6 REPRESENTATION OF THE WEIGHT GIVEN TO QUALITY OF CARE IN

7 COMPARISON WITH OTHER DESIGNATION FACTORS;

8 (b) STATISTICALLY VALID ANALYSES THAT INCLUDE APPROPRIATE

9 RISK ADJUSTMENTS TO ACCOUNT FOR THE PATIENT POPULATION, CASE MIX,

10 SEVERITY OF PATIENT CONDITION, COMORBIDITY, OUTLIER EVENTS, OR

11 OTHER KNOWN STATISTICAL ANOMALIES;

12 (c) A PERIOD OF ASSESSMENT OF DATA, PERTINENT TO THE

13 DESIGNATION, THAT SHALL BE UPDATED BY THE HEALTH CARE ENTITY AT

14 APPROPRIATE INTERVALS;

15 (d) IF CLAIMS DATA ARE USED IN THE DESIGNATION PROCESS,

16 ACCURATE CLAIMS DATA APPROPRIATELY ATTRIBUTED TO THE PHYSICIAN.

17 WHEN REASONABLY AVAILABLE, THE HEALTH CARE ENTITY SHALL USE

18 AGGREGATED DATA TO SUPPLEMENT ITS OWN CLAIMS DATA.

19 (e) THE PHYSICIAN'S RESPONSIBILITY FOR HEALTH CARE DECISIONS

20 AND THE FINANCIAL CONSEQUENCES OF THOSE DECISIONS, WHICH SHALL

21 BE FAIRLY AND ACCURATELY ATTRIBUTED TO THE PHYSICIAN;

22 (f) IF PRACTICE GUIDELINES OR PERFORMANCE MEASURES ARE

23 USED IN THE DESIGNATION PROCESS:

24 (I) PRACTICE GUIDELINES OR PERFORMANCE MEASURES THAT ARE

25 PROMULGATED OR ENDORSED BY NATIONALLY RECOGNIZED HEALTH CARE

26 ORGANIZATIONS THAT ESTABLISH OR PROMOTE GUIDELINES AND

27 PERFORMANCE MEASURES EMPHASIZING QUALITY OF HEALTH CARE, SUCH

1 AS THE NATIONAL QUALITY FORUM OR THE AQA ALLIANCE, OR THEIR
2 SUCCESSORS, OR OTHER SUCH NATIONAL PHYSICIAN SPECIALTY
3 ORGANIZATIONS, AND THE COLORADO CLINICAL GUIDELINES
4 COLLABORATIVE OR ITS SUCCESSOR;

5 (II) PRACTICE GUIDELINES OR PERFORMANCE MEASURES THAT ARE:

6 (A) EVIDENCE-BASED, WHENEVER POSSIBLE;

7 (B) CONSENSUS-BASED, WHENEVER POSSIBLE; AND

8 (C) PERTINENT TO THE AREA OF PRACTICE, LOCATION, AND
9 CHARACTERISTICS OF THE PATIENT POPULATION OF THE PHYSICIAN BEING
10 DESIGNATED.

11 (2) (a) ANY DISCLOSURE OF A DESIGNATION TO A PHYSICIAN OR
12 CONSUMER SHALL BE ACCOMPANIED BY A CONSPICUOUS DISCLAIMER
13 WRITTEN IN BOLD-FACED TYPE. THE DISCLAIMER SHALL STATE THAT
14 DESIGNATIONS ARE INTENDED ONLY AS A GUIDE TO CHOOSING A
15 PHYSICIAN, THAT DESIGNATIONS SHOULD NOT BE THE SOLE FACTOR IN
16 SELECTING A PHYSICIAN, THAT DESIGNATIONS HAVE A RISK OF ERROR, AND
17 THAT CONSUMERS SHOULD DISCUSS DESIGNATIONS WITH THEIR
18 PHYSICIANS BEFORE MAKING A MEDICAL DECISION.

19 (b) FAILURE TO INCLUDE THE DISCLAIMER MAKES THE USE OF THE
20 DESIGNATION A VIOLATION OF THIS ARTICLE.

21 **25-38-105. Disclosure required upon request - information not**
22 **proprietary.** (1) UPON REQUEST BY OR ON BEHALF OF THE DESIGNATED
23 PHYSICIAN OR THE COMMISSIONER, A HEALTH CARE ENTITY SHALL
24 DISCLOSE TO THE REQUESTING PERSON A DESCRIPTION OF THE
25 METHODOLOGY UPON WHICH THE HEALTHCARE ENTITY'S DESIGNATION IS
26 BASED AND ALL DATA UPON WHICH THE DESIGNATION WAS BASED WITHIN
27 THIRTY DAYS OF RECEIVING THE REQUEST. THE DESCRIPTION SHALL BE

1 SUFFICIENTLY DETAILED TO ALLOW THE DESIGNATED PHYSICIAN OR
2 COMMISSIONER TO DETERMINE THE EFFECT OF THE METHODOLOGY ON THE
3 DATA BEING REVIEWED. THE DISCLOSURE OF THE DATA SHALL BE MADE
4 IN A MANNER THAT IS REASONABLY UNDERSTANDABLE AND ALLOWS THE
5 PHYSICIAN OR COMMISSIONER TO VERIFY THE DATA AGAINST HIS OR HER
6 RECORDS. WHERE LAW OR THE HEALTH CARE ENTITY'S CONTRACTUAL
7 OBLIGATIONS PREVENT DISCLOSURE OF ANY OF THE DATA REQUIRED TO BE
8 DISCLOSED BY THIS ARTICLE, THE HEALTH CARE ENTITY SHALL
9 NONETHELESS PROVIDE SUFFICIENT INFORMATION TO ALLOW THE
10 PHYSICIAN TO DETERMINE HOW THE WITHHELD DATA AFFECTED THE
11 PHYSICIAN'S DESIGNATION.

12 (2) AFTER THE DISCLOSURE OF THE DESCRIPTION OF THE
13 METHODOLOGY PROVIDED FOR IN SUBSECTION (1) OF THIS SECTION AND
14 UPON FURTHER REQUEST BY OR ON BEHALF OF THE DESIGNATED PHYSICIAN
15 OR THE COMMISSIONER, THE HEALTH CARE ENTITY SHALL PROVIDE THE
16 COMPLETE METHODOLOGY WITHIN FIFTEEN DAYS OF SUCH FURTHER
17 REQUEST.

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

21 **25-38-106. Notice of use or change of designation required -**
22 **appeal process.** (1) FORTY-FIVE DAYS BEFORE USING, CHANGING, OR
23 DECLINING TO AWARD A DESIGNATION IN AN EXISTING PROGRAM OF
24 DESIGNATION, A HEALTH CARE ENTITY SHALL PROVIDE THE PHYSICIAN
25 WITH WRITTEN NOTICE OF SUCH DESIGNATION DECISION. THE WRITTEN
26 NOTICE SHALL PROVIDE OR ALLOW ACCESS TO THE METHODOLOGY
27 DESCRIPTION REQUIRED IN SECTION 25-38-105 (1) AND ALL DATA UPON

1 WHICH THE DESIGNATION WAS BASED OR DECLINED. THE NOTICE SHALL
2 ALSO DESCRIBE THE PROCEDURE BY WHICH THE PHYSICIAN MAY REQUEST
3 AN APPEAL OF THE DESIGNATION DECISION.

4 (2) (a) ANY HEALTH CARE ENTITY PROVIDING DESIGNATIONS OF
5 PHYSICIANS SHALL ESTABLISH PROCEDURES FOR THE DESIGNATED
6 PHYSICIAN TO APPEAL THE DESIGNATION, INCLUDING A CHANGE IN
7 DESIGNATION OR A DECLINATION TO AWARD A DESIGNATION IN AN
8 EXISTING PROGRAM OF DESIGNATION. SUCH PROCEDURES, IN ADDITION TO
9 THE WRITTEN NOTICE PROVIDED FOR IN SUBSECTION (1) OF THIS SECTION,
10 SHALL PROVIDE FOR THE FOLLOWING:

11 (I) A REASONABLE METHOD BY WHICH THE DESIGNATED PHYSICIAN
12 SHALL PROVIDE NOTICE OF HIS OR HER DESIRE TO APPEAL;

13 (II) DISCLOSURE OF THE METHODOLOGY AND DATA UPON WHICH
14 THE HEALTH CARE ENTITY'S DECISION IS BASED;

15 (III) THE IDENTITY, QUALIFICATIONS, AND RELATIONSHIP TO THE
16 HEALTH CARE ENTITY OF THE PERSON OR PERSONS RESPONSIBLE FOR
17 HEARING THE APPEAL OF THE DESIGNATED PHYSICIAN;

18 (IV) AN OPPORTUNITY TO SUBMIT OR HAVE CONSIDERED
19 CORRECTED DATA RELEVANT TO THE DESIGNATION DECISION AND TO HAVE
20 CONSIDERED THE APPROPRIATENESS OF THE METHODOLOGY USED IN THE
21 DESIGNATION DECISION. SUCH OPPORTUNITY SHALL BE AFFORDED IN A
22 FACE-TO-FACE MEETING WITH THOSE RESPONSIBLE FOR THE APPEAL
23 DECISION AT A LOCATION REASONABLY CONVENIENT TO THE PHYSICIAN
24 OR BY TELECONFERENCE.

25 (V) THE RIGHT OF THE PHYSICIAN TO BE ASSISTED BY A
26 REPRESENTATIVE;

27 (VI) AN OPPORTUNITY, IF SO DESIRED, TO BE CONSIDERED AS PART

1 OF THE APPEAL, AN EXPLANATION OF THE DESIGNATION DECISION WHICH
2 IS THE SUBJECT OF THE APPEAL BY A PERSON OR PERSONS DEEMED BY THE
3 HEALTH CARE ENTITY AS RESPONSIBLE FOR THE DESIGNATION DECISION;

4 (VII) A WRITTEN DECISION REGARDING THE PHYSICIAN'S APPEAL
5 THAT STATES THE REASONS FOR UPHOLDING, MODIFYING, OR REJECTING
6 THE PHYSICIAN'S APPEAL.

7 (b) THE APPEAL SHALL BE MADE TO A PERSON OR PERSONS WITH
8 THE AUTHORITY GRANTED BY THE DESIGNATING HEALTH CARE ENTITY TO
9 UPHOLD, MODIFY, OR REJECT THE DESIGNATION DECISION OR TO REQUIRE
10 ADDITIONAL ACTION TO ENSURE THAT THE DESIGNATION IS FAIR,
11 REASONABLE, AND ACCURATE.

12 (c) THE APPEAL PROCESS SHALL BE COMPLETE WITHIN FORTY-FIVE
13 DAYS FROM THE DATE UPON WHICH THE DATA AND METHODOLOGY ARE
14 DISCLOSED UNLESS OTHERWISE AGREED TO BY THE PARTIES TO THE
15 APPEAL.

16 (3) NO CHANGE OR MODIFICATION OF A DESIGNATION THAT IS THE
17 SUBJECT OF AN APPEAL SHALL BE IMPLEMENTED OR USED BY THE HEALTH
18 CARE ENTITY UNTIL THE APPEAL IS FINAL.

19 (4) THE HEALTH CARE ENTITY SHALL UPDATE THE PHYSICIAN'S
20 DESIGNATION IN ITS PROVIDER DIRECTORY WITHIN FIFTEEN DAYS AFTER
21 THE APPEAL IS FINAL.

22 **25-38-107. Enforcement.** (1) NO HEALTH CARE ENTITY SHALL
23 LIMIT, BY CONTRACT OR OTHER MEANS, THE RIGHT OF A PHYSICIAN TO
24 ENFORCE THIS ARTICLE.

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

27 (3) A VIOLATION OF THIS ARTICLE BY A HEALTH CARE ENTITY

1 SHALL CONSTITUTE AN UNFAIR OR DECEPTIVE ACT OR PRACTICE UNDER
2 PART 11 OF ARTICLE 3 OF TITLE 10, C.R.S.

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

5 10-3-1104. Unfair methods of competition and unfair or
6 deceptive acts or practices. (1) The following are defined as unfair
7 methods of competition and unfair or deceptive acts or practices in the
8 business of insurance:

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

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

21 (2) The provisions of this act shall apply to physician designations
22 on or after the applicable effective date of this act.