9-3-2003

ARBITRATION. HEALTH CARE DISPUTES. INITIATIVE STATUTE.

SECRETARY OF STATE
KEVIN SHELLEY
STATE OF CALIFORNIA

September 3, 2003

TO: ALL REGISTRARS OF VOTERS/COUNTY CLERKS AND PROPONENTS
(03234)

FROM: Brianna Lierman
Brianna Lierman
Elections Analyst

SUBJECT: **INITIATIVE #998**

Pursuant to Elections Code section 336, we transmit herewith a copy of the Title and Summary prepared by the Attorney General on a proposed initiative measure entitled:

**ARBITRATION. HEALTH CARE DISPUTES.
INITIATIVE STATUTE.**

The proponent of the above-named measure is:

Charles Phillips, MD
2216 E. Los Altos Avenue
Fresno, CA 93710

(559) 322-1446

#998

ARBITRATION. HEALTH CARE DISPUTES. INITIATIVE STATUTE.

CIRCULATING AND FILING SCHEDULE

---

1. Minimum number of signatures required:..... 373,816
   California Constitution, Article II, Section 8(b)

2. Official Summary Date:..... Wednesday, 09/03/03

3. Petitions Sections:

   a. First day Proponent can circulate Sections for signatures (EC §336)..... Wednesday, 09/03/03

   b. Last day Proponent can circulate and file with the county. All sections are to be filed at the same time within each county (EC §336, 9030(a))..... Monday, 02/02/04*

   c. Last day for county to determine total number of signatures affixed to petitions and to transmit total to the Secretary of State (EC §9030(b)). ..... Friday, 02/13/04

      (If the Proponent files the petition with the county on a date prior to 02/02/04, the county has eight working days from the filing of the petition to determine the total number of signatures affixed to the petition and to transmit the total to the Secretary of State) (EC §9030(b)).

   d. Secretary of State determines whether the total number of signatures filed with all county clerks/registrars of voters meets the minimum number of required signatures, and notifies the counties..... Sunday, 02/22/04**

   e. Last day for county to determine total number of qualified voters who signed the petition, and to transmit certificate with a blank copy of the petition to the Secretary of State (EC §9030(d)(e)) ..... Monday, 04/05/04

      *Date adjusted for official deadline which falls on a Saturday (EC § 15).
      **Date varies based on the date of county receipt of verification.

INITIATIVE #998
Circulating and Filing Schedule continued:

(If the Secretary of State notifies the county to determine the number of qualified voters who signed the petition on a date other than 02/22/04, the last day is no later than the thirtieth day after the county's receipt of notification).(EC §9030(d)(e)).

f. If the signature count is more than 411,198 or less than 355,125 then the Secretary of State certifies the petition as qualified or failed, and notifies the counties. If the signature count is between 355,125 and 411,198 inclusive, then the Secretary of State notifies the counties using the random sampling technique to determine the validity of **all** signatures.....Thursday, 04/15/04*

g. Last day for county to determine actual number of all qualified voters who signed the petition, and to transmit certificate with a blank copy of the petition to the Secretary of State. (EC §9031(b)(c)).....Thursday, 05/27/04

(If the Secretary of State notifies the county to determine the number of qualified voters who have signed the petition on a date other than 04/15/04, the last day is no later than the thirtieth working day after the county's receipt of notification) (EC §9031(b)(c)).

h. Secretary of State certifies whether the petition has been signed by the number of qualified voters required to declare the petition sufficient (EC §9031(d); 9033).....Monday, 05/31/04*

*Date varies based on receipt of county certification.

IMPORTANT POINTS

- California law prohibits the use of signatures, names and addresses gathered on initiative petitions for any purpose other than to qualify the initiative measure for the ballot. This means that the petitions cannot be used to create or add to mailing lists or similar lists for any purpose, including fundraising or requests for support. Any such misuses constitutes a crime under California law. Elections Code section 18650; *Bilofsky v. Deukmejian* (1981) 124 Cal. App. 3d 825, 177 Cal. Rptr. 621; 63 Ops. Cal. Atty. Gen. 37 (1980).

- Please refer to Elections Code sections 100,101,104,9001, 9008, 9009, 9021, and 9022 for appropriate format and type consideration in printing, typing and otherwise preparing your initiative petition for circulation and signatures. Please send a copy of the petition after you have it printed. This copy is not for our review or approval, but to supplement our file.

- Your attention is directed to the campaign disclosure requirements of the **Political Reform Act of 1974**, Government Code section 81000 et seq.

- When writing or calling state or county elections officials, provide the official title of the initiative which was prepared by the Attorney General. Use of this title will assist elections officials in referencing the proper file.

- When a petition is presented to the county elections official for filing by someone other than the proponent, the required authorization shall include the name or names of the persons filing the petition.

- When filing the petition with the county elections official, please provide a blank petition for elections official use.

Enclosures

Date: September 3, 2003
File No.: SA2003RF0028

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

ARBITRATION. HEALTH CARE DISPUTES. INITIATIVE STATUTE. Prohibits health care service plans from requiring alternative dispute resolution as a condition of enrollment, and permits voluntary participation only after written disclosure signed by each enrollee. Requires Department of Managed Health Care to establish panel of arbitrators, and randomly assign arbitrator to each case. Permits judicial appeal of arbitrator's decisions. Requires plans to submit reports to Department regarding completed arbitrations, litigation, and settlements, and maintain records for five years. Unless otherwise confidential, Department must make the records public on Internet and available at Department. Provisions also apply to health and disability insurance contracts. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Increased administrative costs to DMHC of up to $210,000 (one-time) and $250,000 (ongoing). Unknown increase in state and local government costs to the extent that enrollees in various health insurance products use litigation, instead of binding arbitration to resolve disputes with their health insurers.

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 1
P.O. BOX 9442
SACRAMENTO, CA 94244-2550
Public: (916) 445-9555

Facsimile: (916) 324-8835
Phone: (916) 324-5490

September 3, 2003

FILED
in the office of the Secretary of State
of the State of California

SEP 0 3 2003

KEVIN SHELLEY, Secretary of State
By Brianna Herman
Deputy Secretary of State

Kevin Shelley
Secretary of State
1500 - 11th Street, 5th Floor
Sacramento, California 95814

RE: Initiative Title and Summary
SUBJECT: ARBITRATION. HEALTH CARE DISPUTES. INITIATIVE STATUTE.
FILE NO: SA2003RF0028

Dear Mr. Shelley:

Pursuant to the provisions of sections 9004 and 336 of the Elections Code, you are hereby notified that on this day we mailed our title and summary to the proponent of the above-identified proposed initiative.

Enclosed is a copy of our transmittal letter to the proponent, a copy of our title and summary, a declaration of service thereof, and a copy of the proposed measure.

According to information available in our records, the name and address of the proponent is as stated on the declaration of service.

Sincerely,

Tricia Knight

TRICIA KNIGHT
Initiative Coordinator

For BILL LOCKYER
Attorney General

TK
Enclosures

SA2003RF0028

Charles Phillips, MD
2216 E. Los Altos Avenue
Fresno, CA 93710
(559) 322-1446 - Home/Office
(559) 322-5307 Fax
(559) 262-6240 - Pager

July 9, 2003

Tricia Knight, Initiative Coordinator
Office of the Attorney General
1300 I Street
PO Box 994255
Sacramento, CA 94244-25550
(916) 324-5490
www.caag.state.ca.us

Dear Ms. Knight,

Enclosed please find the Initiative Measure I and my associates would like to be submitted directly to the voters - the Voluntary Health Plan Arbitration Act of 2004. We would like to request that a title and summary of the chief purpose and points of the proposed initiative measure be prepared. Also enclosed is the fee of $200. I will be the contact person as the chairman of the initiative drive. All of my contact numbers can be put on line as I have as a physician always had a published home phone number without restriction.

I am a Board Certified Emergency Physician (FACEP - Fellow of the American College of Emergency Physicians) with a special interest in safe prehospital system development. I am quite convinced that we have within the forcing of arbitration on HMO and PPO patients as they enroll in health plans a life threatening and life ending systems problem throughout California in need of rapid correction. The citizens of California are not willing to be viewed as "external customers" in some business model with profit motives built in.

This initiative has been prepared skillfully by Harvey Frey, MD, PhD. Esq. It is already available online at http://www.harp.org/og/arbitinit.htm. It has already impressed a focus group called the Kaiser Permanente Reform Committee. Interest is growing daily in seeing justice improved in this managed care area of medicine.

Sincerely,

Charles R Phillips MD

Charles Phillips, MD, FACEP
cphil45401@aol.com [ok to post]

SA2003RF0028

Initiative Measure to Be Submitted Directly to the Voters

VOLUNTARY HEALTH PLAN ARBITRATION ACT OF 2004

SECTION 1. The People of the State of California find as follows:

Many health care service plans (HMOs) will not sell coverage unless the client agrees in advance to mandatory binding arbitration. But, under current law, arbitration is much more unfair to enrollees than an action in a real court, if they have a claim against their HMO. The reasons are:

1.Enrollees are currently forced to sign away many of their Constitutional Due Process rights in order to get coverage.
Arbitrators don't have to apply or follow the law. They can make gross errors about the facts. Their decisions cannot be appealed even if they make obvious errors.

2.Arbitrators are more likely to be biased toward the HMO than a judge or a jury would be.
Many arbitrators depend on repeat business for a significant portion of their income. HMOs arbitrate much more frequently than plaintiffs, so can and do maintain dossiers on arbitrators. They know who has ruled against them, and can refuse to use them for future cases. This threat of being blackballed by the HMOs represents a significant conflict of interest for an arbitrator, and an incentive to benefit the HMO, in order to safeguard his own future income. A judge's or jury member's income can not be affected by his decision, as an arbitrator's can.

3.The procedures of arbitration are not as fair to enrollees as those of a court trial.
The enrollee is less able to get needed information from the HMO than in a trial. HMOs can drag out the proceedings to enrollee's detriment. A frequent arbitrator, inured to malpractice, is less likely to reflect community sensibilities to the same degree as a jury of citizens. Arbitration actually results in lower awards than trials. It is precisely this unfairness which is the reason that HMOs push so aggressively for arbitration.

4.Arbitration costs enrollees more than equivalent court trials. If an enrollee can't pay the higher costs, and the HMO won't, the enrollee can never get his case heard.
Under current law, enrollees must often advance the costs of arbitration

administration and arbitrators' compensation before their case can be heard. His or her share of the costs of a three arbitrator panel may be in the range of $10,000 to $20,000. The comparable cost to file a complaint in the California Superior Court is less than $200, plus jury fees and court reporter fees if the case goes to trial.

5.Currently, the law allows the enrollee's constitutional right to a trial to be signed away by employers to save themselves money. This should not be allowed.

6.Arbitration proceedings are more secret than trials, inhibiting regulatory oversight, and preventing other enrollees from learning about bad HMOs and doctors.
Since written arbitration decisions are generally less comprehensive than those of lawsuits, and since arbitrators are not required to follow the law, as judges are, the Department of Managed Health Care is not able to review arbitrated disputes for regulatory issues which may not have been addressed by the arbitrator.

7.Arbitration may not decrease conflict in the long run.
Decisions are not reported and are not binding in future cases, so the same issues may be arbitrated again and again in the absence of binding precedent. Injunctions, which might prevent repetitive malpractice, are unavailable to arbitrators as remedies. The lower awards typically given by arbitrators are less likely to discourage repetitive malpractice.

8.Judges gain personal advantage from arbitration, which may cause them to overlook its potential for injustice.
When salaried, their workload is eased by diverting cases out of the judicial system. They may look forward to a comfortable retirement, funded by acting as private arbitrators themselves. It is therefore to their financial benefit to insure a steady stream of cases to arbitration, in spite of the clearcut detriments to plaintiffs outlined above.

SECTION 2 [Arbitration must be voluntary]

(a) Health and Safety Code Section 1363.1 is amended to read as follows:

(a) Health care service plans must not require, as a condition of plan membership, that potential enrollees agree to binding arbitration or any other dispute resolution procedure which would require the enrollee to waive the right to a trial in a court of law.

(b) Any health care service plan that allows enrollees to voluntarily agree to pre-dispute binding arbitration, or to waive their right to a trial in a court of law, must provide, in clear and understandable language, a disclosure that meets all of the following conditions:
(1) It must clearly state that choosing arbitration is optional, and that full coverage will be provided even if the enrollee does not choose arbitration.

(2) It must clearly state whether the binding arbitration is used to settle claims of medical malpractice, coverage and/or utilization review disputes.

(3) It must be reciprocal, i.e.: it must apply to HMO claims against enrollees, including but not limited to subrogation, as well as to enrollee claims against the HMO.

(4) It must appear as a separate article in the agreement issued to the employer group or individual subscriber and must be prominently displayed on the enrollment form signed by each subscriber or enrollee.

(5) It must be expressed substantially in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure.

(c) The binding arbitration agreement must be individually signed by the individual enrollee, or in appropriate cases, by his parent, guardian, or conservator. The enrollee shall not be bound by the signature of a representative of the group contracting with a health care service plan, nor by an agent of an employer. The disclosure required by this section must be displayed immediately before the signature line provided for the individual enrollee.

(d) Post-dispute binding arbitration agreements must comply with the requirements of this Act, mutatis mutandis.

(b) Insurance Code Section 10127.14 is added to read as follows:
Section 10127.14.

All contracts for health or disability insurance must comply with the requirements of Health and Safety Code § 1363.1, relating to pre-dispute arbitration agreements, Health and Safety Code § 1373.20 relating to arbitration procedures, Health and Safety Code § 1373.21 relating to reporting, and Health and Safety Code § 1373.22.

SECTION 3 [Arbitration Procedures]

(a) Health and Safety Code Section 1373.19 is hereby repealed:

(b) Health and Safety Code Section 1373.20 is amended to read as follows:
Section 1373.20

(a) All disputes arbitrated more than thirty days after the Effective Date of this Act, between health care service plans and their enrollees shall be subject to the following rules.

(b) The Department of Managed Health Care must establish a panel of arbitrators acceptable to the Director, by thirty days after the Effective Date of this Act.

(c) When an arbitration is initiated, the health care service plan must inform the Department, which must assign, within 15 days, by a mechanical or electronic randomization procedure, one neutral arbitrator to hear the case.

(d) The Arbitrator may be challenged by the parties only for such cause as would be valid for disqualifying a judicial officer, as set forth in Section 170.1 of the Code of Civil Procedure. Peremptory challenges shall not be allowed.

(e) The health care service plan must be responsible for all arbitration expenses greater than those of a corresponding court proceeding.

(f) Pre-hearing discovery procedures must be made available to enrollees, as in court proceedings.

(g) Procedural safeguards must be provided, at least some subset of the

Rules of Civil Procedure, to be determined by the Director.

(h) While the arbitrator may relax procedural rules, he must apply substantive law.

(i) Judicial appeals from the arbitrator's decision must be available for abuse of discretion or legal or factual error, on the same grounds as from that of a court.

(j) At the completion of the arbitration, the arbitrator must provide a written decision, naming the parties and witnesses, outlining the evidence and law relied upon, including evidence proffered but not admitted, and describing any awards, and the rationale therefore.

(k) Every health plan contract providing for binding arbitration must provide that any breach of the contractual or statutory arbitration rules by the plan, or its missing any contractual arbitration time requirements by thirty days or more, shall constitute waiver of the plan's right to enforce arbitration.

(l) The hourly fee for an arbitrator assigned by the Department pursuant to this section shall be the current annual salary of a superior court judge divided by Two Thousand (2000) plus reasonable travel expenses. No additional fee or gift may be given to any arbitrator by any party.

SECTION 4 [Reporting of decisions and settlements]

Health and Safety Code Section 1373.21 is amended to read as follows:
Section 1373.21

(a) All health plans must provide to the Director of the Department of Managed Health Care, within 30 days of completion by decision or settlement, a complete report of all arbitrations and litigations with enrollees. These reports must indicate the names of all parties, the amount, other relevant terms, and the reasons for any award rendered, the name of the arbitrator or arbitrators, providers, health plan employees, and health facilities involved, as well as the complete written decision and a list of all evidence submitted to the arbitrator or judge, whether admitted by him or not.

(b) All documents relating to the arbitration or litigation, including but not limited to written decisions, deposition testimony, expert testimony, the record of the proceedings and all documents produced in discovery must be preserved by the plan for five years, and provided to the Director within thirty days of his written demand within that time.

(c) The Director or the Department of Managed Health Care must not make public any enrollee or patient-identified medical information without the written consent of the enrollee or patient, except as mandated by law.

(d) Unless confidentiality is required by law, court and arbitration records are presumed to be open.

(e) Any party may seek a court order to seal the records obtained by DMHC, subject to the qualification of 2001 California Rules of Court 243.1, i.e.: if the court expressly finds that:
(1) There exists an overriding interest that overcomes the right of public access;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(f) The Department may disclose the identity of physicians involved in actions against plans, under the same conditions the Medical Board would apply, as required by Business and Professions Code §803.1.

(g) Subject to sections (c),(d),(e),and (f) above, the Director must make public, in the Department's reading room and on the Internet, all records, including discovery materials used or submitted as a basis for adjudication, relating to arbitrations, litigations or settlements.

(h) These records may be used in compiling the "report cards" required by Health and Safety Code §1368.02(c)(3)(B).

SECTION 5 [Miscellaneous]

Health and Safety Code Section 1373.22 is added to read as follows:
(a) Interpretation and Precedence "This Act" consists of Health and Safety Code sections 1363.1, 1373.20, 1373.21 and 1373.22, and Insurance Code Section 10127.14.
This Act shall be liberally construed and applied to promote its underlying purpose, which is to preserve the access of HMO enrollees to the courts. The provisions of this Act shall take precedence over any statute, regulation or decision in Common Law that may conflict with or limit the most expansive interpretation of these provisions for the protection of every person.

(b) Amendment No provision of this Act may be amended by the Legislature except to further the purpose of that provision by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electorate. No amendment by the Legislature shall be deemed to further the purposes of this Act unless it furthers the purpose of the specific provision of this Act that is being amended.

(c) Effective Date The provisions of this Act shall become effective upon passage of the Act and shall apply to all acts or practices performed or contracts entered into from that date forward.

(d) Legal Challenges It is the will of the People of California that any legal challenge to the validity of any provision of this Act shall be acted upon by the Courts on an expedited basis and any fees or costs incurred by the taxpayers in connection with the defense of the Act shall be promptly repaid to the taxpayers by any person challenging the Act.

(e) Severability If any provision of this Act or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision or application of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable. It is the will of the People of California that any invalid section, subdivision, paragraph, sentence, clause, phrase or word shall be severed from the remainder of the Act to preserve its remaining provisions.