



ISSUE BRIEF:

Nurse Practitioner Independent Practice Provider Attestation

In response to significant changes in law related to Nurse Practitioner practice, CAFP asked Scott Kessenick, of the law firm of Kessenick Gamma LLP, to prepare a letter identifying issues and actions for family physicians to consider when providing a “Nurse Practitioner Independent Practice Provider Attestation” (Attestation). This relates to recent legislation, AB 890 (Nurse practitioners: scope of practice: practice without standardized procedures, Wood, 2020), which created two new categories of nurse practitioners commonly referred to as “103 NPs” and “104 NPs.”

The information provided describes the new law; the Attestation certification process; some of the legal risks family physicians should consider when making an Attestation; and actions physicians might take to lower those risks.

Please note that the legal opinions and recommendations in this document are intended to be illustrative of general guidance and are not applicable to any specific situation, claim, or facts. If any CAFP member or physician has questions or concerns about their particular situation, they should consult with legal counsel of their choosing and should not rely on this letter as legal advice.

I. California’s Two New Categories of Nurse Practitioners Are Granted Widening Scopes of Practice and Increasing Independence

Recent legislation, AB 890, created two new categories of nurse practitioners commonly referred to as “103 NPs” and “104 NPs.” Once certified, a 103 NP can perform a new range of functions without standardized procedures, but only in certain group settings having at least one physician or surgeon.¹ These functions include establishing diagnoses and prescribing controlled substances in accordance with the NP’s “education and training.”² After three years, a 103 NP can be certified as a 104 NP to perform these functions independently, outside a group setting, and without standardized procedures or physician supervision.³ Because the legislation is relatively new, and three years must pass before any 104 NP certifications are granted, this letter focuses on the current 103 NP certification process.

II. The 103 NP Certification Relies, for Now, on Attestations by Physicians Confirming Completion of the NP’s Transition to Practice

A nurse practitioner (“NP”) must meet certain qualifications to become a 103 NP. Primarily, the NP must complete a “transition to practice” of at least three full-time years (or 4600 hours) of “clinical practice experience and mentorship.”⁴ The transition to

¹ Cal. Bus. & Prof. Code § 2837.103.

² *Id.*

³ *Id.* § 2837.104.

⁴ *Id.* § 2837.103; 16 CCR § 1482.3.

practice must consist of “direct patient care” in the same “Practice Category” in which the NP is nationally certified and seeks 103 NP certification.⁵

Under the regulations, the NP proves transition to practice to the Board of Registered Nursing (the “Nursing Board”) through an “Attestation” by either: a physician or surgeon; a 103 NP; or a 104 NP.⁶ The “Attestor” must specialize in the same Practice Category in which the NP seeks 103 NP certification.⁷ So, for example, if the nurse’s national NP certification is in pediatrics, then the transition to practice must be in pediatric care and the Attestor must also specialize in pediatrics.

For now, even though other professionals can be Attestors, physicians are needed to provide Attestations to certify the first wave of 103 NPs. Then, existing 103 NPs may provide Attestations to certify new 103 NPs.

III. The Attestor May Not Have a Financial or Familial Relationship with the NP

Under the regulations, an Attestor may not have a “familial” or “financial relationship” with the applicant.⁸ The Nursing Board explains, “[h]aving the attestation made by a person who is not an immediate family member nor has a financial interest in the applicant’s receiving a 103 NP certification is necessary because professional ethics and objectivity need to be maintained.”⁹

The definition of the term “financial relationship,” under the regulations, is the same as the definition of “financial interest” in California’s law against self-referrals (“Self-Referral Statute”), which similar to the federal Stark law, prohibits physicians from referring patients to settings in which the physician has a financial interest.¹⁰ This definition provides, in relevant part, that:

A “financial interest” **includes, but is not limited to, any type of ownership interest**, debt, loan, lease, **compensation**, remuneration, discount, rebate, refund, dividend, distribution, subsidy, or other form of direct or indirect payment, whether in money or otherwise, between a licensee and a person or entity to whom the licensee refers a person for a good or service specified in subdivision (a). **A financial interest also exists if there is an indirect financial relationship between a licensee and the referral recipient including**, but not limited to, an arrangement whereby a licensee has an ownership interest in an entity that leases property to the referral recipient. . . .¹¹ (emphasis added.)

⁵ The permitted Practice Categories are: “(1) Family/individual across the lifespan; (2) Adult-gerontology, primary care or acute care; (3) Neonatal; (4) Pediatrics, primary care or acute care; (5) Women’s health/gender-related; [and] (6) Psychiatric-Mental Health across the lifespan.” 16 CCR § 1481; see *also* 16 CCR § 1482.3(a)(13)(A)(iv).

⁶ 16 CCR § 1482.3.

⁷ *Id.*

⁸ *Id.*

⁹ Initial Statement of Reasons: Categories of Nurse Practitioners and Scope of Practice (AB 890), California Board of Registered Nursing California Department of Consumer Affairs, September 1, 2022.

¹⁰ Bus. & Prof. Code § 650.01; see *also* 16 CCR § 1482.3.

¹¹ Bus. & Prof. Code § 650.01(b)(2).

As discussed below, this definition could be problematic in the Attestation context; however, at minimum, we can infer that an Attestor may not have an employer-employee, independent contracting, creditor-debtor, or lessor-lessee relationship with the NP.¹²

The Attestor also may not have a “familial” relationship with the NP, which again is defined with reference to the Self-Referral Statute.¹³ From that definition, we can infer that an Attestor may not have a spousal or parent-child relationship with the NP. The definition could also be interpreted to prohibit a parent-in-law or child-in-law relationship.¹⁴

IV. The Attestation Solicited by the Nursing Board Verifies the NP’s Dates of Employment and Qualifications of the Attestor, Including the Absence of a Financial Relationship

To complete the 103 NP application, the NP must identify those who can provide an Attestation for their transition to practice. The NP must state: (1) the number of transition to practice hours “under” a certain physician; (2) that physician’s name, email address, and license number; (3) the date the NP started their transition to practice under the physician; and (4) the Practice Category of direct patient care for the transition to practice under the physician.

After the NP submits their application, each physician identified in the application receives an email from the Nursing Board, which asks them to “[r]eview the below listed information provided by the NP and Approve or Not Approve the hours listed.” It further states, “[i]f the number of hours listed by the NP do not match what you supervised you may edit the hours and only approve those that you can attest to the NP completing under your supervision.”

After the physician either Approves, Not Approves, or Partially Approves, the NP’s submitted information, we understand the physician is asked to “acknowledge” the following in an “Attestation”:

This attestation, that is signed under penalty of perjury, must be completed by a physician; or surgeon; or nurse practitioner practicing pursuant to BPC Section 2837.103 or BPC Section 2837.104 that specializes in the same specialty area or category listed in 16 CCR § 1481(a) which the applicant is seeking authority for independent practice. Please note, the attestor can NOT have a familial or financial relationship with the applicant.

In effect, the Attestor is verifying under penalty of perjury that the NP completed a certain number of hours under their supervision, in a specific Practice Category, and in California. The Attestor is also impliedly declaring under penalty of perjury that: (1) the Attestor specializes in the same Practice Category in which the NP is seeking certification; (2) the Attestor does not have a familial relationship with the NP; and (3) the Attestor does not have a financial relationship with the NP.

Notably, the Attestor is not asked to make any statement or opinion regarding the competency of the NP in the Attestation. The Attestation appears limited to confirming the date ranges of an NP’s employment without further comment.

¹² Bus. & Prof. Code § 650.01; see *also* 16 CCR § 1482.3.

¹³ *Id.*

¹⁴ *Id.*

V. Legal Risks and Protections Family Physicians Should Consider When Making an Attestation

Put simply, the Attestor should not provide factually inaccurate or subjective information in the Attestation. However, doing so could happen in several ways. For example, Attestors might not realize they have a financial or familial relationship with the NP when making the Attestation. Additionally, Attestors could accidentally verify an inaccurate date range of the NP’s employment. Further, Attestors might imprudently decide to offer an opinion to the Nursing Board about the NP, which proves inaccurate or incomplete.

These factual inaccuracies could lead to a wrongful 103 NP certification, which could be scrutinized by authorities or litigants if the 103 NP later harms a patient. An inaccurate Attestation could also lead to the rejection of a 103 NP certification, which could harm the NP’s career. Since these harmful results could lead to criminal or civil liability for the Attestor, there are several legal standards the Attestor should be aware of when making an Attestation.

A. Physicians Should Consider Whether They Have a Financial Relationship with the NP Before Making an Attestation

As noted above, an Attestor and 103 NP applicant are prohibited from having a “financial relationship,” the definition of which was borrowed from the California’s Self-Referral Statute.

California’s Self-Referral Statute is comprised of two main sections—one section defines the “financial relationships” that are prohibited,¹⁵ while another lists *exceptions* to the prohibitions.¹⁶ The prohibition section prohibits both direct and indirect financial relationships. The direct relationships are fairly intuitive, and allow us to conclude, for example, that physicians cannot attest for NPs that they personally employ.¹⁷ But the prohibition of “indirect financial interests” is broad, and potentially captures financial relationships that may not be so naturally understood as creating a conflict of interest. In the context of California’s Self-Referral Statute, the exceptions narrow the prohibition to ensure traditional referrals can occur among physicians, AHPs and facilities without violating the law. Stated another way, the exceptions are crucial in reigning in the seemingly far reaching effect of any “indirect financial interests” that might exist among referring entities.

Whether intentional or not, the regulations governing the NP attestation process only incorporate the prohibition section *without incorporating the related exceptions*.¹⁸ This may have been an inadvertent oversight by the drafters, but nevertheless, it would appear to strictly prohibit any “indirect financial interest” between an Attestor and 103 NP applicant *without exception*. This might include, for example, where an NP and a physician are both employed by the same entity

¹⁵ Bus. & Prof. Code § 650.01.

¹⁶ *Id.* § 650.02 (listing numerous exceptions to the general prohibition of section 650.01).

¹⁷ *Id.* § 650.01 (including “compensation” by one party to another as constituting a “financial relationship”).

¹⁸ See, e.g., *id.* § 650.02(f) (“The prohibition of Section 650.01 shall not apply to any service for a specific patient that is performed within, or goods that are supplied by, a licensee’s office, or the office of a group practice.”).

(even if there is no ownership interest involved).¹⁹ Perhaps this broad prohibition was intentional, as, for example, physicians' objectivity could be compromised when directed by their employer to give an Attestation and where failure to do so might mean termination. But we suspect that employers may not be aware of the implication of the regulations and may assume that no prohibited financial relationship exists between two employees merely by sharing an employer.

We believe that physicians being asked by their employer to provide an Attestation should inquire about any potential financial relationships, and ensure they feel comfortable that the employer has given this issue due consideration.

B. Attestors Should Have Reasonable Grounds to Believe the Attestation Is True to Avoid Civil Liability

There are numerous civil claims, such as negligent misrepresentation and libel, that can result from harm caused by false statements.²⁰ An Attestor is at greatest risk of these claims where an Attestor lacks "any reasonable ground for believing" the Attestation were true, or has no "reasonable grounds for belief in the truth" of the statement.²¹ This is so even if the Attestation were viewed as legally "privileged" and given a degree of protection by the courts because it is information requested by the Nursing Board for certification purposes.²² Therefore, Attestors should at minimum ensure they have reasonable grounds for believing the Attestation is true.

C. Attestors Should Reasonably Believe the Attestation Is True to Avoid Criminal Liability

The Attestation is a statement made under penalty of perjury, which is a crime carrying the penalty of imprisonment in California.²³ Perjury requires: (1) the intent to make a false statement; and (2) that the statement be false.²⁴ Because intent is required, if the Attestor believes the statement to be true, then it is not perjury.²⁵ Accordingly, the Attestor should have reasonable grounds for believing the Attestation is true to minimize the risk of committing perjury.

D. Attestors Should Be Honest in Their Attestations to Protect Their Medical Licenses

The Medical Board of California is required to take action against any licensee who is charged with unprofessional conduct, which includes the "commission of any

¹⁹ Under California's Self-Referral Statute, an exception would cover many such situations. See, e.g., Bus. & Prof. Code § 650.02 (c)(1) (exception for referrals to health facilities); *id.* § 650.02(d) (exception for referrals to nonprofits); *id.* § 650.02(e) (exception for referrals to universities); *id.* § 650.02 (f) (exception for referrals to services provided "in-office").

²⁰ See *Moncada v. West Coast Quartz Corp.*, 221 Cal.App.4th 768 (2013); *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 476 (2003); Cal. Civ. Code § 45.

²¹ *Seanez v. Union Pac. R.R. Co.*, 2021 WL 2379731, at *6 (E.D. Cal. June 10, 2021); *Moncada v. West Coast Quartz Corp.*, 221 Cal.App.4th 768 (2013); *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 476 (2003).

²² See *Lemke v. Sutter Roseville Med. Ctr.*, 8 Cal. App. 5th 1292, 1298-99 (2017); Civ. Code § 47; *Stamas v. Cnty. of Madera*, 795 F. Supp. 2d 1047, 1070 (E.D. Cal. 2011); *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999); *Seanez v. Union Pac. R.R. Co.*, 2021 WL 2379731, at *6 (E.D. Cal. June 10, 2021); Civ. Proc. Code § 425.16; *Talega Maint. Corp. v. Standard Pac. Corp.*, 225 Cal. App. 4th 722, 731 (2014).

²³ Penal Code §§ 118a and 126.

²⁴ Penal Code §§ 118a and 126; *People v. Garcia*, 39 Cal. 4th 1070, 1091 (2006).

²⁵ *Ex parte Lindley*, 29 Cal. 2d 709, 723 (1947).

act involving dishonesty . . . that is substantially related to the qualifications, functions, or duties of a physician and surgeon.”²⁶ Thus, it appears possible for the Medical Board to suspend or revoke an Attestor’s license for making a false Attestation out of dishonesty. Under this standard, Attestors should not knowingly make any false statement in the Attestation to avoid suspension or revocation of their license.²⁷

E. Attestors Should Not Provide Unrequested or Subjective Information in the Attestation

One who provides an opinion, whether positive or negative, about an employee’s qualifications generally faces some degree of civil liability risk.²⁸ Here, the Attestation appears limited to confirming only the objective date range of an NP’s employment without further comment. Thus, the Attestor should not provide any additional information in the Attestation or to the Nursing Board, such as an opinion of the NP’s competence, whether it is a compliment or critique. Such an opinion might not be supported by objective, factual records or could trigger a duty to provide additional information.²⁹ These kinds of additional statements or information could increase the risk of civil claims against the Attestor and should be avoided.

F. Attestors May Have Some Legal Protection from Their Employers

An Attestor may have less risk when asked to complete an Attestation for an NP by their shared employer, which will likely occur more often as 103 NP certifications become more common. Generally, employers are liable for any damages caused by an employee acting within the scope of the employee’s duties, even if the employee was negligent.³⁰ Employers are also required to indemnify an employee against losses incurred in discharging their duties, which generally requires paying for any legal expenses and monetary damages awarded against the employee.³¹

VI. Actions Attestors Should Consider Taking to Lower Their Legal Risks

As explained above, Attestors will be most protected where they have reasonable grounds to believe the Attestation is true. Attestors should consider taking at least the following measures to increase this protection:

- Attestors might refer to and rely on the NP’s employment records to verify the dates of the NP’s transition to practice under the Attestor.
- If employment records are not available, Attestors might refer to and rely on other records such as patient records or even emails or correspondence to establish the accurate dates of the NP’s work performed under the Attestor.
- If there are no records to refer to or rely on, Attestors might ask the NP for records supporting the Attestation.

²⁶ Bus. & Prof. Code § 2234.

²⁷ See definition of “dishonesty” in Bus. & Prof. Code § 7561.4.

²⁸ See, e.g., *Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal.4th 1066 (1997).

²⁹ *Id.*

³⁰ *Bussard v. Minimed, Inc.*, 105 Cal. App. 4th 798, 803 (2003).

³¹ Cal. Lab. Code § 2802; *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 1100 (2000). Note that, for the purposes of this letter, employees do not include those hired as independent contractors. In contrast to employers, a person who hires an independent contractor generally is not liable for damages caused by an independent contractor. Similarly, in contrast to employees, independent contractors generally do not have an automatic right to indemnity, unless it is included in the applicable contract. (*Bostrom v. Cnty. of San Bernardino*, 35 Cal. App. 4th 1654, 1665 (1995); *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 590 (2011).)

- Attestors should avoid making the Attestation based on memory alone if possible.
- If Attestors are unsure of whether they have a financial relationship with the NP, they should consult with an attorney.
- If Attestors have a parent-in-law or child-in-law relationship with the NP, which might be a prohibited familial relationship, Attestors might consider declining the Attestation or seeking legal counsel.
- Attestors might contact their medical malpractice insurer to inquire whether any damages arising from an inaccurate Attestation are covered by the policy.

Additionally, if physicians are asked to complete an Attestation by their employer, a physician should consider: (a) obtaining the employer's request in writing, and (b) a written explanation of why the employer believes the physician does not have a prohibited financial interest with the NP.

The employer's written request could be used as evidence that completing the Attestation was within the physician's scope of duties and strengthen an argument that the employer should be held financially responsible for any claims that might arise from an Attestation. The employer's written explanation could help justify the physician's belief that no financial relationship exists with the NP. The physician, however, should remain careful and diligent in ensuring the Attestation is accurate.

Your CAFPP is providing this document as general information for our members. While this letter should not be considered legal advice, we do hope it is a helpful tool for CAFPP members in understanding this significant change in law. Your dues dollars help us to provide this and other information to members as well as advocate on your behalf. Thank you for your membership.

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