

Volume 2, Issue 6

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A PUBLICATION OF THE HEALTH LAW  
SECTION OF THE NEW MEXICO STATE BAR



# Health -E- News

## SECTION NEWS

**Upcoming CLEs:** Regarding the one hour CLEs, please note that there have been changes in the date and times (in red) for some of the CLEs. If you placed them on your calendar after receiving the last Health-E-News, please correct your calendar. Here is the new schedule:

March 25th	11:30 AM	Fraud & Abuse: State laws and Enforcement Policy
April 22nd	7:30 AM	Fraud & Abuse: Federal Laws - Civil Enforcement Policy
May 27th	11:30 AM	Fraud & Abuse: HMO and DOI Enforcement Activities
June 24th	7:30 AM	Fraud & Abuse: Stark I & II and Anti-Kickback

[Note, if you cannot attend a CLE in person, you can obtain an audio tape and any handouts from the State Bar Center for Legal Education for \$39 by calling Jini Wimmer at 505-797-6061]

**Board Meetings:** The Board will meet on the following dates at the State Bar office, and any member of the Section is welcome to attend these meetings:

March 18 <sup>th</sup>	7:30 AM
April 15 <sup>th</sup>	11:30 AM
May 20 <sup>th</sup>	7:30 AM
June 17 <sup>th</sup>	11:30 AM

## Members of the Board

The following lawyers will serve as your Board for 2004.

<b>Jennifer Stone</b> (Chair)	505-842-1950	jstone@mstlaw.com
<b>John Bannerman</b> (Chair Elect.)	505-837-1900	jab@NMCounsel.com
<b>Susan Sullivan</b>	505-827-2962	ssulliva@doh.state.nm.us
<b>Charles Gurd</b>	505-856-1468	cgurd@aol.com
<b>Diane Garrity</b>	505-983-6956	dgarrity@sgmnlaw.com
<b>W. Ann Maggione</b>	505-844-0777	wamagione@btblaw.com
<b>Caralyn Banks</b>	505-524-9617	clbanks@reeveslaw.com
<b>Barbara Quissel</b>	505-816-4224	Barbara-Quissel@bcbsnm.com
<b>Gabe Parra</b>	505-923-6505	gparra@phs.org
<b>Kathleen Hessler</b> (Past Chair)	505-828-1150	khessler@worldnet.att.net
<b>Brenda Maloney</b> (YLD)	505-765-5900	bmmaloney@rodey.com

## NEW DEVELOPMENTS IN HEALTH LAW

### NM Tort Claims Act Amendment:

Senate Bill 625, passed by the 2004 Session of the NM Legislature, amends the Tort Claims Act to provide for post judgment interest at the rate of 2% above prime (prime is currently 6%). The New Mexico Trial Lawyers are encouraging the Governor to sign this bill. There are a number of hospitals and physicians who are covered by the Tort Claims Act, and this provision has the potential to increase the cost of coverage for these facilities. If you represent clients who may be impacted by this bill, you might want to send the Governor an email ([Richard.guay@state.nm.us](mailto:Richard.guay@state.nm.us)) or a letter stating your position. [Contributed by Ann Maggiore of Butt, Thornton & Baeher, P.C.]

### Governor Signs Health related Bills

On March 3, 2004, Governor Richardson signed a number of the health-related laws that were reported in the last issue (Issue 5) of the Health-E-News. Here is an update:

HB 2	General Appropriations Bill
HB 271*	Creating a Behavioral health Planning Council – Signed 3/3/04
HB 322 & SB 315*	Providing the Secretary of Health Oversight of hospitals, long term care facilities and primary care facilities – Signed 3/3/04 (Committee Substitute Version)
HB 468	Medicaid False Claims Act – Signed 3/3/04 (Committee Substitute Version)
HB 581	NM Telehealth Act – Signed 3/3/04
HB 625	Food and Medical Services Gross receipts Tax
SB 34*	To Develop a Comprehensive Strategic Plan for Health – Signed 3/3/04
SB 73	Cancer Clinical Trial Patient Coverage
SB 113	Brain Injury Medicaid Waiver Program
SB 203 & HB 254	Immunization Registry Act signed 3/3/04 effective on May 19, 2004
SB 385	Health Facility Daily Bed Surcharge Signed February 18, 2004.
SB 436	Nursing Home & Care Facility Tax Credits
SB 502	Increases Premium Tax on all health insurance, group and individual plans (but not self-insured plans), Mandating coverage

### Senate Democrats Act To Bar Premium Support Demonstration Projects In Their States

Numerous Senate Democrats have introduced bills to bar privatization demonstration projects provided for under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) from their respective states. Under the MMA, the Secretary of the Department of Health and Human Services is authorized to designate six sites to participate in demonstration programs where seniors would be provided with a defined contribution payment under Medicare Part B rather than a defined benefit. Under the so-called "premium support" provision, seniors would receive a set minimum payment to be used toward enrolling in either traditional fee-for-service Medicare or a managed care plan. The Democratic senators believe that the premium support provision will result in skyrocketing premiums for traditional Medicare. [Editor Comment: Senator Bingaman has joined in this effort]

### FDA Publishes Final Rule On Bar Codes For Drugs And Blood Products

The FDA published in the February 26 Federal Register (69 Fed. Reg. 9119) a final rule that requires bar codes on most prescription and over-the-counter drugs and blood products. The final rule is effective April 26, 2004. Drugs that received approval before the final rule's effective date must comply with the bar code requirement within two years after the final rule's effective date, and drugs that receive approval on or after the effective date must comply with the bar code requirement within sixty days of the

final rule's effective date.

To read the text of the final rule, click here  
[http://www.healthlawyers.org/hlh/docs/040301\\_69fr\\_9119.pdf](http://www.healthlawyers.org/hlh/docs/040301_69fr_9119.pdf)  
(Note: link will open an Adobe Acrobat PDF file)

## **CMS Proposes New Data Collection And Recordkeeping Requirement For SNFs and NFs**

The Centers for Medicare and Medicaid Services (CMS) issued a proposed rule in the February 27 *Federal Register* (69 Fed. Reg. 9282) that would establish a new data collection and recordkeeping requirement for skilled nursing facilities (SNFs) and nursing facilities (NFs). Comments on the proposed rule are due April 27, 2004.

Under the proposed rule, SNFs and NFs would be required to calculate on a daily basis at the end of each shift the number of full time equivalents of registered nurses, licensed practical nurses, licensed vocational nurses, and certified nurse aides who are directly responsible for patient care. The information would be recorded on the CMS Daily Nurse Staffing Form. The proposed rule would not require data collection on other staff, volunteers, or feeding assistants.

CMS also is proposing that SNFs and NFs use the CMS form to capture and display daily resident census information. The facilities would be required to make the information available to the public upon request.

Although not an explicit part of the Nursing Home Quality Initiative, "we believe that our proposed requirement that all SNFs and NFs post nurse staffing information and make the information available to the public is essential to keeping the public informed," the rule said.

CMS said no current plans are in the works to develop a federal standard for optimal nursing staff levels. Based on studies done to date, "we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements," the agency said. Instead, the objective is to make staffing information available to the public so as to facilitate informed decision-making.

To read the proposed rule, go to [http://www.healthlawyers.org/hlw/issues/040227/69FR\\_9282.pdf](http://www.healthlawyers.org/hlw/issues/040227/69FR_9282.pdf)

[Editor: This link may only be available to members of the AHLA, but try it]

## **Cancer Patients Brace for Medicare Changes**

Patients and doctors are bracing for major changes in the way the government pays for treating cancer, with concerns that patients will have to wait in long hospital lines to receive chemotherapy or will be denied expensive but effective new drugs. Federal officials say they need not worry, that neither physicians nor patients will be shortchanged by a revised payment structure being established under the new Medicare law President Bush signed in December.

[http://news.findlaw.com/ap/o/1500/3-4-2004/20040304000005\\_05.html](http://news.findlaw.com/ap/o/1500/3-4-2004/20040304000005_05.html)

## **More HIPAA Horror Stories**

TO THE EDITOR: Suicide Attempt Due to Misunderstood HIPAA Notice

The federally mandated Health Insurance Portability and Accountability Act (HIPAA) went into effect in April 2003 with the intent of providing standards for protection of patients' privacy

Attention has been given to the administrative burden that these requirements have placed upon health care providers and health care systems (1, 2). However, little focus has been placed on the potential negative impact that these new regulations will have on patients. We report a case in which HIPAA privacy notification was judged as a significant factor in precipitating a serious suicide attempt by an elderly woman due to a misunderstanding of the meaning of notification.

Ms. A, a 79-year-old woman without a previous psychiatric history, was found in a pool of blood as a result of a self-inflicted gunshot wound to her left chest and the left upper quadrant of her abdomen. She was hospitalized, and a psychiatric consultation was obtained. Ms. A's husband reported that she had recently received a letter from her insurance company regarding the new HIPAA policies. She misinterpreted the letter to mean that her insurance company was discontinuing her coverage. Ms. A reported that for several weeks she had planned to kill herself with a rifle because she feared that she had skin cancer (a physical examination did reveal a benign appearing skin lesion on her chest) and believed she had no medical insurance to pay for treatment. She stated that she did not want to be a burden to her husband, physically or financially. She also admitted having a depressed mood, feelings of worthlessness, and loss of interest. She reported no other symptoms of major depression or previous episodes of depression.

Legislative bodies need to be aware of the potential unanticipated negative impact of new laws. This case provides an example of such; others may follow. Patients with active medical, cognitive, or psychiatric illnesses may be more vulnerable to misinterpretation. Language in our patient's notice indicating who may have access to and potential disclosure of her protected health information may have contributed to her misunderstanding. Misinterpretation may also be related to the source of the notification (i.e., hospital, physician's office, or insurance company). In addition to patient confusion over the meaning of these new regulations, there is a potential for decreased communication between medical providers and families in the care of patients resulting from misunderstanding and fear of noncompliance with these complex regulations in a medical system already stressed by economic and regulatory pressures that are not conducive to effective communication. Ongoing evaluation of adverse events related to HIPAA notification should be part of future revisions of the act. References 1. Appelbaum PS: Privacy in psychiatric treatment: threats and responses. *Am J Psychiatry* 2002; 159:1809\*1818 2. Gostin LO: National health information privacy: regulations under the Health Insurance and Portability and Accountability Act. *JAMA* 2001; 285:3015\*3021 ONDRIA C. GLEASON, M.D. WILLIAM R. YATES, M.D. Tulsa, Okla.

[Contributed by Barbara Mathis, UNM Health Sciences Center]

## Health Law Cases

### CATHOLIC GROUP MUST PROVIDE BIRTH CONTROL Associated Press

A state Supreme Court ruling that a Roman Catholic charity must provide employees with birth-control coverage despite its opposition to contraception "shows no respect" to California's religious organizations, a spokeswoman for the church's policy arm said. The 6-1 decision Monday, the first such ruling by a state's highest court, could open the door to mandated insurance coverage of abortion, said Carol Hogan, spokeswoman for the California Catholic Conference, which represents the church's policy position in the state.

[http://news.findlaw.com/ap/o/1110/3-2-2004/20040302014501\\_07.html](http://news.findlaw.com/ap/o/1110/3-2-2004/20040302014501_07.html)

Read Yesterday's California Supreme Court Decision [PDF]

<http://caselaw.lp.findlaw.com/data2/californiastatecases/s099822.pdf>

### US EX REL. KARVELAS v. MELROSE-WAKEFIELD HOSP., No. 03-1901 (1st Circuit, February 23, 2004)

Plaintiff-employee's complaint contains no allegation, pled with adequate specificity, of a false claim for Medicare/Medicaid payment that was actually presented to the government. Since the False Claims Act attaches liability to the submission of false claims for payment, not to the underlying fraudulent activity or other wrongful conduct, the complaint was properly dismissed per FRCP rule 12(b)(6).

To read the full text of this opinion, go to: <http://laws.findlaw.com/1st/031901.html>

## The New Book Section

Board member, Ann Maggiore, has suggested this addition to the Health-E-News, and she has offered the first recommendation: Legal Medicine published by the ACLM, which she says is an excellent reference tool.

The American Health Lawyers Association, (AHLA), also publishes a number of excellent Books, references, and resources. The one your Editor orders as soon as it is announced is the AHLA's "United States Health Care Laws and Rules" edited by Peter A. Pavarini, Esq. It is a reprint of federal statutes and regulations related to health care. It comes in paperback and the 2002-2003 Edition was 2.5 inches thick. It saves a lot of on line research time and our firm's edition gets worn out very quickly.

***This Email Newsletter is a publication for the members of the Health Law Section of the New Mexico State Bar Association. Its contents may be time dated, and references to Internet sites may change. The Content of this Newsletter does not reflect the opinions of the Members of the Board of Directors of the Health Law Section of the State Bar. This Newsletter is informational only, does not constitute legal advice. Members of the Health Law Section may submit topics for the newsletter by emailing them, or the internet site at which they can be located, to JAB@NMCounsel.com***