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# Health -E- News

## Section Board

**John Bannerman**  
Chair  
505-837-1900  
jab@NMCounsel.com

**Brenda Maloney**  
(Secretary/Chair-Elect)  
505-765-5900  
bmmaloney@rodey.com

**Caralyn Banks**  
Budget Officer  
505-522-7500  
Lgclcb@zianet.com

**Francis Barikor**  
505-837-1900  
fsb@NMCounsel.com

**Douglas J. Compton**  
505-764-5400  
Dcompton@lrlaw.com

**Charles Gurd**  
505-856-1468  
cgurd@aol.com

**Kay C. Jenkins**  
505-622-6221  
Kjenkins@atwoodmalone.com

**W. Ann Maggiore**  
505-844-0777  
wamaggiore@btblaw.com

**Gabe Parra**  
505-923-6505  
gparra@phs.org

**Barbara Quissel**  
505-816-4224  
Barbara-Quissel@bcbsnm.com

**Susan Sullivan**  
505-265-4285  
NM\_sussull@hotmail.com

**Jennifer Stone**  
(Past Chair)  
(505) 827-2962  
Jenni-  
fer.Stone@doh.state.nm.us

**Robert L. Schwartz**  
(Ex Officio Member)  
505-277-3119  
Schwartz@law.unm.us

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## SECTION NEWS

**Legislative Update:** The 2005 Legislative Update is scheduled on April 21<sup>st</sup> at the State Bar. Lunch will not be provided but you can bring your own lunch. CLE is optional and attendees who are interested must elect to receive CLE credit at the end of the program. Materials will be available to all attendees and will also be posted on the Section forum for those who did not attend. An E-Blast will accompany the posting.

**State Bar Annual Meeting:** The Section has picked 3 topics ("Hot Topics") for the State Bar Annual Meeting in September: 1) Hot Topics In Medical Liability (D. Compton volunteered as presenter); 2) Hot Topics in General Health Law (speakers still undetermined); and 3) Hot Topics with HIPPA and NPI (speakers still to be determined, although John A. Bannerman is inclined to do so, schedule permitting).

### **Schiavo and Beyond: The End-of-Life Debate:**

Wednesday, May 11, 2005, 1:00-5:00 P.M.

Presenters: Debbie Armstrong, Cabinet Secretary, New Mexico Aging & LTC Services Department;  
Professor David Bennahum, MD, UNM School of Medicine;  
Ellen Litzer, Esq., Co-Founder and Co-Director, Senior Citizens' Law Office (SCLO);  
Professor Rob Schwartz, UNM School of Law; and  
Hon. Merri Rudd, Bernalillo County Probate Judge.

**Topics and Speakers:** Members of the Education Committee, D. Compton, B. Quissel, and B. Maloney are to suggest topics and speakers for the next three quarterly Lunch time sessions. If you have suggestions please contact them.

**Fall CLE:** The Section will coordinate its Fall CLE with the rescheduling of the CMS program in October. The morning CMS session will be followed with a lunch and an afternoon session in which Ethics and Professionalism Credits will be earned.

## NEW DEVELOPMENTS IN HEALTH LAW

### CMS Proposes Revisions To Hospital Conditions Of Par-

## **ticipation**

The Centers for Medicare and Medicaid Services (CMS) on March 24, issued a proposed rule that would revise certain requirements in the hospital 'Conditions of Participation' (CoPs). The revisions focus on requirements for completion of history and physical examinations, authentication of verbal orders, securing medications, and completion of post anesthesia evaluations. The revisions were contained in a notice of proposed rule making published December 19, 1997 that involved extensive revisions to the entire set of hospital CoPs, CMS said in a press release. The proposed revision for history and physical examinations would expand the number of permissible practitioners and the timeframe for performing and completing such examinations. For more information, go to: <http://www.cms.hhs.gov/>

## **Achievements in Public Health: Elimination of Rubella and Congenital Rubella Syndrome --- United States, 1969—2004**

According to an assessment by an independent CDC panel, since rubella vaccine licensure in the United States in 1969, substantial declines in rubella and CRS have occurred, and the absence of endemic transmission in the United States is supported by recent data: 1) fewer than 25 reported rubella cases each year since 2001, 2) at least 95% vaccination coverage among school-aged children, 3) estimated 91% population immunity, 4) adequate surveillance to detect rubella outbreaks, and 5) a pattern of virus genotypes consistent with virus originating in other parts of the world. Given the available data, members of the panel concluded unanimously that rubella is no longer endemic in the United States. This report summarizes the history and accomplishments of the rubella vaccination program in the United States and the Western Hemisphere and the challenges posed by rubella for the future. CDC, *Morbidity & Mortality Weekly Report*. For the full report go to: <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm54e321a1.htm>

## **CMS Posts New HIPAA Security Rule Paper To Its Web Site**

CMS has posted a second article on the Health Insurance Portability and Accountability Act (HIPAA) Security Rule to its Web site. All covered entities must be in compliance with the Security Rule by April 20, 2005, except for small health plans, which have until April 20, 2006, to come into compliance. The paper, "Security Standards: Physical Safeguards," focuses on the implementation of "reasonable and appropriate physical safeguards for information systems and related equipment and facilities" to protect electronic protected health information (EPHI). The paper reviews the physical safeguard standard and provides sample questions for covered entities to consider in implementing physical safeguards. To download the first paper in this series, "Security 101 for Covered Entities," visit the CMS website at: [www.cms.hhs.gov/hipaa/hipaa2](http://www.cms.hhs.gov/hipaa/hipaa2). For more information, visit the CMS website at <http://www.cms.hhs.gov/hipaa/hipaa2> for the latest security papers, or visit the Office for Civil Rights website, <http://www.hhs.gov/ocr/hipaa>, for the latest guidance, FAQs, and other information on the Privacy Rule.

## **Procedures For Submitting Non-Privacy HIPAA Complaints**

CMS also issued a notice in the March 25 *Federal Register* (70 Fed. Reg. 15329) setting forth the procedures for filing a complaint of non-compliance by a covered entity with certain provisions of the administrative simplification rules under HIPAA. According to the notice, complaints must be filed either on paper or electronically; must describe the acts or omissions believed to be in violation of the applicable administrative simplification provisions; must provide contact information; and must be filed within 180 days of when the complainant knew or should have known that the act or omission that is the subject of the complaint occurred. To read the notice, go here: [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=15329&dbname=2005\\_register](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=15329&dbname=2005_register)

## **OIG Surveys Nursing Home Improvement Initiatives**

The Department of Health and Human Services Office of Inspector General (OIG) conducted a survey of various initiatives being used by nursing homes to improve quality of care. The report, "Emerging Practices in Nursing Homes" (OEI-01-04-00070), is based on telephone interviews with sixty-one nursing homes and site visits to sixteen nursing homes. The OIG found various tactics being used to improve staffing at nursing homes. High staff turnover is typical and methods nursing homes are using to deal with the problem include mentoring programs, involving staff in decision-making, and maintaining flexible work schedules. Many nursing homes are also taking

steps to improve quality of care, OIG found. For example, five nursing homes used patient data, such as falls or weight loss or gain, to identify those at high risk for adverse events. To read the report, go here <http://oig.hhs.gov/oei/reports/oei-01-04-00070.pdf>

### **CMS Rule Requires Fire Safety Improvements In Certain Nursing Homes**

The Centers for Medicare and Medicaid Services (CMS) issued an interim final rule in the March 25 *Federal Register* (70 Fed. Reg. 15229) that requires, among other things, nursing homes that do not have sprinkler systems or hard-wired smoke detectors to install battery-operated detectors in patient rooms and public areas. The rule comes after the Government Accountability Office (GAO) studied two nursing home fires that occurred in 2003 and determined that smoke detectors could have led to a faster staff response. To read CMS' press release, go to <http://www.cms.hhs.gov/media/press/release.asp?Counter=1403>

### **Medicare's Financial Outlook Improves Slightly Over Last Year**

A new Medicare Trustees Report projects that the Medicare Part A trust fund will be exhausted by 2020, which is one year later than the prediction of 2019 in last year's report. The report, which was released by the Department of Health and Human Services (DHHS) March 23, the actual increases in 2004 payroll taxes and other income, slightly higher future projections, and slightly slower growth in inpatient hospital benefits to account for the one-year improvement over last year's estimate. But a CMS fact sheet on the report cautioned that the long term outlook "remains very problematic because of steady increases in projected health care costs as well as the growing number of Medicare beneficiaries following the retirement of the baby boom generation." To read the Trustees' report, go here: <http://www.cms.hhs.gov/publications/trusteesreport/> To read CMS' fact sheet on the Trustees' report, go to <http://www.cms.hhs.gov/media/press/release.asp?Counter=1397>

To read the Families USA press release on the report, go to:

[http://www.familiesusa.org/site/PageServer?pagename=Media\\_statement\\_Recent\\_CongressionalActions](http://www.familiesusa.org/site/PageServer?pagename=Media_statement_Recent_CongressionalActions)

## **HEALTH LAW CASES**

*Szold v. Med. Bd. Of Cal.*, No. D044448 (California Appellate Districts, March 15, 2005).

The Medical Board of California is allowed to post on the Internet public information regarding its licensees, including references to probation. To read the full text of this opinion, go to:

<http://caselaw.lp.findlaw.com/data2/californiastatecases/d044448.doc>

*Guttman v. Khalsa*, No. 03-2244 (10th Circuit, March 18, 2005)

Plaintiff's suit, seeking reinstatement of his license to practice medicine, is dismissed on the basis of lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. To read the full text of this opinion, go to:

<http://www.kscourts.org/ca10/cases/2005/03/03-2244.htm>

*Rodriguez v. Am. Int'l Ins. Co. of Puerto Rico*, No. 03-2256 (1st Circuit, March 23, 2005). "A regional diagnostic and treatment center, which treats only ambulatory patients and has an emergency room independent of a hospital, is not subject to the requirements of the Emergency Medical Treatment and Active Labor Act." To read the full text of this opinion, go to: <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=03-2256.01A>

*Pennsylvania Prot. v. Pennsylvania Dept. of Public Welfare*, No. 03-1461 (3rd Circuit, March 24, 2005). In a suit alleging a failure to provide suitable services to persons with mental illness and retardation, summary judgment in favor of defendant-Commonwealth is reversed where its fundamental alteration defense to an integration mandate claim was legally insufficient. To read the full text of this opinion, go to:

<http://www.ca3.uscourts.gov/opinarch/031461p.pdf>

## **Administrative Decisions**

*Susanne Marie Allen vs. The Inspector General*

In this case, the ALJ upheld Allen's five year program exclusion because she was convicted of a criminal offense related to the delivery of health care items or services. [http://twcc.mediregs.com/cgi-bin/\\_rs/remote\\_search?](http://twcc.mediregs.com/cgi-bin/_rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&)

[searc\\_start&dbs=mms\\_dec\\_dabcr&search\\_and\\_fetch&](http://twcc.mediregs.com/cgi-bin/_rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&)

[beg\\_doc=1&num\\_docs=15&Q2=a&Q3=mmsdec dabrcr1241&search\\_end](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1241&search_end)

*Estes Nursing Facility Civic Center vs. Centers for Medicare & Medicaid Services*

Because Estes ensured that its residents' environment remained as free of accident hazards as possible and because it was properly administered, the judge found that Estes complied with program requirements and was not subject to penalties.

[http://twcc.mediregs.com/cgi-bin/rs/remote\\_search?](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1240&search_end)

[searc\\_start&dbs=mms\\_dec\\_dabcr&search\\_and\\_fetch&](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1240&search_end)

[beg\\_doc=1&num\\_docs=15&Q2=a&Q3=mmsdec dabrcr1240&search\\_end](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1240&search_end)

*Layfe Robert Anthony, M.D. vs. The Inspector General*

Here, the DAB upheld the Inspector General's five year exclusion of Dr. Anthony from federally funded health care programs because he was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

[http://twcc.mediregs.com/cgi-](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1239&search_end)

[bin/rs/remote\\_search?searc\\_start&dbs=mms\\_dec\\_dabcr&search\\_and\\_fetch&beg\\_doc=1&num\\_docs=15&Q2=a&](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1239&search_end)

[Q3=mmsdec dabrcr1239&search\\_end](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1239&search_end)

*Northeast Center for Special Care vs. Centers for Medicare & Medicaid Services*

Disagreeing with CMS, the judge overturned a decision to terminate Northeast's participation in health care programs finding that CMS failed to prove any deficiencies.

[http://twcc.mediregs.com/cgi-bin/rs/remote\\_search?](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1237&search_end)

[searc\\_start&dbs=mms\\_dec\\_dabcr&search\\_and\\_fetch&](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1237&search_end)

[beg\\_doc=1&num\\_docs=15&Q2=a&Q3=mmsdec dabrcr1237&search\\_end](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1237&search_end)

*Robert C. Richards, M.D. vs. The Inspector General*

Because Dr. Richards entered a guilty plea in abeyance, he was "convicted" of a felony within the meaning of the Social Security Act and subject to the statutory minimum of five years exclusion.

[http://twcc.mediregs.com/cgi-bin/rs/remote\\_search?](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1235&search_end)

[searc\\_start&dbs=mms\\_dec\\_dabcr&search\\_and\\_fetch&](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1235&search_end)

[beg\\_doc=1&num\\_docs=15&Q2=a&Q3=mmsdec dabrcr1235&search\\_end](http://twcc.mediregs.com/cgi-bin/rs/remote_search?searc_start&dbs=mms_dec_dabcr&search_and_fetch&beg_doc=1&num_docs=15&Q2=a&Q3=mmsdec dabrcr1235&search_end)

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