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Health -E- News

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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:

April 22nd	7:30 AM	Fraud & Abuse: Federal Laws - "Update on Civil Healthcare Fraud Prosecution." The guest speaker is Howard Thomas, Assistant U.S. Attorney for New Mexico
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

The April 22nd CLE will be a look at Federal civil healthcare fraud law, investigation and prosecution.

Howard R. Thomas, Assistant United States Attorney for the District of New Mexico, will cover recent legal developments, and discuss other topics of interest. The information presented at this meeting does not necessarily represent or reflect the interpretation, position or opinion of the United States Department of Justice or of the presenter. Nothing presented at this meeting creates or diminishes any rights, obligations, benefits or privileges. Further, nothing presented at this meeting may be relied upon to create any substantive or procedural evidence, rights, claims or remedies; and, nothing presented at this meeting shall place any limitations on otherwise lawful prerogatives of the United

States Department of Justice.

[Editor's Comment: Anything with a disclaimer like this just has to be good!]

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:

April 15 th	11:30 AM
May 20 th	7:30 AM
June 17 th	11:30 AM

NEW DEVELOPMENTS IN HEALTH LAW

CMS Issues Guidance On Specialty Hospital Moratorium

CMS issued on March 19 guidance containing details of its plan to implement a moratorium on physician investment in and referrals to specialty hospitals. Under the moratorium, a physician may not refer a patient to a specialty hospital in which he or she has an ownership or investment interest, *even if the hospital is in a rural area*. According to CMS, the moratorium, enacted as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, expressly applies to hospitals that are primarily or exclusively engaged in treating patients with cardiac or orthopedic conditions, patients receiving surgery, and "any other specialized type of services that CMS may designate."

To read CMS' press release, go to
<http://www.cms.hhs.gov/media/press/release.asp?Counter=982>

NY Federal Court (Southern District) Orders Hospital to release Abortion Records.

Rejecting the argument that the production of abortion records from which all PHI had been redacted pursuant to a Protective Order violated HIPAA, a federal court in New York has ordered certain hospitals to produce records of abortions allegedly conducted by physicians who claim to have standing to challenge the new statute banning partial birth abortions. The government was apparently not inclined to accept the good doctors' mere representation regarding standing, perhaps because very few such abortions are alleged to be performed each year. In its opinion the court held that the anti-preemption provision in HIPAA was not intended to make state law applicable to actions brought in the federal sphere.

[In this case Attorney General Ashcroft has been criticized for seeking patients' abortion records. The media, however, has failed to note that the Attorney General sought the Protective Order to redact all PHI, and that the PHI was removed. HIPAA permits and in fact encourages, the use of Protective Orders. It is the anti-preemption ruling in this decision that deserves the health care lawyer's attention].

The case is *National Abortion Federation v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 WL 555701 (S.D.N.Y. Mar. 19, 2004).

See, however, the Seventh Circuit Decision quashing similar subpoenas: *Northwestern Mem'l Hospital v. Ashcroft*, No. 04-1379 (7th Cir Mar. 26, 2004)

The Book Corner

The American Health lawyers Association (AHLA) has an excellent selection of Books, Monographs, and other resources for the health care attorney. Members of the AHLA receive a discount on this publication.

A "must have" publication for any health care attorney is the current edition of *United States Health Care Laws and Rules 2004-2005 Edition* By Peter A. Pavarini, Esq. (Editor). It is a compilation of federal statutes and laws related to health care, including relevant portions of the Social Security Act. In

one handy 4 inch paperback you have most of what you may need to research federal law. To order go to: <http://www.healthlawyers.org/Ecommerce/ProductDisplay.cfm?productID=3277>

There is a new publication on [EMTALA](#). Go to <http://www.healthlawyers.org/Ecommerce/ProductDisplay.cfm?productID=55413>

[The Editor thanks Ann Maggiore for this suggestion].

CMS Announces Increase In 2005 Medicare Advantage Capitation Rates

The Centers for Medicare and Medicaid Services (CMS) announced March 26 that based on preliminary data the capitation rates for Medicare Advantage (formerly Medicare+Choice) plans is expected to increase 6.6% in 2005. However, the estimate could change before the final 2005 capitation rates are announced on May 10, said CMS. The capitation rates are based on formulas outlined in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). CMS has approved six new Medicare Advantage organizations and fourteen service area expansions since the MMA was enacted in December 2003. There are also ten new plans and ten service area expansions awaiting CMS approval.

To read CMS' press release, go to <http://www.cms.hhs.gov/media/press/release.asp?Counter=992>

Government Attorneys Provide Overview Of Stark II, Phase II Rule

Government attorneys Joan P. Dailey from the Department of Health and Human Services (DHHS) Office of General Counsel and Vicki L. Robinson senior counsel from the Office of Counsel to the Inspector General offered their insights on the newly issued Stark II, Phase II Interim Final Rule at AHLA's Institute on Medicare and Medicaid Payment Issues. S. Craig Holden of Ober Kaler Grimes & Shriver in Baltimore, Maryland was also a presenter in the hour-long session that reviewed various aspects of the new rule further addressing physician referrals to entities with which they have a financial relationship. Robinson outlined the overarching goals of the Phase II rule: (1) to interpret prohibitions narrowly and exceptions broadly; (2) not to adversely affect patient care; (3) to conform to other CMS payment policies; and (4) to establish bright-line rules where possible and promote administrative simplicity.

To obtain a CD and materials from the presentation, go to <http://www.healthlawyers.org/pdeml.cfm?i=58185>

Stark Phase II Regulations

The April 5, 2004 edition of Health Lawyer's Weekly has an excellent overview of the new regulations written by Jonnell B. Williamson, Michel R. Hess, and Thomas E. Bartrum. In addition to many definitional changes, they highlight four important points:

1. Changes in the Fair Market Value definition for physician personal services, which are keyed to hourly rates paid to ER doctors of the 50th percentile of national compensation for physicians within the same specialty.
2. A revision to the provision allowing for percentage compensation arrangements.
3. Changes to the definition of "same building."
4. Revisions to the physician recruitment exception to focus on relocation of the physician's office and percentage of new patients rather than the physician's residence.

For those who have access to the Health Lawyers Weekly, go to: http://www.healthlawyers.org/hlw/issues/040402/040402_a_art_01_Williamson.cfm

CMS Increases Payments To Small Urban And Rural Hospitals

CMS announced March 31 that it is implementing changes under the new Medicare law that will increase payment rates for rural and small urban hospitals. Rural hospitals and urban hospitals with fewer than 100 beds, in addition to other hospital types that serve a disproportionate share of low-income Medicare and Medicaid patients, will receive an increase in their disproportionate share hospital (DSH) payments for discharges beginning on or after April 1, 2004. According to CMS, the cap on DSH payment adjustments will increase from 5.25% to 12%.

To read CMS' press release, go to
<http://www.cms.hhs.gov/media/press/release.asp?Counter=994>

DHHS Unveils New Medicare Discount Drug Card Web Site

Seniors can now obtain more information on Medicare-approved drug discount cards through the DHHS' new Web site. The site contains general information about the drug card program and offers hints for additional savings. Drug price comparisons will be available on the site beginning April 29. To access the site, seniors must go to <http://www.medicare.gov> and then click on Prescription Drug and Other Assistance Programs. "In addition to providing a fundamentally new way for Medicare beneficiaries to find the best prices and the most help for their drug purchases, the Medicare Web site goes even further in helping low-income seniors and people with disabilities by including information about ways to save even more by using less expensive drugs, including generics," said CMS Administrator Mark B. McClellan, M.D., Ph.D. "The updated Web site also lists other programs like state Medicaid plans, state pharmaceutical programs and discount programs offered by pharmaceutical manufacturers and the \$600 credit available through the Medicare-approved discount drug card program."

To view the site, go to
<http://www.medicare.gov/AssistancePrograms/home.asp?version=default&browser=IE%7C6%7CWin2000&language=English&defaultstatus=0&pagelist=Home>

OIG Posts Special Alert To Physicians About Concierge-Type Services

The Department of Health and Human Services Office of Inspector General (OIG) issued March 31 an Alert reminding physicians participating in Medicare that they may not charge Medicare beneficiaries for services that are already covered by Medicare.

"We are hearing reports about physicians asking patients to pay additional fees, and we believe this is an ideal time to remind physicians and Medicare patients about this potential liability. Charging extra fees for already covered services abuses the trust of Medicare patients by making them pay again for services already paid for by Medicare," said Acting Principal Deputy Inspector General Dara Corrigan.

The Alert cites an example recently encountered by the OIG where the government alleged that a physician asked his patients, including Medicare beneficiaries, to pay an annual fee of \$600 under a "Personal Health Care Medical Care Contract." The OIG alleged that at least some of the services provided under the contract were covered services under Medicare. The physician agreed to stop offering such contracts to patients and to pay a settlement to OIG in order to resolve the allegations.

<http://www.healthlawyers.org/hlw/issues/040402/OIGalert.pdf>

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