

Volume 3, Issue No. 8

September 1, 2005

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



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 Maggioro
505-844-0777
wamaggioro@btblaw.com

Gabe Parra
505-923-6505
gparra@pshs.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

SPECIAL SECTION NEWS

This Special Section of the Health – E – News discusses the Section’s forthcoming CLE to be held at the State Bar Center on October 14, 2005, entitled:

Public Health Emergencies: What Lawyers and Medical Professionals Need to Know and How They Can Help in An Emergency

Emerging Issues: If your client calls you in the event of a public health emergency, would you know what to do, what the emerging law says, your professional and ethical obligations as an attorney, the rights and obligations of your client, and the public policy underlying the actions being taken by local or state authorities? These are some of the issues that would be discussed on **October 14, 2005**, in this first of its kind program in New Mexico.

Who May Attend: The program which is co-sponsored by the Health Law Section of the State Bar of New Mexico and the American Bar Association Health Law Section/CDC Partnership, is a must to all attorneys (regardless of whether they are health law attorneys) and medical professionals who are likely to be called upon in the event of a public health emergency.

Ethics and Professionalism Credits: The afternoon session of the program will be devoted entirely to professionalism (2.0 CLE Credits) and ethics (1.2 CLE Credits) and will examine **“The Lawyer as Public Servant in a Public Health Emergency.”**

...numerous components of the Creed of Professionalism of the New Mexico Bench and Bar will be discussed, with each component discussed with respect to its relationship to public health emergencies and representation of clients affected by a public health emergency.

... in the event of a public health emergency, lawyers may be asked to represent clients related to isolation and quarantine orders, seizure or loss of use of property and other issues. A lawyer’s representation of clients affected by those issues in light of the obligations of a lawyer under the Creed to be loyal and committed to a client’s cause and to be a zealous advocate while at the same time striving to

make the justice system work fairly and efficiently with a commitment to the public good will be discussed.

...a lawyer's commitment to public good, civic influence and an obligation to strive to make the justice system work fairly and efficiently will also be discussed with regard to the potential advance registration of lawyers as volunteer professionals in the event of a public health emergency.

...attendees will also participate in a town hall meeting through small break-out groups, will discuss application of aspects of the Creed to particular hypothetical fact situations, and bring results of those discussions back to the large group.

Registration: Registration fee for the program is as follows: \$179 Standard and Non-Attorney, \$169 Government Attorney and Paralegal, and \$159 Health Law Section Member. You may attend whatever portion of the program that you prefer. However, the cost would be the same. To register, go to:

http://www.nmbar.org/Template.cfm?Section=Browse_by_Category&Template=/Ecommerce/ProductDisplay.cfm&ProductID=236

Schedule (Tentative):

- 8:00 a.m. Registration
- 8:30 a.m. **Introductory Remarks**
Michelle Lujan Grisham, Esq.
Secretary, New Mexico Department of Health
- 8:45 a.m. **The CDC/ABA Community Public Health Legal Preparedness Initiative: An Overview**
Montrece McNeill Ransom, Esq., Public Health Law Program, CDC
- 9:30 a.m. **Overview of Medical Issues/Conditions That Might Result In A Public Health Emergency Or Require An Emergency Response**
Michael Richards, MD.
- 10:15 a.m. Break
- 10:30 a.m. **Legal Overview of General New Mexico Emergency Preparedness Laws**
Clifford Rees, Esq.
- 11:00 a.m. **Legal Overview of New Mexico Law Related to Public Health Emergencies**
Jennifer Stone, General Counsel, New Mexico Department of Health
- 11:30 a.m. **Emergency System For Advance Registration of Volunteer Healthcare Professionals And Advance Registration of Volunteer Lawyers**
Jennifer Stone, Esq.
- 12:30 p.m. Lunch (provided at the State Bar Center)
- 1:30 p.m. **Ethical Issues That Lawyers May Face In Public Health Emergencies**
Jennifer Stone, Esq., and Robert Schwartz, Professor, UNM School of Law
- 2:30 p.m. Break
- 2:45 p.m. **Professionalism: The Lawyer As Public Servant In A Public Health Emergency**
John Bannerman, Esq. and Jennifer Stone, Esq.
- 4:25 p.m. Adjourn

DEVELOPMENTS IN HEALTH LAW

World Health Organization Partners with Joint Commission and Joint Commission International to Eliminate Medical Errors Worldwide

Collaboration signifies urgent need for patient safety solutions to address serious global issue

Recognizing that health care errors seriously harm one in every 10 patients around the world, the World Health Organization (WHO) is designating the Joint Commission on Accreditation of Healthcare Organizations and Joint Commission International (JCI) as the world's first WHO Collaborating Centre dedicated solely to patient safety. This action is aimed at reducing the unacceptably high numbers of serious medical injuries around the world each day. To see the news release, go here:

http://www.jcaho.org/About+Us/News+Letters/JCAHOnline/jo_08_05.htm

Joint Commission Hails Enactment of Patient Safety and Quality Improvement Act of 2005

On July 29, the Joint Commission hailed the enactment of federal patient safety legislation that establishes federal protections that encourage thorough, candid examinations of the causes of health care errors and the development of effective solutions to prevent their recurrence. Preventing adverse events represents one of the greatest challenges to health care. The Patient Safety and Quality Improvement Act of 2005, signed by President George W. Bush, will promote cultures of safety across health care settings and will encourage the voluntary reporting of medical errors, serious adverse events, and their underlying causes. Previously, evaluative information about the underlying causes of adverse events was not always considered confidential or protected from lawsuits, a fact that the Institute of Medicine blamed for driving errors underground and slowing progress in improving patient safety. Read the full release: http://www.jcaho.org/About+Us/News+Letters/JCAHOnline/jo_08_05.htm

CMS Advisory Opinion No. CMS-AO-2005-80-01 - issued August 22, 2005

On August 22, 2005, the Centers for Medicare and Medicaid Services (CMS) issued its first advisory opinion since 1998 analyzing the Stark Law (excluding a series of advisory opinions in 2004 and 2005 related to the specialty hospital moratorium). The advisory opinion addresses whether the purchase and ownership of certain stock by physicians in a nonprofit, tax-exempt corporation operating a large group medical practice constitutes a financial relationship for purposes of the Stark Law, 42 U.S.C. § 1395nn(a). To read the full Advisory Opinion, go here:

<http://www.cms.hhs.gov/physicians/aop/CMS-AO-2005-08-01.pdf>

CMS Issues Interim Final Rule On Power Wheelchairs And Motor Scooters

The Centers for Medicare and Medicaid Services (CMS) announced August 24 an interim final rule it says will clarify requirements for prescribing, supplying, and receiving payments for power wheelchairs and motor scooters. In a press release, CMS said it was eliminating the requirement that a Certificate of Medical Necessity (CMN) signed by the prescribing physician or other treating practitioner must accompany claims for power wheelchairs and scooters. To view the interim final rule and a fact sheet, go to

<http://www.cms.hhs.gov/coverage/wheelchairs.asp>

CDER Making Progress Toward Drug Safety, Report Says

The Food and Drug Administration's Center for Drug Evaluation and Research (CDER) approved 119 new medicines, 147 new or expanded uses for already approved medicines, and 380 generic versions of existing drugs in 2004, according to the agency's performance report, "CDER 2004 Report to the Nation: Improving Public Health Through Human Drugs."

CDER also processed and evaluated more than 400,000 reports of adverse drug events, more than 20,000 of which were submitted by individuals, the report said.

In addition, CDER issued regulations that require bar codes on over-the-counter drugs commonly used in hospitals and most prescription drugs, as well as warnings about side effects of non-steroidal anti-inflammatory pain medicines and certain antidepressants.

According to the report, CDER has implemented several initiatives aimed at ensuring the safety of drugs, including the new Drug Safety Oversight Board, new communication channels (such as the new Web site <http://www.fda.gov/cder/drugsafety.htm>), and an upcoming Institute of Medicine study. To read the report, go to <http://www.fda.gov/cder/reports/rtn/2004/rtn2004.htm>

HEALTH LAW CASES

Fifth Circuit Finds States Waive Eleventh Amendment Immunity When Accepting Federal Funds On Condition Of Waiver

The Fifth Circuit found August 15 that states that accept federal funds under the condition that they will waive their Eleventh Amendment immunity, are in fact required to waive their immunity.

The Louisiana Department of Education (LADOE), Department of Social Services (DSS), and Texas Tech University Health Sciences Center (TTUHSC) (collectively defendants) appealed rulings by district courts that held that, by accepting federal funds offered on explicit conditions of waiver, defendants in fact waived their right to Eleventh Amendment immunity pursuant to 42 U.S.C. § 2000d-7 and thus were subject to suit for violations of § 504 of the Rehabilitation Act.

While the case was pending, the Fifth Circuit decided *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005) (en banc), which held that a state does waive Eleventh Amendment immunity from suit under § 504 by accepting federal funds offered on the condition of waiver. The case is, *Miller v. Texas Tech Univ. Health Sciences Ctr.*, No. 02-10190 (5th Cir. Aug. 15, 2005); 2005 WL 1950352, C.A.5 (Tex) August 15, 2005.

Sixth Circuit Finds EMTALA Claim Subject To Michigan Medical Malpractice Damages Cap

Kelly Smith, who weighed approximately 600 pounds, injured his leg in a car accident. He was taken to Botsford General Hospital where it was determined that he suffered an open femur fracture. Botsford did not have the capacity to care for a patient of Smith's size, so the hospital decided to transfer him. In the ambulance, Smith died from extensive blood loss.

Andrea Smith, personal representative of Smith's estate, brought suit against Botsford alleging the hospital failed to stabilize Kelly before transferring him as required under the Emergency Medical Treatment and Labor Act (EMTALA). At trial, the jury found in favor of plaintiff and awarded her \$35,000 for economic damages and \$5 million for non-economic damages. Botsford appealed.

The Sixth Circuit affirmed in part and reversed in part. After affirming the lower court's decision to strike the testimony of one of Botsford's experts, the appeals court turned to Botsford's argument that the non-economic damages award should be reduced to the amount of the malpractice damages cap contained in Mich. Comp. Laws § 600.1483. That section caps non-economic damages at \$359,000.

To read the full opinion, *Smith v. Botsford Gen. Hosp.*, No. 04-1436 (6th Cir. Aug. 18, 2005), go here: <http://www.ca6.uscourts.gov/opinions.pdf/05a0355p-06.pdf>

Sixth Circuit Says Hospital May Be Liable Under FCA Even If Overcharges It Made During Interim Payment Period Were Corrected Through Medicare Cost-To-Charge-Ratio Adjustment

The Sixth Circuit reversed and remanded a summary judgment order, finding that genuine issues of material fact remained as to whether a hospital violated the False Claims Act (FCA) under Medicare's cost-based reimbursement payment system. In doing so, the appeals court rejected the hospital's argument that any perceived overcharges made during the interim payment period would be "immaterial" because they were ultimately corrected by Medicare's cost-to-charge-ratio adjustment.

Thomas Schell (Schell), a certified registered nurse and former employee of the defendant, brought this qui tam action alleging that Battle Creek Health System violated the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, by

charging Medicare for entire multi-dose vials of anesthetic medication when less than the full vial of medication was administered to patients. Battle Creek argued that it had simply adopted a flat-fee method of charging and made no representations to Medicare as to the amount of drug it administered to a particular patient. To read the case, *United States ex rel. Schell v. Battle Creek Health System*, No. 04-1418 (6th Cir. Aug. 22, 2005), go to: <http://www.ca6.uscourts.gov/opinions.pdf/05a0363p-06.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 FSB@NMCounsel.com