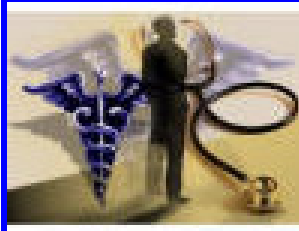


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Health -E- News

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SECTION NEWS

Board Meeting Schedule

The board encourages members of the Health Law Section to attend and participate in board meetings. They are generally held at the State Bar offices. Please mark your calendars for: May 17, July 13 or 14th (at the State Bar Annual Meeting in Ruidoso), September 20, and November 18, 2007.

April 19th CLE Opportunity

The Section's Annual Legislative Update will be held at the State Bar offices on April 19 at 12:30 noon.

Prior to the April 19th Annual Legislative Update you can participate in a seminar and web cast on the **Deficit Reduction Act of 2005 (DRA)**. *Larry Heyeck*, Chief of the HSD Medicaid Assistance Division, *Kathy Vincent*, head of the Medicaid Fraud Unit, *Linda Baumann* and *David Johnson* will discuss various facets of the DRA 2005. Ms. Baumann is with a Washington, D.C., law firm and Mr. Johnson is with the Rodey Law Firm. The Web cast is available to all members of the State Bar of New Mexico. The Web cast and CLE will start at 8:30 A.M. and run until 11:30 A.M. Look for updates in section e-blasts, the *State Bar's E-News*, and this newsletter. Lunch will be provided for those who register for the morning and afternoon sessions.

By the way, the State Bar's Web cast capabilities have been greatly improved. The picture on your computer monitor is crisp and during the Web cast you can communicate with the speakers using e-mail.

State Bar Annual Meeting Presentations

The Section will present programs involving ADR and healthcare related issues and it will repeat and update the legislative report on healthcare. By July, a number of new laws will have been implemented and new regulations may be in the works.

Recruit Section Members

If you know someone in your community or your firm that would benefit from

being a member of the Health Law Section, please encourage them to join. Membership in the section is available all year long!

HLS Board Considering Associate Members

At its March 15th meeting the board discussed amending the section bylaws to add a non-voting "associate membership" which would include UNM law students and healthcare professionals employed in New Mexico. The committee will also consider creating a non-voting member position on the section board. Other sections have similar provisions in their bylaws. A committee has been appointed to consider this issue. If you would like to provide your input, please contact George Koinis, Jeff Gilmore, or John Bannerman.

Bio-Ethics Seminar to be held at UNM Hospital March 23, 2007, from Noon to 1:30 PM

A seminar titled "*Ethics of Medicine in an Age of Terrorism*" will be held at the UNM Hospital Ambulatory Care Center (second floor) on March 23rd. Speakers will be Gerald Demarest, MD (a combat surgeon); Lt. Col. Amanda Conley, RN (a combat nurse), David Bennahum, MD (discussing the conflict between the ethics of medicine and military necessity), and Eva Caldera, MD (discussing *Individual Rights in Times of War*). The event is free and open to the public. Lunch will be provided by the Institute for Ethics with support by the UNM HSC Biomedical Ethics Committee. For more information call Dr. Bennahum at 272-4566 or Barbara Mathis at 238-6656.

DEVELOPMENTS IN HEALTH LAW

NM Legislature Passes and Governor Signs HB 192 – the MEDIATION PROCEDURES ACT

Many health provider agreements have mediation provisions and many disputes are mediated even when there is no express provision. Until now there was a great deal of uncertainty regarding the scope of confidentiality associated with the mediation process. The New Mexico Supreme Court has not issued a mediation rule, and the Rule 408 of the Rules of Evidence is limited to legal proceedings. Much mediation occurs before litigation is initiated. The Mediation Procedures Act broadly defines mediation and a "mediation communication." Its scope applies to "all mediators, nonparty participants, mediation parties and any mediation in the parties are required to mediate by statute or by court or administrative order, or the mediation and the mediation parties agree to mediate and the agreement to mediate is evidenced by a record that is signed by the mediation parties. The Act contains many provisions as well as a number of exceptions to the confidentiality provision. It is a "must read" for any lawyer preparing grievance procedures that contain mediation requirements.

Consumers Union criticizes Medicare Part D insurers for raising prices.

[USA Today](#) (3/1, Appleby) reports that Consumer Reports publisher Consumers Union reported that more than a fourth of Medicare Part D insurers raised their enrollees drug prices last year, "often after members were locked in for the year." The report stated that 62 of 225 such insurers raised costs by at least 5%. However, "The insurance industry and the Centers for Medicare & Medicaid Services criticized the report, saying it looked only at a narrow set of drugs. They added that a majority of seniors are happy with the program, which is saving them money overall." Meanwhile, "Consumers Union said it wants better information for consumers about cost fluctuations and for Medicare to allow enrollees to change plans if costs differ substantially after they enroll."

OIG Issues Advisory Opinion No. 07-02 regarding ambulance reimbursement for Hospitals outside the local area.

For a copy of the Opinion go to: <http://oig.hhs.gov/fraud/docs/advisoryopinions/2007/AdvOpn07-02E.pdf>

For an Index of recent OIG Advisory opinions go to: <http://oig.hhs.gov/fraud/advisoryopinions/opinions.html>

High Court hears challenge to ban against parental representation of disabled children.

The [New York Times](#) (2/28, Greenhouse) reported, "While federal law gives people the right to represent themselves in court, there has been a notable exception to that general rule. Most federal courts have barred parents of children with disabilities from appearing without a lawyer in cases filed under the statute that guarantees all children a 'free appropriate public education.'" The "Supreme Court on Tuesday heard an appeal, brought by the parents of a 9-year-old autistic boy, which "will clarify the situation for the parents of millions of children with disabilities and for the public school districts that are obliged to serve them under the Individuals With Disabilities Education Act." The parents, unable to afford a lawyer, "proceeded on their own to file a lawsuit challenging the adequacy" of their son's program and seeking reimbursement for the tuition at the private school where they had enrolled him." They "lost in Federal District Court in Cleveland, while their case was on appeal, the U.S. Court of Appeals for the Sixth Circuit, in Cincinnati, ruled that parents could not pursue such suits without a lawyer. Most of the federal circuits agree with that position."

HHS Secretary Leavitt debuts healthcare quality-improvement plan.

[Modern Healthcare](#) (2/28, DoBias) reported, Health and Human Services "Secretary Mike Leavitt debuted a new quality-improvement plan that would build and establish local quality-improvement collaboratives with an eye toward a national link-up in a few years' time." Leavitt "told reporters in Washington today that the system of so-called Value Exchanges would be based on 'national coordination (but) local control,' and would include physicians, nurses and hospitals who work in conjunction with health plans, employers, unions and other purchasers to achieve a reliable public reporting system." Meanwhile, "the Robert Wood Johnson Foundation unveiled a two-year, \$115 million commitment to improve healthcare quality that dovetails with the broader HHS plan." The "RWJF announced that its Aligning Forces for Quality initiative" will "spread \$14 million in grants and technical assistance to 10 regional participating communities." The "\$115 million pledge would build on the current program and eventually the double the number of communities that participate in the quality-improvement program."

New healthcare technology uses "debit and information" card.

The [Kansas City Star](#) (3/1, Karash) reports on Healthe Mid-America, a healthcare improvement program spearheaded by a company called Cerner, in which "an electronic debit and information card" can be "swiped through a machine in a doctor's office to pay for the visit. The card also includes a patient's personal health record, which can be accessed on a computer after entering a PIN." In a speech at the Healthcare Information and Management Systems Society 2007 conference in New Orleans, Neal Patterson, Cerner's chairman and chief executive officer, said, "One of our goals is to eliminate insurance companies as they exist today," suggesting that healthcare reimbursement is "basically a rat's nest" because "31 percent of U.S. health-system costs" are going toward administration.

Prescription drug abuse will exceed illicit narcotics use worldwide.

The [AP](#) (3/1, Kole) reports that the U.N. affiliated International Narcotics Control Board said, "Abuse of prescription drugs is about to exceed the use of illicit street narcotics worldwide, and the shift has spawned a lethal new trade in counterfeit painkillers, sedatives and other medicines potent enough to kill." According to the group, "In the United States alone, the abuse of painkillers, stimulants, tranquilizers and other prescription medications has gone beyond 'practically all illicit drugs with the exception of

cannabis." Oxycodone and hydrocodone are two American prescription "drugs of choice."

GAO's Walker warns Medicare could bankrupt U.S.

On its Web site, [CBS News](#) (3/2) reports that U.S. Comptroller General David Walker "says the law that added a prescription drug benefits to Medicare may be the most financially irresponsible legislation passed since the 1960s." He says "Medicare -- barring vast reform to the program and the nation's healthcare system -- is already on course to possibly bankrupt the treasury and adding the prescription bill just makes the situation worse." He "talks to 60 Minutes correspondent Steve Kroft this Sunday, March 4, at 7 p.m. ET/PT." CBS states, "The problem is the baby boomers." Walker said, "They'll be eligible for Medicare just three years later and when those boomers start retiring en masse, then that will be a tsunami of spending that could swamp our ship of state if we don't get serious." CBS also adds, "As life expectancies increase and the cost of healthcare continues to rise at twice the rate of inflation, radical reform in healthcare will be necessary, Walker says. He says the federal government is also going to have to find ways to increase revenue and reduce benefits."

The IRS announces its Executive Compensation Compliance survey results

The Tax-Exempt/Government Entities Division of the Internal Revenue Service has released a report on the initial portions of its executive compensation compliance project. The project began in 2004, and consisted of three parts. Part I included the distribution of compliance check letters to over 1,200 organizations. Part II consisted of examinations of nearly 800 organizations. Part III is still in process. Here are the results:

Part I: Compliance Check Results

- 31% of the 1,223 organizations receiving compliance check letters amended their previously-filed IRS Form 990 information returns and/or accompanying schedules.
- 15% of the organizations receiving compliance check letters were selected for examination based on their responses.
- Of the organizations receiving compliance check letters, 50 public charities reported compensation over \$250,000. None of these 50 organizations, however, had included with their initial Forms 990 detailed schedules regarding compensation paid to officers or employees. After receipt of the compliance check letters, 41 of these organizations filed acceptable amended returns, while the other 9 were referred for examination.
- 100 public charities reported loans of over \$100,000 to officers, directors, trustees, and key employees. The IRS conducted follow-up inquiries on 92 of these organizations and eventually referred 37 of them for examination.

Part II: Examination Results

- Of the 782 examinations conducted, 179 were triggered by the compliance check letters. Approximately 10% of these examinations remain open currently.
- 25 of the examinations that have been closed thus far have resulted in excise taxes, amounting to more than \$21 million (although only \$4 million attributable to public charities such as healthcare organizations), and involving 40 disqualified persons or organization managers. The taxes were assessed in cases involving excessive compensation and/or the payment of personal expenses (such as vacation homes, legal fees, automobiles, meals, and gifts) not reported as compensation.
- In excess benefit cases involving public charities, none of the participating disqualified persons self-reported the excess benefit transaction, and only 11% had been corrected before contact by the IRS examinations staff.
- 15% of the public charities undergoing examination had provided loans and/or pledged assets for the benefit of disqualified persons. 53% of such loans included terms more favorable than commercially-reasonable, and 31% were not repaid per their terms.
- 85% of the public charities examined reported compensation correctly on Form 990, and

approximately the same number reported correctly on Forms W-2.

- The IRS contacted 300 organizations which had failed to indicate on Form 990 whether they had engaged in an excess benefit transaction, and 78 organizations which indicated that they did in fact engage in such a transaction. Of the latter, most appeared to have incorrectly responded to the question.
- 51% of the organizations examined attempted to meet the three requirements for obtaining the rebuttable presumption of reasonableness.
- 54% of organizations obtained comparability studies. Of these, 97% included comparables of similar type and size, and the same percentage of organizations actually set compensation within the range of comparables.
95% of disqualified persons recused themselves from discussion and voting on their own compensation.

For a full copy of the report go to http://www.irs.gov/pub/irs-tege/exec_comp_final.pdf

Oregon's Right to Die Law Has Its 10th Birthday

The [Christian Science Monitor](#) (3/12, Knickerbocker) reports that 10 "years after Oregonians passed a controversial ballot measure allowing physicians to help some patients take their own lives," records show that there has been no "rush to end one's life, no people flocking here from other states, no pressure from family, doctors, and insurance companies to commit suicide." With only about "one-tenth of 1 percent of those diagnosed with terminal illnesses in Oregon" actually making use of the law, more patients are instead turning to "palliative and hospice care," which "have increased markedly...because the law helped raise awareness about caring for terminally ill patients." As a result, "Oregon ranks among the best in the nation in end-of-life care." Currently, California, Arizona, Vermont, and Washington are considering similar versions of the Oregon law, which "specifically prohibits 'lethal injection, mercy killing, or active euthanasia, but "does allow mentally competent adults who declare their intentions in writing, and have been diagnosed as terminally ill, to take a doctor- prescribed lethal drug themselves, orally, after a waiting period."

New Mexico may approve compulsory HPV vaccine.

The [Boston Globe](#) /AP (3/12, Mygatt) reported that "New Mexico is on the verge of becoming the latest state to require sixth-grade girls to be vaccinated against" human papilloma virus. "The state House approved the bill Sunday, and Gov. Bill Richardson will sign it once he receives the legislation." To date, "Texas is the only state to require the vaccine so far, but other states are considering doing the same." However, the vaccine's maker, Merck & Co., "said last month that it would suspend a behind-the-scenes lobbying campaign to get states to require it for school-age girls because of pressure from parents and medical groups."

Waxman inquiry could raise costs of Medicare drug benefit.

The [AP](#) (3/14, Freking) reports that Rep. Henry Waxman's "inquiry could slightly increase the cost of the Medicare drug benefit if its results are publicized, congressional auditors said Tuesday." Waxman has "asked several insurers sponsoring Medicare drug plans to submit information about price concessions they wring from drug manufacturers. That pricing information is given to the Centers for Medicare and Medicaid Services, but cannot be disclosed." Waxman's request "has pharmaceutical companies worried, though he has not said what he would do with the information once he gets it." The Congressional Budget Office "estimates that disclosing the discounts means the cost of the drug benefit would likely increase by less than \$10 billion over a 10-year period, and possibly much less."

[Editor's Comment: I guess a one billion dollar a year increase in the cost of Medicare drugs is "pocket change" for Congressman Waxman. If all lawyers in a community were required to report their hourly rates and that information were made public, do you think the firms that charged the most would drop

their rates, or would the firms with the lowest rates increase theirs?

Third Circuit Finds ERISA Preempts Lawsuit Against Insurer for Failing to Timely Approve Medical Treatment.

See *Kurtek v. Capital Blue Cross*, No. 05-4325 (3rd Cir. Mar 1, 2007) (unpublished but reported in AHLA Lawyers Weekly for March 9, 2007) Plaintiff claimed that she sustained lupus-related multi-organ system failure because her health plan failed to approve her medical treatment in a timely manner. A three judge panel affirmed the district court's dismissal. The initial denial was based on the carrier's position that treatment involving hospitalization was experimental. The court rejected the argument that the delay in approving treatment was a medical decision affecting quality of the benefits.

Profiling Physician's Efficiency Has Potential to Generate Savings

Or at least says GAO in a report discussing testimony by the director of Health Care for GAO presented on March 6, 2007. GAO studied 10 healthcare purchasers that used physician profiling tied to incentive to promote efficiency. Three of the ten reported that profiling produced savings. See *Medicare Spending: Preliminary Findings Regarding an Approach Focusing on Physician Practice Patterns to Foster Program Efficiency* (GAO-07-567T).

Power of Attorney Held by Daughter Could Bind Mother to Nursing Home Arbitration Agreement

There are decisions all over the ballpark on the enforceability of arbitration clauses in health care agreements. In this California case decided March 1, 2007 by the appeals court the court enforced a provision in an agreement that was signed by a daughter using a power of attorney. Against the argument that the healthcare power of attorney did not authorize the holder of the power to sign arbitration agreements, the court held that it allowed the daughter to execute admission forms, and the form contained the agreement. If patients want to avoid the use of arbitration, the healthcare forms may want to expressly exclude the power to sign any document containing an arbitration provision. See *Hogan v. Country Villa Health Services*, No. G036406 (Cal Ct. App. March 1, 2007).

Grassley Wants Medicaid for all US-Born Babies

Senator Charles Grassley, a Republican from Iowa, has introduced the Guaranteed Access to Medicaid for Newborns Act (S. 751) to correct what he perceives as a problem caused by the Deficit Reduction Act of 2005, which requires states to more carefully document the citizenship of Medicaid recipients and applicants. New Mexico is one of five states that have experienced a decline in Medicaid costs associated with the birth of children whose parents are not U.S. Citizens. Those interested in this issue should watch this Bill as it progresses through the U.S. Senate.

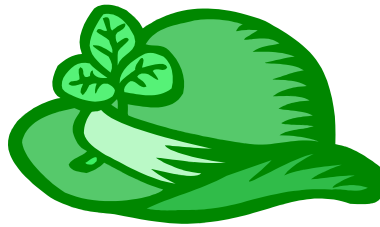
FDA Still says "No" to Gay Blood Donators

The San Jose Mercury News had reported that the FDA has no plans to lift its prohibition against gay men donating blood, despite pressure from blood collection agencies and complaints by civil liberties groups that it is outdated. The FDA's rules preclude any man who has had even one sexual encounter with another man since 1977 from donating blood. According to the FDA, such men are 60 times more likely to have HIV than the general public.

What will they think of next: A washable computer for the healthcare industry.

The Boston Globe reported on March 5, 2007 that Emano Tec has unveiled a washable computer – a wafer thin wireless hand-held computer that is designed to be washed thousands of times. It will give doctors full access to medical records on the go.

[Editor's comments: What a great idea! Anyone who has a computer literate child can describe the condition of the key board after chocolate, cokes, and coffee have glued it into submission. Come to think of it, looking at my keyboard as I write this comment makes me want to go wash my hands. I predict that one day we will see new signs being posted in the rest rooms of hospitals, doctor's offices and eventually restaurants admonishing employees and patrons to wash their hands – and their computers before leaving the inner sanctum. We will be able to text message and compute with impunity while washing dishes, flying fishing, and engaging in other activities near bodies of water. No longer will I fear my Blackberry falling into my pint of Guinness. What a wonderful place the world will become!]



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