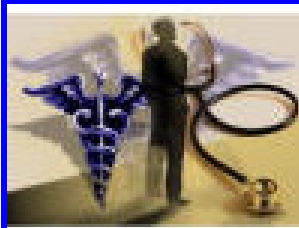


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Health -E- News

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SECTION NEWS

THE FALSE CLAIMS ACT AND THE HEALTHCARE INDUSTRY: NEW ISSUES FOR ATTORNEYS AND PROVIDERS

and
2007 LEGISLATIVE UPDATE

Thursday, April 19, 2007
State Bar Center, Albuquerque

3.7 General CLE Credits (Both Sessions); 2.7 General (A.M.), 1.0 General
(P.M.)

Standard Fee (Both Sessions)	\$129
Health Law Section Member (Both Sessions)	\$119
Standard Fee, A.M. Session only	\$95
Health Law Section Member (A.M. Session only)	\$85
Standard Fee, P.M. Session only	\$45

Co-Sponsor: Health Law Section

SCHEDULE OF EVENTS

8:00 a.m. Registration

A.M. SESSION

8:30 a.m. **The DRA: Implications for State Medicaid Programs**
Larry Heyeck, Esq., Deputy Director, Medical Assistance
Division,
Human Services Department, State of New Mexico

9:20 a.m. **I Can't Find MAHFOOCOO in the Dictionary**
Katherine Vincent, Esq., Director, MFCU Medicaid Fraud
Control Unit, New Mexico Office of the Attorney General

9:45 a.m. Break

- 10:00 a.m. **Trends in False Claims Act Prosecutions: What's Going On Outside New Mexico?**
David Johnson, Esq., Rodey Law Firm
- 10:45 a.m. **What To Do When The Government Comes Calling
(or when a compliance officer says, "I think we have a problem.")**
Linda Baumann, Esq., Partner, Arent Fox, Washington, D.C.
- 11:30 a.m. Lunch (provided at the State Bar Center)
Health Law Section Board Meeting
- P.M. SESSION**
- 12:30 p.m. **Legislative Update**
Barbara Quissell, Gabe Parra, and Jeff Gilmore, attorneys at law.
- 1:30 p.m. Adjourn

LIST SERVE USAGE IS STILL LIGHT

Section member Charles Gurd reports that only 17 of the over one hundred ten members of the Section have signed up for the list serve. Please check out the list serve at

<http://groups.yahoo.com/group/SBNM-HealthLawSection/> and BOOKMARK IT.

You are encouraged to JOIN up and use it. Consider using it to ask if someone has dealt with a certain problem, knows someone in state government who might help your client, has a form to use for a specific problem, can recall a case involving a certain fact pattern, has handled a Medicaid Fraud Unit investigation, and whatever else you might need.

DEVELOPMENTS IN HEALTHCARE LAW

Medical Identity Theft is Growing

In an excellent article appearing in the February issue of the ABA's *Health eSource* newsletter, William E. Hopkins of Thompson & Knight in Austin, Texas, discusses the devastating potential impact of medical identity theft. Unlike credit card theft, those who have their medical identity stolen do not have a clear cut legal right to have their medical records corrected. Once acquired, the name, social security number, insurance plan number, address and other PHI is used to make false claims for medical services, or to acquire needed services free of charge. In order for the fraud to be effective, key medical information like blood type, prescription history, allergies or chronic diseases is changed. These changes can then make their way into the real patient's records, later creating serious medical complications for the real patient. As we move closer to the electronic medical record, the implications become even more foreboding.

We are not just dealing with HIPAA violations here, the provider can be drawn into criminal activities associated with misuse of DEA numbers and the provider identification numbers. It is healthcare providers, and their staffs that are the "Guardians of the Vault" as Mr. Hopkins calls them in his article. Lawyers who handle PHI need to be cautious as well. Care needs to be taken to protect this PHI. Who does your cleaning service hire and are they bonded? Who handles your office trash? Do you shred PHI related information? What is the reputation of the shredding company?

Mr. Hopkins suggests there are some red flags that may alert the provider to a potential problem. They include:

- Records showing medical treatment or diagnosis that are inconsistent with physical examinations or medical history as repeated by the patient, including incorrect blood types;
- Records showing substantial discrepancies in age, race, and other physical descriptions between the patient record and the patient in the office;
- Questions being raised by the patient about an explanation of benefits for services that the patient isn't shown as having received; and
- Dispute of a bill by a patient to claims to be a victim of fraud.

Additionally, your clients might be advised to post signs in their office that state you will require two forms of identification, and your staff is required to check an insurance card against a driver's license or some other form of identification. While proper identification has become an issue for the Medicaid Program, the need for proper identification transcends government funded healthcare.

Remember, to date most of the reported cases of medical identify theft have been *insider jobs*. It is important for healthcare providers to run background checks, criminal history checks, and check references. Make everyone aware of the problem and consider limiting access to medical records to those who clearly have a need to know. Discuss with your computer vendors how you might be able to track access to PHI related information on a user-by-user basis, looking for the mis-users and abusers. Use passwords, change them frequently and make it clear to employees that sharing passwords is prohibited. Enforce any of the rules that you lay down.

If you belong to the ABA Health Law Section, Mr. Hopkins' entire article may still be available for viewing. It is in Volume 3, Number 6 of the Health Law Section's *Health eSource*.

GAO believes doctors are grifting government, Medicare out of millions.

The [Washington Post](#) (3/20, D1, Day) reports, "The federal government has failed to collect more than \$1 billion in back taxes owed by Medicare doctors and suppliers, nearly half of it payroll taxes deducted by healthcare providers who spent the money on luxury cars and other personal expenses rather than sending it to the IRS, a congressional report says."

The [New York Times](#) (3/20, Pear) reports, "The findings are set forth in a report from the Government Accountability Office, a nonpartisan watchdog agency, to the Senate Permanent Subcommittee on Investigations, which plans to hold a hearing on the problem on Tuesday." The report suggests that "Medicare has no mechanism to prevent doctors who are delinquent on their taxes from receiving the payments." Gregory D. Kutz, director of forensic audits and special investigations at the GAO, said "more than 21,000 healthcare providers, mostly doctors, had tax debts totaling \$1.3 billion as of last Sept. 30. That amount reflects tax liabilities that have been acknowledged by taxpayers or certified by a court. The number almost certainly understates the amount owed because it does not include the obligations of people who failed to file tax returns or understated their incomes, Mr. Kutz said. The [Wall Street Journal](#) (3/20, Zhang) continues, "The levy system allows the Internal Revenue Service to withhold all payments to providers who owe government taxes until their debt is paid; agencies often withhold about 15% of payments to such providers. GAO recommended in 2001 that the IRS and the Treasury Department's Financial Management Service work with Medicare to develop plans for using the levy program, which has been adopted by several agencies, including the Defense Department and the Postal Service. GAO estimates that Medicare would have collected at least \$50 million had Medicare collected back taxes through the levy system during the first nine months of 2005."

JCO Reports frequency of Non-Compliance

See a table of the highest frequency of non-compliance among hospitals and critical access hospitals with Joint Commission standards and National Patient Safety Goals during surveys conducted from January through July 2006.

Go to http://www.jointcommission.org/Library/jconline/jo_03_07.htm#1b

West Virginia High Court says pharmacies covered by liability act.

The [West Virginia Record](#) (3/20, Korris) reported, "Affidavits from five authors of the Medical Professional Liability Act of 1986," a law that set limits on damages in medical malpractice claims, "failed to convince the West Virginia Supreme Court of Appeals that the Act does not cover pharmacies." The Record notes, "In oral arguments March 13 at the West Virginia University College of Law, Justice Spike Maynard told attorney J. Robert Rogers of Hurricane that the affidavits snatched defeat from the jaws of victory." According to the affidavits, "members of the 1986 Legislature swore that inclusion of pharmacies in the medical malpractice law was considered and rejected." Circuit Judge Lee Schlaegel "ruled last year that a pharmacy is a healthcare provider. He certified the question for the Supreme Court of Appeals."

Arizona ahead of electronic medical records curve.

The [Arizona Republic](#) (3/21, Snyder) reports, "Arizona appears to be in the forefront of a U.S. drive to have all patients' records available in electronic form." According to a survey conducted by "the newly created non-profit Arizona Health-e Connection board," it appears that "only six percent of the states surveyed...are as far along." The *Republic* added that the "first milestone could be reached in 2009, when all of the state's one million Medicaid patients are targeted to have electronic records." Janet Marchibroda, CEO of e-Health Initiatives, said, "Arizona is ahead of the curve in bringing providers, employers, and insurers together to talk about electronic medical records," which keeps in step with President Bush's agenda, which instructed federal health officials "to make electronic records widely used by 2014."

New report highlights problems with high insurance deductibles.

[USA Today](#) (3/22, Appleby) reports that "co-payments and deductibles, along with difficult-to-understand policies and complex hospital billing issues, are among the main reasons even people...who have health insurance can face devastating financial costs, says a report out today from The Access Project, an advocacy group that researches medical debt." The Boston-based Access Project studied people "who had trouble paying medical bills to determine why they ran into difficulties. The study was funded by the W.K. Kellogg Foundation and the Missouri Foundation for Health." It was released "as higher annual deductible policies -- those at \$1,000 or more for individuals or \$2,000 for families -- are being touted by some policymakers, insurers, and employers as one way to control rising healthcare spending in the USA." USA Today adds, "Most insured people have lower annual deductibles, according to data from the Kaiser Family Foundation. Even with lower deductibles, some families are having trouble."

New CMS standards to assess quality of transplant centers.

The [Wall Street Journal](#) (3/23, A5, Meckler) reports "the federal government set the first national standards protecting living organ donors with new rules that require transplant centers to detail the risks of surgery and provide independent advocates to protect donors' interests. Hospitals that fall short of the new standards could lose Medicare reimbursement for the expensive procedures." The regulation "also sets out new standards for evaluating the quality of transplant programs."

Good Samaritan law only protects emergency medical care, court says.

The [Washington Post](#) /AP (3/23) reports that California's "2nd District Court of Appeal wrote in a decision Wednesday that the Good Samaritan law only protects people from liability if they are administering emergency medical care." A woman accused of "rendering a friend a paraplegic by pulling her out of a

wrecked car 'like a rag doll' may not be protected by California's Good Samaritan law," because "the perceived danger of remaining in the wrecked car was not 'medical,' the court ruled." The lawyer for the defendant said that "he will appeal, saying the Samaritan law should protect everybody.

[Editor's Commentary: New Mexico has a Good Samaritan Law –NMSA 24-10-3 1978 Comp. It covers emergencies, which are defined at NMSA 24-10-4 as “motor vehicle accidents or collisions; acts of God; and other accidents and events of a similar nature.” It provides:

No Person who comes to the aid of another person by providing care or assistance in good faith at or near the scene of an emergency as defined in Section 24-1-10 NMSA 1978 shall be held liable for any civil damages as a result of any act or omission by that person in providing that care or assistance, except when liable for an act of gross negligence; ...

The Act excludes assistance provided for, or with the expectation of, remuneration. A quick review of annotations – Editor's prerogative – see the disclaimer below - shows one case in which members of the Border Patrol pulled someone from a car after an accident and were provided the same protections as a private citizen. (*Ortiz v. United States Border Patrol*, 39 F.Supp.2d 1312 (DNM 1999)).

The origin of the term “Good Samaritan” is contained in the biblical account of a traveler from Samaria, who stopped to help an injured traveler. He not only bound his wounds, but took him to an inn and paid the innkeeper enough to cover the cost of the lodging and the meals. In the story by Luke (Chapter 10) there is nothing to indicate that the Samaritan was a doctor.

That being said, the definition of “emergency,” quoted above, might present some interesting legal issues – what “other acts or events” are of a similar nature to a motor vehicle accident or an act of God? Is a collision between two soccer players similar to an auto collision? If a soccer player is struck by lightning, it would be an act of God. But what if a basketball player on a break toward the basket trips, falls forward, strikes her head on the floor and is rendered unconscious, and the first person to reach the player moves her and in doing so allegedly causes a spinal injury? What if the player's heart stops and the Good Samaritan” uses an external defibrillator that is hanging on the wall of the gym? (See Sections 24-10C-1 through 24-10C-7 1978 Comp).

As a father of former soccer players, I know two things for certain: (1) Until this case gets resolved, I would not want my child to go to a sports tournament held in California, and (2) life was a lot simpler in the first century A.D.].

THE USUAL DISCLAIMER

This Email Newsletter is a publication for the members of the Health Law Section of the State Bar of New Mexico. 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 Board of Bar Commissioners of the State Bar of New Mexico. 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 John Bannerman, whose email address is JAB@NMCounsel.com.