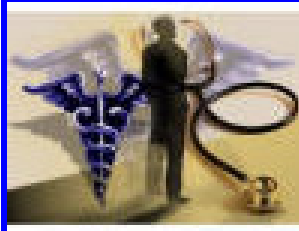


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## Health -E- News

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### SECTION NEWS

#### The Section's CLE was Well Attended and a Great Success.

The turnout for the CLE held on April 19, 2007 was good. A large number of non-lawyers attended and learned about the Employee Education requirements of the DRA 2005, federal and state fraud and abuse laws, and how to deal with the authorities when they come knocking at your door. The lunch served by the CLE office allowed members to network and share opinions. Following lunch the attendees learned about the plethora of new laws that will impact, directly or indirectly, health care in New Mexico. An excellent handout was produced by section board members Barbara Quissell, Gabe Parra and Jeff Gilmore.

The next educational opportunity will be at the State Bar Annual Meeting in July.

#### Health-E-News Welcomes Contributions

The Health-E-News is a compilation of stories from various sources, with a few editorial comments (some that purport to be humorous and some that are serious) thrown in. The Editor is more than willing to include materials submitted by members of the Health Law Section or others who have an interest in health law.

#### Health-E-News To Include a Regional Perspective

The Editor believes that it may be important for healthcare lawyers, providers and government officials to keep informed of what is going on in Arizona, Colorado and Texas, the states that border New Mexico and influence our economy and the delivery of healthcare in communities adjacent to these borders. (Yes, the Editor knows about the Four Corners monument and the fact that a pencil point of New Mexico connects with Utah and no slight of Utahans is intended). Therefore, an effort will be made, beginning in this section, to collect in one section of the newsletter stories from these states.

There are currently two members of the section who practice in adjacent states: Brenda Maloney (Phoenix, AZ) and Victor Poulos (El Paso, TX). We thank them for showing an interest in the health law issues of New Mexico. You can use the Attorney/Firm Finder section of the NM State Bar Website to locate a member of the section in a given town. Simply fill in the dialog box near the bottom that asks for the "Section Membership" and hit search.

A complete list of all section members, with their address will appear. (Apparently you cannot search by selecting the dialogue box for a state and a particular section). This is an easy way to find an employment lawyer, or some other lawyer who is a member of one of the many excellent sections of the State Bar.

## **NEW DEVELOPMENTS IN HEALTH LAW**

### **Regional Developments**

#### **Texas Legislator Introduces Bill to Rein in Medicaid costs**

The [East Texas Review](#) (4/11, DeLoma) reported that Texas' "Medicaid costs are estimated to exceed 40 percent of the state's budget in only 10 years -- a trend virtually unsustainable over the long term." That news is motivating State Representative Jane Nelson (R-Lewisville) to introduce a plan, "SB 10, the omnibus Medicaid reform bill." The goals of the bill are to "rein in Medicaid costs while maintaining healthcare coverage for the state's neediest," to "encourage patients to take responsibility for their health through the use of preventative programs," and to "encourage employers to provide private health insurance to employees who would otherwise be eligible for Medicaid." Rep. Nelson said the bill "does not aim to take away money flowing to hospitals, but to reduce the overall burden of uncompensated care on hospitals by getting more Texans covered by health insurance." The article notes that the "reactions of the various stakeholders of the Medicaid reform package was varied, but generally positive."

#### **Texas Senate Passes Budget to Fund Healthcare for Poor Children**

The [AP](#) (4/13, Castro) reports that with a 26-5 vote, the "Texas Senate on Thursday adopted its version of a state budget that would stash away about \$3 billion for future tax cuts and fund a multimillion-dollar legal agreement to help poor children get healthcare." The "spending plan involves a settlement in a 14-year-old lawsuit over healthcare for poor children," which "will cost the state about \$700 million in improving access to Medicaid services," but "will be funded by cutting money spent on other state agencies by about a half percent across the board." Sen. Eliot Shapleigh (D-El Paso), "who voted against the budget, argued against saving money for property tax cuts in two years when Texas ranks highest in the number of uninsured children and ranks high in the number of high-school dropouts. Shapleigh said the move was 'robbing Peter to pay Paul.'" However, Republican Sen. Steve Ogden (Bryan) "insisted that children would be better off after the budget is implemented than before."

#### **Arizona Federal District Court Finds that Resident Research Time may be Included in IME Reimbursement.**

The government statute regarding resident research is somewhat ambiguous, and CMS has used this to restrict reimbursement. In *University Medical Center Corp. v. Leavitt*, No. 05-CV-495 TUCJMR (D. Az. March 21, 2007) the federal court said CMS was wrong when it denied reimbursement for resident research. The issue was whether or not the word "portion" as used in 42 CFR §412.105(f)(1)(A) (1999) is a geographical term, and thus all residents assigned to the hospital are included. CMS had improperly, according to this court, taken the position that the term was ambiguous and could be construed to imply that direct patient care was required.

#### **Arizona Should Protect Healthcare Workers from False Claims of Malpractice.**

In a guest opinion piece in the [Arizona Daily Star](#) (4/9) surgical technologist Steve May wrote, "Healthcare services provided to Arizona are on a cataclysmic course due to a shortage of physicians and other healthcare providers. It is a shortage that, in large part, can be attributed to false claims of malpractice." Through Arizona Senate Bill 1032, "in order to prove malpractice in emergency situations, the level of evidence to prove liability would be changed from 'a preponderance of evidence' to 'clear

and convincing evidence," which will "protect all emergency healthcare workers in the state." May argues, "The current situation creates a dilemma, as the healthcare team cannot provide optimal care...while at the same time they are unable to opt out of care for [a] patient," and points out that the bill "will in no way safeguard negligent healthcare workers, but it will protect those working hard to ensure quality healthcare for all of Arizona."

## **National Developments**

### **JCR Releases *Getting the Board On Board: What Your Board Needs To Know About Quality and Patient Safety***

(Oak Brook, Ill.—April 5, 2007) Board members who are committed to improving the quality and patient safety of the care provided at their hospitals can arm themselves with a new book from Joint Commission Resources (JCR), *Getting the Board on Board: What Your Board Needs to Know About Quality and Patient Safety*. JCR is a not-for-profit affiliate of The Joint Commission.

*Getting the Board on Board: What Your Board Needs to Know about Quality and Patient Safety* shows how board members can play a leading role in improving the quality and safety of the care, treatment and services provided at their organizations. This book addresses growing demands for the boards to take responsibility not just for the organization's financial integrity but for quality and patient safety as reflected, for example, in the Institute for Healthcare Improvement's 5 Million Lives Campaign. It is available for \$50 using order code EBQS-061, or five copies for \$199 using order code EBQS-06. To order, call JCR Customer Service toll-free at 877.223.6866, 8 a.m. to 8 p.m. CT, weekdays, or visit [www.jcrinc.com](http://www.jcrinc.com).

### **OIG Advisory Opinion No. 07-04**

On Friday, April 6, 2007, OIG posted a new Advisory Opinion (07-04) concerning a request from a pharmaceutical company (that manufactures and markets prescription drug products) to provide, through its patient assistance programs, free outpatient prescription drugs to financially-needy Medicare Part D enrollees who are enrolled in a Part D plan. For a copy of the opinion go to: <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2007/AdvOpn07-04.pdf>

### **Medicare Covers Less in Retirement than Many Americans Think, Expert Says**

The [South Florida Sun-Sentinel](#) (4/9, Jarvis) reports, "Although many Americans think Medicare covers all medical costs for retirees, the reality is much different. You are probably going to have to pick up more than 20 percent of your costs. For the average 65-year-old couple retiring today, healthcare expenses over the next 20 years are likely to total about \$215,000, according to a recent estimate by Fidelity Investments. That's on top of what Medicare and the new prescription-drug benefit will cover." Brad Kimler, Senior Vice President for Fidelity Employer Services, said that "in retirement, people must pay a monthly premium for their Medicare insurance -- at least \$93.50 in 2007, according to AARP. And Medicare only pays 80 percent of most medical expenses. If you need an ambulance, you pay 20 percent. If you go to the doctor, you pay 20 percent. If you need an X-ray or other tests, you pay 20 percent" Kimler notes. "People haven't identified healthcare as a primary part of their retirement planning," and "healthcare expenses generally take retirees by surprise."

[Editor's Comment: Just when you think you have it all figured out..... As a Baby Boomer, my retirement gets extended every time I read something like this].

### **Judge Awards \$334 Million in FCA Suit Against Medicaid HMO**

[CCH Healthcare](#) (4/9) reported, "A federal judge has awarded over \$334 million in a False Claims Act (FCA) lawsuit against a Medicaid Health Maintenance Organization (HMO)." The HMO, which was not named, "received hundreds of millions of dollars to fund a Medicaid managed care plan to help low income pregnant women who had inadequate prenatal care" between 2000 and 2004. "However, the

HMO spent less than half of the funds it was paid by state and federal governments on providing health-care." The HMO was found to have "engaged in discriminatory marketing practices and then repeatedly [have] lied to the state Medicaid agency about these practices." And, "Under the federal FCA, the HMO was liable for three times the amount of damages sustained by the government." The \$334 million "verdict amounts to one of the largest ever fraud judgments against a Medicaid contractor and the largest civil verdict in the history of the Illinois Attorney General's office."

### **FDA says "Cocaine" Drink is Falsely Advertised, Illegal**

The [AP](#) (4/12) reports, "The FDA is taking a beverage company to task for the way it's marketing an energy drink called Cocaine," which "doesn't contain cocaine," but is marketed as "'Legal Alternative to the drug.'" The FDA says Redux Beverages "claim that the product contains an ingredient that can reduce cholesterol and prevent hardening of arteries" is illegal. Moreover, the "FDA says the drink is a drug that can't be sold without federal approval" and says "the product is mislabeled because it doesn't have 'adequate directions for its intended uses.'" While Redux says its beverage "isn't a drug and says all its marketing is intended to be tongue-in-cheek," the company is planning to meet with the FDA about compliance.

[Editor's Comment: Thank heavens we have a federal agency with the expertise and discernment to make this call!]

### **A Majority of U.S. Doctors Believes Religion, Spirituality Influences Patients' Health**

[HealthDay](#) (4/11, Reinberg), referencing a study published in the *Archives of Internal Medicine*, reports that a majority of American doctors think "that religion and spirituality play an important role in influencing patients' health." Researchers also found that "the more religious a doctor was, the more likely he or she was to have a positive view of the impact of religion and spirituality on health." According to lead author Dr. Farr A. Curlin, a "majority of U.S. doctors -- 56 percent -- believes that religion and spirituality influence patient's health." Also, a "minority of doctors -- 7 percent -- believes that religion and spirituality can have a negative influence." However, Curlin added that "most doctors don't believe that religion has an influence on hard medical outcomes -- like heart attacks, infections," etc. Researchers found that "most doctors -- 85 percent -- thought that religion and spirituality was generally a positive influence, but only 6 percent thought that religion and spirituality changed medical outcomes."

### **Caterpillar Cells Used as Base for Flu Shot**

The [AP](#) (4/11) reports, "Genetically engineered flu vaccine made from yellow-striped caterpillars instead of hen eggs has been shown for the first time to keep people from getting the flu", scientists say. The results "are preliminary but suggest the insect method could be a quicker, easier alternative to the lengthy, antiquated egg-based procedure now used and lead to a more rapid response to a pandemic", the study authors say. The AP goes on to note that the "experimental vaccine used in a study of 451 adults during the 2004-05 flu season was designed to protect against three common influenza strains. Among participants who got a single high-dose injection, at least two-thirds had a strong immune response and none developed the flu that season." Moreover, "more than half of those given a lower dose had a strong immune response and two got the flu. By contrast, seven patients who received a dummy vaccine got the flu."

[Editor's Comment: Imagine the possible beneficial side effects. Men with hair loss problems may start to show the growth of fuzz on top when spring arrives (albeit the dome may be yellow striped). There may be weight loss when the patient starts getting an uncontrollable urge to devour anything vegetable that crosses his or her path. And near the end of the flu season, you might sprout wings and fly away! But then again, after my flu shot this year I did not sprout feathers or otherwise behave like a chicken – although I have been waking up every morning when the sun rises with an uncontrollable urge to sing zipity doo dah!]

## **“There is Gold in Them Thar Scripts!”**

The [AP](#) (4/13) reports, "Legislators are taking a hard look at data-mining companies that keep detailed records on exactly what drugs are prescribed by nearly every doctor in the U.S. These databases, updated weekly, are stripped of patient names and then sold to drug companies, which use the information to identify doctors who might be particularly receptive to their sales pitches. Consumer advocates and others say sales reps then try to manipulate these doctors into prescribing certain drugs," which "drives up healthcare costs and interferes with the practice of medicine." Data-mining companies, however, "strongly defend what they do, saying the information they provide makes marketing less wasteful, more profitable and less annoying to doctors."

## **“Excuse me Doctor, but my Server Crashed. “**

The [New York Times](#) (4/16, Freudenheim) reports that on Thursday, AOL founder Stephen M. Case plans to unveil a new consumer-oriented Web site called RevolutionHealth.com. The *Times* notes the site "has built a growing audience since a test version went online in January." Case "says the time is ripe for a dominant healthcare brand -- one that could be as powerful as Starbucks in latte or Nike in fitness," and has "devoted more than \$100 million of his money toward that goal with the RevolutionHealth.com Web site." The *Times* continues, "It is such a potentially big opportunity, in fact, that one of RevolutionHealth.com's main challenges could be making itself visible in a market increasingly crowded with competitors elbowing for the consumer-patient's attention. The biggest in the pack by far is WebMD Health, a stock market favorite of late, which has more than 40 million unique users a month visiting its network of consumer sites, including the flagship, WebMD.com. Other leaders, as measured by Web traffic, include NIH.gov, from the National Institutes of Health; Yahoo Health; MayoClinic.com; and About.com Health, which is owned by The New York Times Company."

## **Efforts Continue to Ensure that Medicare Payments Better Recognize the Cost of Care**

On April 13, 2007, the Centers for Medicare & Medicaid Services (CMS) issued a proposed rule to update the hospital inpatient prospective payment system (IPPS) for fiscal year (FY) 2008. In FY 2008, payments to all hospitals are expected to increase by an average of 3.3 percent, or by more than \$3.3 billion, taking into account all changes in the proposed rule.

The proposed reforms to the payment system included in this rule continue efforts, for the third consecutive year, to implement the most significant revision of Medicare's inpatient hospital rates since 1983. CMS is proposing to adopt a severity diagnosis related group (DRG) system for FY 2008, called the Medicare-Severity DRGs (or MS-DRGs).

- CMS updated an analysis of a severity DRG system that it considered adopting in the mid-1990s and is proposing to create 745 new DRGs to replace the current 538. The proposed change represents a significant improvement to the Medicare programs' ability to recognize severity of illness in its inpatient hospital payments.

**Three Strikes and you are..... ????????** [Bloomberg](#) (4/20, Davidson) reports, "Former HealthSouth Corp. executive Kenneth Livesay must be re-sentenced for his role in a \$2.7 billion accounting fraud that nearly bankrupted the company," as the "11th U.S. Circuit Court of Appeals in Atlanta threw out, for a second time, a sentence of five years of probation." U.S. Attorney Alice Martin "appealed that sentence as too lenient for his crimes of conspiracy and falsifying financial reports." Along with probation, "Livesay forfeited \$750,000 of his \$1.4 million assets as part of his sentence," but the appeals court said that neither "punishment was harsh enough under judicial guidelines suggesting eight years in prison." In a 22-page decision, the three-judge panel wrote, "Livesay's sentence of probation completely fails to account for the need to deter other would-be white-collar criminals."

[Editor's Comment: One has to give the 11<sup>th</sup> Circuit credit in this case. Mr. Livesay may have friends in high places, but the U.S. Attorney and the members of the 11<sup>th</sup> Circuit understand that fraud and abuse

is rampant and that a slap on the hand does not an impression (or deterrent) make.]

### **The usual Disclaimer**

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