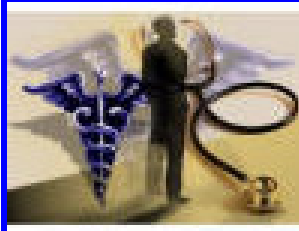


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## Health -E- News

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### SECTION NEWS

#### See You in Ruidoso!

Section members are encouraged to congregate in Ruidoso for the State Bar's Annual Meeting, July 12<sup>th</sup> through the 15<sup>th</sup>. The Section will provide two sessions. , and there will be a Section Board meeting at 11:30 AM on Friday, July 13<sup>th</sup>, at a location to be announced (check your materials). One of the Section sponsored CLE will cover the use of ADR in Health contracts on Saturday morning, another will be a repeat of the Legislative Update on health care that will be held Sunday morning.

#### The AHLA Meeting in Chicago

*The AHLA meeting in Chicago was excellent.* Four members of the Health Law Section attended: Rod Schumacher, Rikki Quintana, and John Bannerman. The fourth member was Brenda Maloney, a former Board member, who has moved to Arizona, but continues to be an active member of the New Mexico Bar.

*The Keynote Speaker was Atul Gawande, PhD, MPH, from Harvard.* Dr. Gawande's new book, *Better*, was provided to all members who attended the meeting, and it has reach Number 14 on the NY Times Best Seller list. He is an award winning author, and his last best seller was *Complications: A surgeon's Notes on an Imperfect Science*. All of those present were held spell bound as he spoke about medical errors and the need for our profession's to reduce errors. Using empirical studies, Dr. Gawande has identified those characteristics that make doctors and health care facilities exceptionally good. He said that "...good medicine is a moral endeavor and not just a performance driven endeavor... In medicine all of our history of science is brought to bear on one person at a time, and it can involve hundreds of people at a time." It ranges from the most skilled neurosurgeon to the person who delivers the meals to the patient, where a mix-up in the plate can mean life or death to a diabetic patient or one with a peanut allergy. It is not just the fact that lives are a stake; it is the complexity of the endeavor that allows for mistakes. Using slides showing x-rays, and example after example, he sent the message that the more that we, as health-care lawyers, try to diminish or cover up errors, the more we contribute to the problem.

*The continued challenges presented by Health Information Technology and Compliance were major themes in the many CLE presentations. Glen Reed, a past President of the AHLA, presented a session on Legal Ethics called *Compliance Counseling Amid Unpredictable Enforcement*. [Glen represented Charter Medical decades ago in a Certificate of Need battle here in New Mexico]. Glen noted that it was 30 years ago in June, at the first meeting of what was then the American Academy of Hospital Attorneys (The AAHA was an adjunct of the American Hospital Association) that an emergency meeting of the attendees was held to discuss the impact of the recently passed Anti-Kickback statute. Interested lawyers (the editor of this newsletter was among them) abandoned their families on the beach at the Del Coronado in San Diego to listen to dire predictions – almost all of which came true!*

The major point of Glen's presentation was when we as lawyers are asked "Will this work?" we are really being asked to give a legal opinion. Glen stressed that when we give a client a compliance opinion, we are ethically obligated to present not only the pros but the cons – the adversarial point of view – how the OIG, the Department of Justice, or the state Attorney General might look at the arrangement.

*The AHLA "ARCHIVES" program was announced, and it may become the most valuable benefit available to AHLA members. It costs \$98 per year to current AHLA members and it contains everything the AHLA has published at its many meetings. Materials are placed in the archives one year after they are printed, and they can be accessed using the Google search machine. The brain child of Past President, Al Adelman, it eliminates the need to keep on the shelf the two four-inch binders you get at every annual meeting, not to mention the Interest Group newsletters, and the materials from the 13 other live CLE sessions the AHLA sponsors each year. If you are a current member of the AHLA, sign up, and if you are not a member, this is another reason to become one.*

## REGIONAL DEVELOPMENTS

### **New Mexico medical-marijuana law requires state to grow its own supply.**

The [AP](#) (6/30) reported that New Mexico's new medical-marijuana law "requires the state to grow its own" supply. Effective on Sunday, the law "not only protects medical marijuana users from prosecution - - as 11 other states do -- but requires New Mexico to oversee a production and distribution system for the drug." The AP noted, "The state Department of Health must issue rules by Oct. 1 for the licensing of marijuana producers and in-state, secured facilities, and for developing a distribution system." Also, faced with the fact that "distribution and use of marijuana are illegal under federal law, and the U.S. Supreme Court ruled in 2005 in a California case that medical-marijuana users can be prosecuted," the New Mexico "health department has asked state Attorney General Gary King whether its employees could be federally prosecuted for running the medical marijuana registry and identification card program, and whether the agency can license marijuana producers and facilities."

### **Texas governor signs Medicaid reform bill.**

The [AP](#) (6/15) reports, "Governor Rick Perry (R) today signed a Medicaid reform bill that aims to help as many as 200,000 more Texans get health insurance." While "Perry praised the plan, which has an insurance component that mainly targets workers earning too much to qualify for Medicaid," he says it's "not the magic wand." The bill "encourages recipients to seek treatment at [a] doctor's office instead of the emergency room," calls "for instituting co-payments for treatment received in an ER if it can safely be delivered elsewhere," and also "rewards Texans for adopting healthy lifestyles, such as completing weight-loss or stopping-smoking programs." The AP notes that "U.S. Health and Human Services Secretary Mike Leavitt also attended the news conference at John Peter Smith Hospital in Fort Worth -- the county hospital."

## **Surgeon sues Texas hospital under whistle-blower law.**

The [AP](#) (6/21) reports that Dr. Larry Gentilello, former chair of the Division of Burn, Trauma and Critical Care, has filed a lawsuit against University of Texas Southwestern Medical Center "under Texas' whistle-blower law, alleging he was demoted after claiming that residents in Parkland Memorial Hospital's trauma unit performed surgeries without proper supervision." Dr. Gentilello "said in a lawsuit filed last week that he also was stripped of an endowed position after raising concerns at the county hospital, which is the primary training site for residents at U.T. Southwestern Medical School." The lawsuit "said Gentilello became aware of problems with patient care, resident supervision and operating room and patient treatment protocols that violated Medicare and Medicaid requirements and procedures." Dr. Gentilello "is seeking reinstatement to his positions, attorney fees and damages. A judge has issued a temporary restraining order preventing U.T. Southwestern from filling his positions."

## **NATIONAL DEVELOPMENTS**

### **U.S. Supreme Court denies overtime pay to home healthcare workers.**

In a unanimous decision in [Long Island Care at Home, Ltd. v. Coke](#) (pdf), the Supreme Court found that home healthcare workers employed by a private company or employer are not covered by laws on overtime pay or the minimum wage because they are "companion workers." [ABC World News](#) (6/11, story 9, 0:20, Gibson) noted that the decision "has implications for the nation's one million home healthcare workers and the people for whom they care."

The [Washington Post](#) (6/12, D2, Barnes) reports that yesterday the Supreme Court ruled "that workers in the fast-growing home-care industry are not entitled to overtime pay." The court's decision upheld "a 1975 Labor Department regulation," which exempts "workers paid by third parties from minimum-wage and maximum-hour rules." The high court said the regulation "was a valid exercise of the power given to the agency by Congress."

**Ruling won't affect every state.** Meanwhile, [Bloomberg](#) (6/12, Stohr) reports, "At least 10 states impose their own minimum-wage and overtime requirements on providers that employ home-care workers." For example, the [Philadelphia Inquirer](#) (6/12, Von Bergen) notes that "yesterday's decision will have little bearing on two local overtime cases involving home-care workers," because "Pennsylvania wage laws do not have the same ambiguities as the federal law. ... Philadelphia-area home-health employees, working with the Service Employees International Union, have filed lawsuits against two nonunion home-care agencies -- Lee's Industries Inc., of Germantown, and Total Health Home Care Corp., of Upper Darby." The [Wall Street Journal](#) (6/12, A12, Bravin, Anderson) also notes the Supreme Court's decision.

### **"My Zoloft Made Me Do It!" South Carolina Supreme Court upholds murder conviction for teen who took the drug.**

The [AP](#) (6/12, Kinnard) reports, "The South Carolina Supreme Court upheld the murder conviction Monday of a teenager who claimed antidepressants led him to kill his grandparents and set their house on fire when he was 12 years old." The teen's lawyers "argued unsuccessfully that he had been involuntarily intoxicated by the antidepressant Zoloft (sertraline) at the time of the shooting and didn't know right from wrong. In appealing, his attorneys said the trial judge should have used a different standard for jurors to determine involuntary intoxication." Pfizer Inc., the manufacturer of the drug Zoloft, stated that the drug "didn't cause his problems, nor did the medication drive him to commit murder."

### **Insurers find profits in Medicaid.**

[Fortune](#) (6/12, McLean) profiled the Medicaid plans run by four companies: Amerigroup, WellCare, Centene, and Molina. Fortune wrote, "While subsidiaries of multiline insurers like UnitedHealth and Well-

Point are still the biggest players in Medicaid, the 'pure plays,' as they're called, have grown rapidly and now have 22 percent of the Medicaid managed-care market, up from 14 percent in 1999, according to Merrill Lynch analyst Doug Simpson. The four upstart companies now manage the care of about five million Medicaid patients, collect some \$9 billion in annual premiums, and have a combined market capitalization of roughly \$7 billion. Their remarkable growth -- Amerigroup's revenues have risen at an annual rate of over 60 percent in the past decade -- has been accompanied by generally stellar stock performance." Fortune continued, "Any business that is supposed to deliver a public good while maximizing profits for its shareholders invites skepticism. These companies 'need to operate in a way that is squeaky-clean,' says Dan Mendelson, who oversaw Medicaid at the Office of Management and Budget in the Clinton administration and is now president of consultant Avalere Health. But a close look reveals some blemishes -- and more profits than anyone imagined." Fortune then highlighted recent disputes the companies had over coverage as well as the companies' political connections. For example, Fortune noted, "WellCare executives and their family members, along with the company PAC, gave a total of \$1.5 million to Florida candidates for state and federal elections in 2006."

### **Circuit court rules peer-review shielding not applicable to federal discrimination cases.**

[Law.com](#) (6/20, Palmer) reports, "Handing a rare win to an employment-discrimination plaintiff, a panel of the 11th U.S. Circuit Court of Appeals ruled last week that state privilege rules shielding documents related to doctors' peer review processes don't apply to federal discrimination cases." And while it is unclear "how far the holding goes," two lawyers "who represent healthcare providers said that, arguably, the decision could apply to federal claims beyond discrimination." Paul R. Koster, who represents the hospital sued in the case, said, "What the court's decision does -- it opens the door to allow disgruntled physicians the ability to get access to any and all peer-review files just because they baldly assert a federal claim," which "undermines the entire peer review process." The case, *Adkins v. Christie*, No. 06-13107, "was brought by Russell E. Adkins, a black surgeon who claims that Houston Medical Center in Warner Robins, Ga., and some of its physicians racially discriminated against him." However, the hospital defendants "contend that Adkins repeatedly was unavailable to handle on-call duties, failed to complete medical records on time, and failed to follow hospital protocol on patient admissions." When Adkins requested the defendants produce peer-review documents, "the defendants invoked Georgia's medical peer review privilege." While all "50 states and the District of Columbia have recognized a peer review privilege," the panel "concluded that the countervailing interests in a civil-rights case outweigh the benefits of peer review, noting that the court would follow similar rulings by the 4th and 7th Circuits."

### **Cigna expands coverage at retail clinics.**

The [Wall Street Journal](#) (6/19, Goldstein) Health Blog reported, "Now somewhere between 40% and 50% of care at" retail care clinics, often housed in stores, "is reimbursed by insurance," according to Tine Hansen-Turton, executive director of the Convenient Care Association. The Journal continued, "Today the trend advanced another step, as health-benefits giant Cigna added reimbursement for care at Take Care Clinics, a Midwestern retail-clinic chain acquired last month by Walgreens. Cigna already reimburses for care in at least two other chains, RediClinic and MinuteClinic, which is owned by CVS. ... Jeffrey Kang, Cigna's chief medical officer, tells the Health Blog that the company tries to work only with retail clinics that strictly limit treatment to relatively simple things like sore throats and flu shots."

### **FDA approves computerized pillbox.**

The [AP](#) (6/22) reports, "A computerized pillbox that patients can keep at home to dole out their drugs on schedule and in the correct doses received federal approval Thursday." The Electronic Medication Management Assistant -- EMMA -- "can be programmed to dispense individual doses of up to a month's worth of 10 different drugs, according to its manufacturer, INRange Systems Inc." Also, the "electronic nurse" enables "pharmacists, doctors and nurses to tweak both the dosing schedules and dosages of drugs loaded into the device in special blister cards." Furthermore, the "bread-box-sized device may re-

duce drug identification and dosing errors." It will "be available in early 2008." [UPI](#) (6/22) also covers the story.

[*EDITOR'S COMMENT*: During the last three years of my father's life, we had a weekly ritual. On Saturday I would go to the "senior retirement community" where he lived, and we would fill up his weekly pill dispenser. Because of his many health conditions, over the course of the week he took 17 different pills, some on different days and at different times during the day. I had to put together a spreadsheet to keep track of it all, and I was always concerned that we would mess it up. On the other hand, it was a special time that we had together. We caught up on what he had done (or not done – like take a pill on time) during the week, talked Bronco football in the Fall and Winter, and we usually had lunch together. A computerized pill dispenser would have been a great thing to have].

### **Judge says pharmaceutical companies unfairly adjusted prices.**

The [Wall Street Journal](#) (6/22, Tesoriero, Korn) reports that U.S. District Court Judge Patti B. Saris in Boston "ruled that pharmaceutical companies AstraZeneca Plc, Schering-Plough Corp. and Bristol-Myers Squibb Co. engaged in unfair and deceptive trade practices regarding some of their drug prices," but said "that Johnson & Johnson didn't violate the law." The Journal continues, "The four companies were defendants in a suit that alleged they inflated the average wholesale prices, or AWP, they reported for certain drugs." Judge Saris "ordered AstraZeneca to pay damages of \$4.45 million to non-Medicare third-party payers and Bristol-Myers Squibb to pay damages of \$183,000." In her opinion, Judge Saris wrote, "Unscrupulously taking advantage of the flawed AWP system...by establishing secret mega-spreads far beyond the standard industry markup was unethical and oppressive." She also "wrote that such practices 'caused real injuries to the insurers and patients' who paid inflated prices for life-sustaining drugs." Meanwhile, a spokesperson from each company noted the likelihood of an appeal. [Bloomberg](#) (6/22, O'Reilly) also covers the story.

**FDA issues another warning about Internet drug sales.** [UPI](#) (7/3) reports, "The U.S. Food and Drug Administration issued another [warning](#) Monday about the dangers of buying medications via the Internet," noting that "new data show consumers are continuing to buy drugs from Internet outlets in an attempt to save money on expensive prescription drugs sold in the United States." The FDA "said people don't need to take chances by buying prescription drugs from Internet sites, because low-cost generic versions are available in the United States."

[*EDITOR'S COMMENT*: Given the number of emails I personally receive daily regarding various drugs, I think the FDA should consult with the CDC and develop a virus that seeks out and destroys all pharmaceutical related spam.]

### **The usual Disclaimer**

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