DON’T MISS THE ANNUAL MEETING

December 2nd  5:00- 8:00 PM  Annual Meeting – In the Rio Grande Room at the Petroleum Club, 500 Marquette, Albuquerque.

THANK YOU JENNIFER AND CONGRATULATIONS ON YOUR NEW JOB!

As the Chair-Elect of the Health Law Section and the Editor of this newsletter, I want to take this opportunity to thank Jennifer Stone, the out going Chair, for a job very well done.

Jennifer has been an avid proponent of health law in New Mexico, and her dedication to the Section has been exemplary. Under her leadership the Section completed one of its most active years. Building off a tradition begun by Susan Sullivan and carried on by Kathleen Hessler, Jennifer found the time to direct the Section while changing law firms and dealing with an active legal practice. As a long time member of the Board of the Health Law Section, I appreciated Jennifer’s efficient and professional handling of the Board’s many meetings, and her demonstrated desire to provide meaningful health-related legal education to all segments of the Health Law Section’s membership.

On behalf of the entire Board, we thank Jennifer for her hard work. Please come to the Annual Meeting and express your gratitude to Jennifer in person.

The Board also congratulates Jennifer on her new position as General
Counsel to the new Mexico Department of Health. Her new phone number is 505-827-2962.

NEW DEVELOPMENTS IN HEALTH LAW

JCAHO Issues Corrections to 2005 Requirements for Hospitals and Issues Deadlines

The JCAHO has issued a correction to the 2005 Requirements for Hospitals which modifies its position taken two years ago regarding Medical Staff Bylaws. Anyone who has an interest in drafting or amending Bylaws will need to be aware of this change, which was sent to members by E-Blast through a Special Release, September 29, 2004. Medical Staffs and their Governing Bodies have until January 1, 2006 to come into compliance with respect to the existing content of their Medical Staff Bylaws and rules and regulations. JCAHO has reordered the elements of performances (EPs) and that reordering is effective January 1, 2005. {Contributed by John Bannerman}.

Senate Hearings Begin On FDA's Handling Of Vioxx Safety Issues, FDA Issues Statement

The Food and Drug Administration (FDA) issued a statement November 17 by Acting Commissioner Dr. Lester M. Crawford that addresses several allegations that have surfaced regarding how the FDA handled its approval and post market review of the drug Vioxx. November 18 marked the beginning of Senate hearings on the matter. FDA researcher Dr. David Graham testified at the hearing that his conclusion that high-dose Vioxx significantly increased the risk of heart attacks and sudden death was not welcomed at FDA and he stated that he was "pressured to change my conclusions and recommendations, and basically threatened that if I did not change them, I would not be permitted to present the paper [from a Vioxx study] at the conference." According to Crawford, however, the agency "did not have this report or the underlying data prior to" September 30 when Vioxx was withdrawn.

To read Crawford's statement, go to http://www.fda.gov/bbs/topics/news/2004/NEW01136.html
For more information on the Senate hearings, go to http://finance.senate.gov/sitepages/hearing111804.htm

FDA Announces Initiative To Track Prescription Drugs Using New Technology

FDA announced a new initiative on radio frequency identification (RFID) technology November 15 in an effort to improve the safety and security of the nation's drug supply. As part of its initiative, FDA published a Compliance Policy Guide for implementing RFID feasibility studies and pilot programs. RFID is a state-of-the-art technology that uses electronic tags on product packaging to allow manufacturers and distributors to more precisely keep track of drug products as they move through the supply chain, according to FDA.

To read FDA's Federal Register notice of the availability of the Compliance Policy Guide, go to http://www.healthlawyers.org/docs/ask2004/69FR_67360.pdf (Note: Link will open a PDF file)

ALJ Upholds FTC's Complaint Against Physicians Group For Price Fixing

In an initial decision announced November 16, an Administrative Law Judge (ALJ) upheld the Federal Trade Commission's (FTC's) complaint against a physicians group alleging that the group conspired to fix prices in certain contracts its doctors entered into to provide medical services to the patients of health plans. According to the FTC, nearly all of North Texas Specialty Physicians' (NTSPs') participating physicians are parties to some non-risk contracts and that "[w]ith respect to these non-risk contracts, NTSP often has sought to negotiate for, and often has obtained, higher fees and other more advantageous terms than its individual physicians could obtain by negotiating individually with payors." In its decision,
the ALJ stated that, "In this case, Complaint Counsel [FTC staff] has proven that Respondent [NTSP] engaged in horizontal price fixing through its negotiation, on behalf of its member physicians, of economic terms of non-risk contracts with health plan services for the provision of physician services."

For more information, go to http://www.ftc.gov/opa/2004/11/northtexas.htm

DHHS OIG OKs City's Proposal To Treat Local Tax Revenue As Payment Of Cost-Sharing Amounts For Emergency Medical Services Provided To Residents

The Department of Health and Human Services Office of Inspector General (OIG) will not impose administrative sanctions under the Anti-Kickback Statute on a city that runs an ambulance service and wants to use local tax revenue to cover cost-sharing amounts due for emergency medical services provided to residents and those local taxpayers who receive services while within city limits, according to Advisory Opinion 04-14 posted on November 4. Although the OIG noted "insurance only" billing could implicate the Anti-Kickback Statute to the extent it constitutes a limited waiver of Medicare or other federal healthcare program cost-sharing amounts, it found the special rule for providers and suppliers that are owned or operated by a state or a political subdivision of a state was applicable here. The CMS Medicare Benefit Policy Manual provides that a state or local government facility that reduces or waives charges to the extent of a federal healthcare program's payments will not be considered to be providing free services and will be entitled to program payments.

To read Advisory Opinion No. 04-14, go to http://www.healthlawyers.org/docs/ask2004/AO_0414.pdf

CMS Unveils Final 2005 Payment Rules For Physicians, Hospital Outpatient Services, And Inpatient Psychiatric Facilities

The Centers for Medicare and Medicaid Services (CMS) announced November 3 three final rules establishing Medicare payments under the physician fee schedule, the hospital Outpatient Prospective Payment System, and the new inpatient psychiatric facilities prospective payment system for 2005. The rules incorporate changes mandated by the Medicare Modernization Act and advance CMS' commitment to making the program more "prevention-oriented," said CMS Administrator Mark McClellan during a November 3 press call. All three rules, which will be published in the November 15 Federal Register, are effective January 1, 2005.

To read CMS' press release on the physician fee schedule, go to http://www.cms.hhs.gov/media/press/release.asp?Counter=1248
To read CMS' press release on the OPPS, go to http://www.cms.hhs.gov/media/press/release.asp?Counter=1250
To read CMS' press release on the new IPF PPS, go to http://www.cms.hhs.gov/media/press/release.asp?Counter=1252

Quality Of Care Needs To Be Improved In Rural Areas, IOM Report Finds

Shortcomings in the quality of healthcare provided in rural areas stem from a lack of access to core healthcare services, a new report released November 1 by the Institute of Medicine (IOM) found. Core healthcare services include primary care in the community, emergency medical services, hospital care, long term care, mental health and substance abuse services, oral healthcare, and public health services. The report, "Quality Through Collaboration: The Future of Rural Health," is part of a series of reports by IOM focusing on fundamental reforms to the national healthcare system. The report assesses the quality of healthcare in rural areas; provides a conceptual framework for a core set of services and the infrastructure necessary to provide quality healthcare services in rural areas; and recommends priority objectives and identifies program and policy changes necessary to achieve those objectives.
Joint Commission Participating in Development of Surgical Care Improvement Project

The Surgical Care Improvement Project (SCIP) is a national partnership of organizations committed to improving the safety of surgical care through the reduction of post-operative complications. In summer 2005, the SCIP partnership will launch a collaborative, multiyear national campaign to substantially reduce surgical mortality and morbidity in four target areas: surgical site infections and cardiac, respiratory, and venous thromboembolic complications. The goal is to reduce nationally the incidence of surgical complications by 25 percent by the year 2010. For more information, visit www.MedQIC.org/scip.

HEALTH LAW CASES

LOCHER v. UNUM LIFE INS. CO., No. 03-9229 (2nd Circuit, November 12, 2004)

Judgment in favor of plaintiff, granting her disability benefits under a long-term disability plan provided through an insurance policy issued by defendant, is affirmed over defendant's contention that the district court erred in considering evidence outside the administrative record.

To read the full text of this opinion, go to: http://caselaw.lp.findlaw.com/data2/circs/2nd/039229p.pdf

PIEDRA v. DUGAN, No. G032653 (California Appellate Districts, November 12, 2004)

A physician can not be held liable for battery when he does not intentionally violate the conditions of consent to treatment form.

To read the full text of this opinion, go to: http://login.findlaw.com/scripts/callaw?dest=ca/caapp4th/slip/2004/g032653.html

HACKMAN v. CHRISTIANA CARE HEALTH SERV., No. 514, 2003 (Delaware Supreme Court, November 15, 2004)

In a medical malpractice case, exclusion of plaintiff's expert witness was proper where the expert's opinion lacked probative value since there was no factual support for the predicate assumption.

To read the full text of this opinion, go to: http://caselaw.lp.findlaw.com/data2/delawarestatecases/514-2003.pdf

MASON v. CENTRAL SUFFOLK HOSP., No. No. 143 (New York Court of Appeals, November 18, 2004)

An action for damages may not be based on a violation of medical staff by-laws, unless clear language in the by-laws creates a right to that relief.

To read the full text of this opinion, go to: http://caselaw.lp.findlaw.com/data/ny/cases/app/143opn04.pdf

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 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 JAB@nmccounsel.com.