MESSAGE FROM THE CHAIR

by Paula G. Sanders
Wolf, Block, Schorr & Solis-Cohen, LLP

The field of health care law is rapidly expanding, both in the number of lawyers who claim to practice "health law," and in the magnitude of the laws that touch upon health care practitioners and businesses. It is unusual for a week to go by where there is no new legislation introduced or passed, government initiative announced, policy interpretation set forth, or novel litigation advanced. Keeping abreast of these developments is often difficult for experienced health care attorneys, and overwhelming for those who are newer to the field.

For the past four years, the PBA Health Care Law Committee has used this Newsletter as one vehicle for providing our members with pertinent information. This issue continues our mission of membership service by striving to furnish a wide range of articles that cover a variety of topics reflective of the diversity of our members. As with any "volunteer" publication, however, the scope of information we can provide is limited by the willingness of people to contribute articles.

Committee meetings also provide a forum for our members to network and exchange information. Our next meeting, scheduled for December 4, 1998 at 9:15 a.m. at the Holiday Inn/Harrisburg East, promises to be continued on Page 2

Long-term Care Participation Guidelines Upheld

by Jeff Bechtel
Assistant Counsel of the Department of Public Welfare

Following a March 12, 1998 hearing, the Independent Regulatory Commission (IRC) found that the Department of Public Welfare's (DPW) Nursing Facility Participation Review Statement of Policy codified at 55 Pa. Code §1187.21a "should be promulgated as a regulation." As a result of this finding, IRC issued a report to the Join Committee on Documents under 71 P.S. §745.7a. Under this statutory provision, the Joint Committee is authorized to determine whether the document must be promulgated as a regulation. The Joint Committee scheduled a hearing to consider the issue on May 12, 1998. DPW was represented by Mary Frances Grabowski.

After hearing testimony from DPW Chief Counsel John A. Kane, IRRC's Executive Director, and an industry representative, and after considering written submissions of all three parties, the Joint Commission voted, by a margin of 6 to 2, that the Department's Nursing Facility Participation Review Guidelines were a valid statement of policy immune from formal rule-making requirements.

The result of this ruling is that long term care providers wishing to participate in the Medical Assistance Program should obtain approval from DPW before embarking on any new construction projects.

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Editor's Column

by Thomas J. Blazusiak

Healthcare in America has become the focus of the most critical ethical issues of the day: life and death issues. There are tough ethical issues for lawyers to be sure, but there are, I submit, tougher ethical issues for our clients. As counselors, not merely advocates, what does this mean to us?

It has, for example, become conventional wisdom that people in nursing homes don’t want to be “kept alive on the tubes”. But who asks this question and how it is asked may dictate the answer. Suppose the question is posed, “certainly Hazel you would like another Christmas with your grandchildren, wouldn’t you?” When the question is asked by someone with an interest in the answer, an ethical issue looms large over the participants.

Lawyers acting in their roles as counselors (I just looked up at the certificate on my wall and it does say “Attorney and Counselor”) can and should offer to serve their healthcare clients in this regard. We should be sensitive to these issues and counsel our clients accordingly. But, the importance of this aspect of our authority from the Supreme Court is easy to overlook in the daily demands of our practice.

There are times in healthcare law when this kind of professional sensitivity is not only appropriate but necessary. Moreover, it is the prudent use of this kind of skill that can elevate us as professionals. By using this useful skill for our healthcare clients, we will not only help them but will help to engender an uplifting spirit for ourselves and our profession: a lift we can all use.

WANTED: Committee Helpers

The Health Care Law Committee is seeking a few good members to help with committee duties. These include chair of the Annual Meeting Program Subcommittee, chair of the Legislative Subcommittee, chair of the Lunch and Learn Subcommittee (Pittsburgh), chair of the Lunch and Learn Subcommittee (Harrisburg), and chair of the Lunch and Learn Subcommittee (Philadelphia).

Message from the Chair
continued from Page One

an excellent opportunity to learn about significant health care developments in the Commonwealth. Howard Burde, Deputy General Counsel for the Commonwealth, will briefly discuss changes in Pennsylvania’s managed care laws, and then shift gears entirely to describe the Commonwealth’s involvement in the AHERF bankruptcy and the sale of the affected facilities to Tenet. Mr. Burde’s presentation will also touch upon the Commonwealth’s integrated delivery system (IDS) policies. In addition to this discussion, the December meeting’s agenda includes other governmental updates and a brainstorming session for upcoming Committee activities.

As we look for new ways to develop stronger membership involvement in the Committee, we are proud to announce the creation of the Health Care Law Committee Award for Excellence in Practice. This award, which shall be made annually, will be presented to the health lawyer, who, in the opinion of the Awards Committee, best demonstrates the highest degree of professionalism, competence and service in the field of health care law.

All members of the Committee are eligible for the Award for Excellence. The nomination period is now open. Each nomination must contain a brief narrative about the nominee’s qualifications for the award. Nominations should be submitted by January 15, 1998 to: Health Care Law Committee Award for Excellence in Practice, c/o Jennifer Zimmerman, Pennsylvania Bar Association, P.O. Box 186, Harrisburg, Pennsylvania 17108-0186. The successful nominee will receive the award at our next Committee/Section Day Meeting which is scheduled for June 4, 1999 at the Holiday Inn/Harrisburg East.

The Committee is looking for other ways to serve you as well. Among items under consideration are the creation of a Committee web site, a membership directory and a speakers’ bureau. We welcome any suggestions you have, especially if you are willing to implement them! We look forward to seeing you on December 4th.

I invite you to contact me before then (or after) if you have ideas for the Committee or other issues you’d like to discuss. You can reach me at 717-237-7183, or by e-mail to PSANDERS@WOLFBLOCK.COM.

SEARCH FOR AUTHORS

The Committee is looking for articles for upcoming editions. Submit articles of interest to Thomas Blazusiak, Editor, at tomb@dpw.state.pa.us or call him at 610-740-3348.

Health Care Law Committee

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Recent Whistleblower Decision Has Healthcare Implications

by Kimberly Thomas
Assistant Counsel of the Department of Public Welfare

Mr. Paolella, a whistleblower, was terminated for “poor performance” less than one month after sending a warning letter to his employer to “immediately cease all illegal activities.” Paolella brought suit against his employer for wrongful discharge and sought the protection of the public policy exception to the employment-at-will doctrine. At the direction of his employer, Paolella, a sales manager, had drafted letters to and had negotiated contracts with customers based on a fraudulent billing scheme, had lied to a customer and fabricated documents to substantiate fraudulent billing, and had continued to bill a customer for services not provided as long as the customer continued to pay.

The Third Circuit Court of Appeals affirmed the District Court of the Eastern District of Pennsylvania affording whistleblowing employees protection under the public policy exception to the employment at will doctrine even where the employee’s conduct was illegal, not merely questionable or unethical. Although the facts of this case involve a non-healthcare employer, its holding and rationale may be logically extended to protect whistleblowing employees of health care providers, even those committing illegal acts where the whistleblower asserts a public interest recognized by some legislative, administrative or judicial authority.


IRS Guidance on Excess Benefit Transactions May Affect Physicians

by Dan Mulholland
of Harty, Springer and Mattern

On July 31, 1998, the IRS released long-awaited guidance on what constitutes an “excess benefit transaction.” This was the concept first introduced by the Taxpayer Bill of Rights Law of 1996, which provided for excise (read “penalty”) taxes on contracts and other transactions that confer “excessive” benefits on tax-exempt organization insiders (read management, Board members and some physicians). Basically, the law states that if a transaction between a tax-exempt organization and a person in a position to substantially influence the affairs of that organization (referred to as a “disqualified person” in the regulations) confers an “excess” benefit on the disqualified person, that person can be liable for an excise tax equal to 25% of the excess benefit.

The purpose of this law was to provide the IRS with an additional way of policing inappropriate transactions with nonprofit organizations such as hospitals without having to resort to the revocation of exempt status, a penalty so disastrous to almost any tax-exempt organization that it almost never used. The so-called “intermediate sanction” of excess benefit taxes has required hospital board members and managers to carefully examine contracts, since now they may have personal liability for contracts that pay too much.

The proposed regulations also introduce a new concept that must be considered when developing compensation methodologies for physicians and executives. The IRS has proposed rules governing “revenue sharing transactions.” The proposed rule defines revenue sharing transactions as those that confer an economic benefit on a “disqualified person” that is determined in whole or in part by the revenues of one or more activities of the tax-exempt organization.

Executive compensation arrangements should also be scrutinized. Many hospital Chief Executive Officers and Vice Presidents receive significant bonus payments above and beyond their salaries. Often, these bonus payments are tied directly to revenues and thus would constitute revenue sharing arrangements. As is the case with physicians, it is extremely important to have an outside limit on the total amount of bonus or incentive compensation available to executives. Hospitals would do well to immediately review all existing contractual relationships, and make sure that procedures are in place to authorize further contracts in accordance with the law. The consequences of not doing so are too ugly to contemplate.

— Excerpted from Action Kit for Hospital Law, Inc. Copyrighted 1998
Healthcare Bankruptcies and the Government: The Sovereign is Immune ..... Mostly

by Jeff Bechtel and Kim Thomas
of the Department of Public Welfare


Before the circuit court, the Debtor hospital, aided by the amicus brief filed by the Business Bankruptcy Law Committee of the New York County Lawyers' Association, made two novel arguments. First, the hospital argued that the right of bankruptcy was a "privilege or immunity" of federal citizenship citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) and arguing that these rights could be enforced under Section 5 of the Fourteenth Amendment. In ruling for DPW, the circuit court disposed of the "privilege or immunity" argument by reiterating its holding in Lutz v. City of York, 899 F.2d 255, 264 (3d Cir. 1990) that the Privileges and Immunities Clause of the Fourteenth Amendment "has remained essentially moribund" since the Supreme Court's decision in The Slaughter-House Cases, and recognized that the Supreme Court has subsequently relied almost exclusively on the Due Process Clause as the source of unenumerated rights.

The Debtor also argued that bankruptcy judges wield legislative power under Article I, rather than judicial power under Article II of the Constitution, and that the Eleventh Amendment, therefore, does not apply. The circuit court likewise rejected this argument relying on Seminole Tribe in that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Seminole Tribe, 116 S.Ct. At 1131-32.

Healthcare Law Committee Meets December 4

The Health Care Law Committee of the Pennsylvania Bar Association will meet on December 4, 1998 at the Holiday Inn-Harrisburg East from 9:15 a.m. until 10:45 a.m. Guest speaker is Howard Burde, Deputy General Counsel for the Commonwealth of Pennsylvania who will speak on the AHERF Bankruptcy and Managed Care. Also on the agenda are:

- Review of Health Care Committee Survey Results: Paula Sanders, Chair
- Update on AHERF Bankruptcy and Managed Care: Howard Burde, Deputy General Counsel for the Commonwealth of Pennsylvania
- Government Updates: Tom Blazusiak, Vice Chair
- New Business

This is the place to be for all Pennsylvania healthcare attorneys.

Announcing the First Annual Health Care Law Committee Award for Excellence in Practice

The Health Care Law Committee announces the opening of nominations for its Award For Excellence In Practice. All members of the Bar are eligible. Nominees should demonstrate the highest degree of professionalism, competence and service in the field of healthcare law. Submit your nomination with a brief narrative about the nominee by January 15, 1998 to:

Health Care Law Committee Award
For Excellence In Practice
c/o Jennifer Zimmerman
Pennsylvania Bar Association
P.O. Box 186
Harrisburg, PA 17108-0186
Fraud and Abuse Update

- HCFA issued its first advisory opinion under the Stark laws on October 29, 1998, stating that an ambulatory surgery center (ASC) owned by physicians who make referral to the ASC does not violate Stark if the ASC is located outside of a federally defined metropolitan area and if 75 percent of its patients live in such rural areas. (HCFA Advisory Opinion #HCFA-AO-98-001.) HCFA posts its advisory opinions on its web site at http://www.hcfa.gov/regs/aop.

- The Pennsylvania Insurance Department has created a new Fraud Examination Unit which will report directly to the Deputy Commissioner for Consumer Services and Enforcement. Insurance Commissioner Diane Koken announced the formation of the new unit on October 26, 1998, and stated that it's goal is to work with Pennsylvania insurers to develop effective anti-fraud plans, to educate insurers and their employees on how to detect and report suspected fraud and to inform consumers that fraud is a crime that takes money out of their pockets.


- On November 13, 1998, the OIG posted Advisory Opinion 98-17, in which it concluded that the proposed arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Social Security Act. The arrangement involved the donations by Company X to Organization A (an independent, 501(c)(3) charitable organization) for the purpose of funding a program to pay for Supplementary Medical Insurance ("Medicare Part B") or Medicare Supplementary Health Insurance ("Medigap") premiums for financially needy Medicare beneficiaries with end-stage renal disease, where some or all of the beneficiaries may be receiving treatment from Company X. This Advisory Opinion is posted on the OIG web site at http://www.dhhs.gov/progorg/oig/advopn/1998/ao98_17.htm.

- The OIG issued Advisory Opinion 98-15 on November 2, 1998. The OIG was asked whether an arrangement for contracted pharmacy services between University A and Pharmacy Company B to facilitate an outpatient pharmacy program for the University's hemophilia center pursuant to section 340B of the Public Health Service Act (the "Proposed Arrangement") would constitute grounds for sanctions under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), the exclusion authority for kickbacks, section 1128B(b)(7) of the Act, or the civil monetary penalty provision for kickbacks, section 1128A(a)(7) of the Act. The OIG concluded that the Proposed Arrangement would not be subjected to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act, provided that the compensation is fair market value as certified by the requesters. This Advisory Opinion is posted at the OIG web site at http://www.dhhs.gov/progorg/oig/advopn/1998/ao98_15.htm.

- OIG Advisory Opinion 98-16 was issued November 3, 1998, and examined whether a proposed arrangement under which a pharmacy would assign an employee pharmacist to work in designated hospital transplant centers for the purpose of providing pharmacy-related products and services (the "Proposed Arrangement") would constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), and, if so, whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the anti-kickback statute, section 1128B(b) of the Act, the exclusion authority related to kickbacks, section 1128(b)(7) of the Act, or the civil monetary penalty provision for kickbacks, section 1128A(a)(7) of the Act. Based on the information presented, the OIG concluded that the Proposed Arrangement may constitute prohibited remuneration under section 1128B(b) of the Act. This Opinion is posted at the OIG web site at http://www.dhhs.gov/progorg/oig/advopn/1998/ao98_16.htm.

Other recent developments include:


- The new federal budget act that passed on October 22, 1998 requires federal prosecutors to abide by ethical standards set by federal and state courts. In some jurisdictions, federal prosecutors are not subject to state ethic rules. This provision takes effect April 1999.
Settling a Medical Staff Disciplinary Matter without a Hearing

by Joe Bubba
of Fitzpatrick, Lentz and Bubba, Allentown

Medical Staff Bylaws typically indicate that a physician can be disciplined under certain circumstances. For example, questions related to competency or professional conduct can result in the loss of a physician's privileges at a particular institution. Bylaws also provide a physician with an opportunity to challenge a recommendation or action which could have an adverse impact upon his/her privileges through an internal hearing. That internal medical staff hearing has historically been conducted in a rather informal manner. The process was controlled by physicians and truly resembled a continuation of the peer review process; that is, physicians evaluating the care or conduct of one of their peers. However, with the advent of the Health Care Quality Improvement Act ("Act")¹, the consequences and ramifications of the hearing process have been heightened. And, as expected, the internal hearing process has now become lengthy, detailed, formal and costly.

The Act requires a healthcare facility to make a report to the National Practitioner's Data Bank if the healthcare facility takes a final action against a physician which adversely affects the physician's privileges. However, a healthcare entity must also make a report if it accepts a physician's resignation (i) while the physician is under investigation by the facility or in the midst of a proceeding relating to possible incompetence or improper professional conduct, or (ii) in return for not conducting such an investigation or proceeding.² Obviously, the goal of the reporting requirement is to make sure that other healthcare entities are aware of the concerns raised by the healthcare facility. The penalty to a healthcare facility for failing to submit a report can be significant.

The reporting requirement has made it very difficult to “settle” any claims of incompetency or improper professional conduct. A physician cannot merely resign his/her privileges and avoid a Data Bank Report. The physician has very little to gain if he/she does not challenge the adverse recommendation or action. The physician typically demands an internal hearing and (because of the significant consequences) both parties are required to spend substantial time and resources prosecuting and defending the claims.

However, there is an alternative which has been used successfully. Counsel for the parties should attempt to draft a Data Bank Report which might be acceptable to the physician and still comply with the healthcare facility’s duty under the Act. The healthcare facility can prepare a Report which would place other healthcare entities on notice but which would still allow the physician to try to persuade the second institution that he/she should be permitted to exercise privileges at that institution. The following example is illustrative:

The medical executive committee recommended that the physician's privileges be revoked due to alleged competency concerns and imposed a precautionary suspension of the same privileges. However, while the hospital was reviewing the matter and prior to any final determination, the physician relinquished his privileges.

The critical issue for the healthcare facility is that the Report must be a factually accurate report. In the example listed above, any recipient of the Report should now be aware that the healthcare facility had at least some concerns regarding the physician. At the same time, however, the Report accurately indicates that the internal review was not completed and a final determination had not yet been made. The physician can under those circumstances at least attempt to persuade another institution that he/she should be granted privileges.

Legislature Weighs Oversight of Nonprofits

by Betsy Taylor
of the Hospital Association of Pennsylvania

Both the state Senate and House held hearings in September on health care delivery, mergers and acquisitions in the wake of the financial problems of the Allegheny Health, Education and Research Foundation. The hearings also centered on legislation, Senate Bill 1497, introduced by Senator Tim Murphy, R-Allegheny, which would strengthen government oversight of all mergers and acquisitions involving nonprofit organizations. The hearings provided an opportunity for industry representatives to educate members of the legislature on the trends and pressures on health care organizations, and to discuss the proper role of state government in today's health care environment.

A work group of the Society of Healthcare Attorneys reviewed the pending legislation strengthening government oversight of nonprofit activities and provided HAP with technical assistance in identifying problems and recommending changes to improve the legislation.

In other legislative activities relating to oversight of nonprofit organizations, Senate Bill 1157 was approved by the House of Representatives in October. This legislation attempts to provide relief for Harrisburg-based technology company AMP, Inc. in its fight against a hostile takeover attempt by Allied Signal, Inc. The bill is significant in that it includes a unanimously approved amendment by the House, offered by Representative Dennis O'Brien, R-Philadelphia, that expands the oversight by the courts and the attorney general of nonprofit mergers, acquisitions, dissolution, sale or conversion of assets.

The amendment would require at least 90 days advance written notice to the attorney general of any proceeding in the orphans' court concerning the proposed transaction. The amendment does not grant the attorney general any new approval powers, leaving this authority with the orphans' court. Under the provision, the attorney general may contract with independent experts and consultants in evaluating the propriety and effects of the proposed transaction. The attorney general could also conduct one or more public meetings to hear comments from interested parties regarding the proposed transaction. Finally, the amendment also spells out the information that must be submitted to the attorney general.

The amendment contains numerous provisions that are problematic for a variety of nonprofit organizations. Key areas of concern include: the expansion of the types of transactions that must be submitted for court approval and review by the attorney general, the open-ended scope of the review, reimbursement of the costs of independent experts and consultants, and the submission of certain documents and information.

The legislature returned to Harrisburg on November 9 to finish its business for the year. It has not been decided if the legislature will take up the bill. The legislature is required to conclude business by November 30. At that point all bills expire and must be reintroduced in the next session starting in January 1999.

Case Briefs

The Federal Court in the long running case of *Haldeman v. Pennhurst State School and Hospital*, 9 F. Supp. 2d 544 (E.D. Pa. 1998) held that the governments of the state and and County are in substantial compliance with its order requiring habilitation, care and protection from harm for institutionalized persons with mental retardation. In February 1998, the federal district court issued an opinion reviewing the history of the case and stating its intent to conclude its active supervision over the case. The court found that, based on the special master's report, the Commonwealth and County had substantially fulfilled their obligations under the 1985 decree.

The Third Circuit in *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998) found that a doctor with attention deficit disorder who had staff privileges could sue the hospital for discrimination under Title III of the ADA. The appeals court examined the legislative history and found that Title III prohibits discrimination against “individuals” that would inhibit their “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” The court rejected the hospital's argument that Title III protects only members of the public, such as “guests” or “customers” who use the facilities as a place of public accommodation, in favor of a broad reading that included a physician who can no longer use the facilities to provide care for his patients.
Don’t forget the PBA Health Care Law Committee Meeting Dec. 4!
See Page 4 for details.

HEALTH CARE LAW NEWSLETTER
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