



The Bittinger Law Firm is dedicated to customer service. To stay abreast of the latest developments, we review proposed and current developments in the law. We monitor business and financial trends that affect your businesses. The Firm provides this information to support your decision making processes.

CHANGES IN THE WORKS

Tampa Court: Physicians wrongly denied medical staff privileges get \$1.2 million

A Hillsboro County circuit court in early October awarded a group of eleven radiologists \$1.2 million, finding that University Community Hospital wrongly terminated their staff privileges when the hospital terminated the group's exclusive contract with the hospital. In 2001, the hospital notified the physicians of its decision to change radiology service providers; a change that hadn't been made since 1967.

In finding for the physicians, the court held that the hospital's medical staff bylaws "constituted a binding and enforceable contract between UCH and the physicians." The court held that the termination of the physicians' privileges solely because the exclusive contract was terminated violated the bylaws.

OIG: DME suppliers can't provide free oxygen

The Office of Inspector General of the federal Department of Health and Human Services issued Advisory Opinion 06-20 on November 1, analyzing the issue of whether Durable Medical Equipment (DME) suppliers giving free short-term home oxygen or free overnight oximetry testing to Medicare beneficiaries would violate the federal anti-kickback statute or the federal civil monetary penalty, which prohibits inducements to Medicare beneficiaries.

Typically, there is a lag period between the date that the physician orders the oxygen and the time that the qualifying oximetry tests can be conducted. Medicare will not pay for the oxygen without the completed oximetry test. A supplier who asked for the Opinion had been providing free oxygen in the interim period. Even though the supplier would provide the oxygen pursuant to the doctor's order and not advertise the provision of the free oxygen, the OIG stated that patients typically learn about the free oxygen from their physicians. The supplier said that the provision of free oxygen during this short period is common in the industry. The supplier also asked for advice on whether the provision of free overnight oximetry testing to patients would be permissible.

In its opinion, the OIG repeated its longstanding concern about giving free items in connection with covered services. The OIG stated that the value of free testing and oxygen was "remuneration" under the anti-kickback statute. It said that the testing is "reasonable and probable" to influence a patient's choice of provider. Finally, the OIG stated that the provision of free tests or oxygen was to be calculated to generate subsequent business. Interestingly, this Opinion indicates that the government's enforcement efforts target activities even though they do not cost the Medicare program any additional money and even though they would benefit patients. To obtain a copy of the Opinion, [email us](#).

This is the second recent Advisory Opinion addressing Durable Medical Equipment compliance. The OIG issued Advisory Opinion 06-16 on October 3, 2006, stating that it is probably impermissible for a DME manufacturer to provide advertising assistance and reimbursement consulting services to some of its DME supplier company customers.

BUSINESS TIP OF THE DAY

Take Advantage of the Florida Prompt Pay Law: Review and Renegotiate Managed Care Contracts

If your private payor reimbursement rates are based on a percentage of Medicare fees, be aware that the recently announced Medicare rates could negatively impact your private-pay revenues. In other words, if your contract with Aetna sets fees at a percentage of Medicare, your Aetna revenues may go down per-service in the next year.

Further, the Florida Supreme Court gave the go-ahead in early November for a class action suit against seven HMOs for failing to promptly pay providers. The Florida Prompt Pay Law is very pro-provider. Many providers' managed care contracts actually waive the provisions of the Prompt Pay Law, believe it or not, because physicians' attorneys don't know about the statutory protections or because the physicians don't review the contractual terms.

If you would like information about Managed Care Contract Negotiation, [email us](#).

COMPLIANCE TIP OF THE DAY

Bah Humbug: giving gifts to referral sources?

If you're thinking about giving holiday gifts to referral sources, think again. The federal Stark Law prohibits physicians from making referrals to entities with which they have financial relationships for certain services. Gifts constitute financial relationships. There's an exception to the definition of financial relationships, though, for non-monetary compensation up to \$300 per year, so long as the compensation does not take into account the volume or value of referrals. The federal Anti-Kickback Statute, however, contains no such exception with a bright-line dollar amount rule. This firm recommends not giving anything of value at any time to other physicians or businesses who refer business to you. So before you take your best referral source to the Jaguars game, think about these federal statutes. Your organization's Code of Ethics or Business Practice Guide should describe the parameters for allowable gift giving and entertainment among referral sources. If you do not have a procedure for disclosing such relationships and for setting ethical and legal limits on these relationships, consider asking your attorney for assistance in drafting these, particularly to include them in your organization's overall compliance plan.

SPOTLIGHT ON SERVICES: EMPLOYMENT AGREEMENTS

If you haven't reviewed your organization's employment agreements in a while, the end of the year is an opportune time to do so. Consider the following:

- Does the non-compete provision take into account recent case law on the geographic limitations on protectable business interests?
- Do all your employees of similar status have the same basic agreement? Why not adopt a template agreement on which all contracts are based?
- Does the agreement contain arbitration provisions to keep you out of court?
- Are current relationships and work locations changing, such that the agreements may no longer fit into the Stark and Anti-Kickback statute exceptions (particularly the group practice exception for in-office ancillary services) and Medicare rules on "direct supervision" of nurse practitioners and physician assistants?

SPOTLIGHT ON SERVICES: PRACTICE CHECK UP

Ring in the New Year with an annual company legal check-up. With ever-steady enforcement of state and

federal self-referral and kickback prohibitions, along with Medicare billing fraud enforcement, many practices and health care companies schedule annual meetings with health law counsel to evaluate their risk and fashion a compliance plan. To schedule a consultation, [email](#) us. We have developed a simple diagnostic check list that we use to pinpoint vulnerabilities.

RECENT FLORIDA CASE LAW AFFECTING THE MEDICAL INDUSTRY

Brass & Singer, P.A. v. United Automobile Insurance Company; Florida Supreme Court; November 9, 2006: Florida insurance law prevented an appellate court from awarding attorney's fees to the insured in this matter. The insured had assigned her benefits to the physicians, and they filed suit directly against the insurance company. Under the plain language of the statute, the insured herself did not prevail.

Beth Linn v. Basil D. Fossum, M.D.; Florida Supreme Court; November 2, 2006. The Supreme Court ordered a new trial after a medical expert for the defense stated in her deposition that the doctor's conduct complied with the prevailing standard of care. She said she reached her conclusion based on a conference with several other physicians who were not witnesses in the trial. The testimony was found to be inadmissible because it improperly permitted the expert to bolster her opinions and created the danger that she, and other testifying experts, would serve as conduits for the opinions of others who were not subject to cross examination.

Hannon v. Steven Roper, M.D., Shands Teaching Hospital and Clinics, Inc., d/b/a Shands at Live Oak; Court of Appeal, First District; November 16, 2006. The appeals court granted a petition for writ of certiorari to determine whether the patient confidentiality statute prohibits communication between a non-party physician and his own attorney. In granting the writ, the court examined Section 456.057, Florida Statutes, which states: "except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given." The patient argued that because the doctor was not a defendant, the information cannot be released. The physician tried to argue that because he worked for Shands, and Shands had a statutorily-mandated relationship with the University of Florida, Section 456.057 should not bar a discussion of the patient between the physician and University agents.

Stone v. Palms West Hospital, et. al; Court of Appeals, Fourth District; November 8, 2006: The court reversed a summary judgment in favor of the hospital. The appeals court held that there was a jury question about whether the hospital could be liable on a theory of apparent agency based on the negligence of three on-call physicians. The plaintiff sued a hospital and three on-call physicians. The hospital filed a motion for partial summary judgment as to the agency authority of the physicians, saying that a hospital is not liable for the acts of physicians merely because they have staff privileges. The court stated that while the granting of privileges alone does not create an agency relationship, other facts could give rise to the presence of an agency relationship. If a hospital holds out a particular physician as its agent and if that patient accepted treatment from a physician believing it is rendered on behalf of the hospital, the hospital will be liable, wrote the court, citing a 2000 case. While the court did not go so far as to analyze the factors indicating agency, it stated that a question of fact existed for the jury to decide in addressing apparent agency.

Department of Health, Board of Medicine v. Matthew Wise, M.D.; November 9, 2006: Dr. Wise operated a website called getthepill.com. It provided prescriptions for contraceptives to individuals who complied with instructions provided on line and by way of an internet medical questionnaire. Dr. Wise, who lived in New Mexico but was licensed in Florida, reviewed the questionnaires. The Board found that the physician clearly and convincingly failed to comply with the requirements of the Telemedicine Rule in prescribing medications solely on the internet medical questionnaire to Florida residents. He should have documented a patient evaluation, including history and physical examination, to establish the diagnosis for which the

legend drug was prescribed, discussed with the patient treatment options and the risks and benefits of treatment, and maintained contemporaneous medical records. The Board recommended that the physician's license in Florida be suspended for six months, followed by a two-year probation and a fine of \$10,000.

Department of Health, Board of Medicine, v. Scott Geller, M.D.; November 2, 2006: In a case involving what the Board considered research or experimental treatment, the Board recommended that the physician be reprimanded, fined \$3,000, put on probation for one-year and take certain continuing education. The Board found that the physician failed to properly emphasize to the patient in 1998 the experimental nature of a procedure to implant an intraocular lens into the patient's eye. This type of lens was not yet approved by the FDA and was not available through standard, mainstream commercial sources in the United States. The opinion states that the informed consent form discussed the use of the procedure outside the United States, but did not adequately inform the patient of the extent that the procedure was being done in the United States. This case demonstrates the need for legal review of informed consent documents, particularly for experimental or emerging procedures. If you would like the firm to review your informed consent documents and processes, [email us](#).

Florida Medical Association, et. al., v. Department of Health, Board of Pharmacy; Division of Administrative Hearings; November 1, 2006. The administrative law judge found that a Board of Medicine regulation was an invalid exercise of delegated legislative authority. The regulation addressed drug therapy management. The rule stated that a pharmacist may dispense a different drug when a practitioner indicates on the prescription "formulary compliance approval" and the pharmacist provides the practitioner information about the giving of the therapeutic equivalent that the pharmacist dispensed. Proposed Rule 64B16-27.830.

CALENDAR

- February 21, 2007: Ms. Bittinger has been invited to speak at the American Bar Association's "Emerging Issues in Health Law" seminar in Orlando. Other lawyers from across the country will speak at this national conference.

WE'RE MOVING!

Look for our move to a new office in Jacksonville this spring. Located near Hodges Boulevard and Butler Boulevard, our new address will be: 13500 Sutton Park Drive South, Suite 201, Jacksonville, FL 32224

***The content of this newsletter is not legal advice and should not be relied on as legal advice.
Consult your attorney for advice on these and other legal matters.***

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