

Healthcare Law for the General Practice Attorney

By Brenda Eady Stafford

The healthcare system is one of the largest industries in the United States, with healthcare expenditures making up 16 percent of the gross domestic product (GDP) in 2006. It is a diverse industry comprising consumers, hospitals, physicians, pharmaceutical companies, and more.

Therefore, it should come as no surprise that sooner or later, as a general practice attorney, your next client, transaction, or dispute may involve a healthcare-law issue. Take the time to familiarize yourself with major healthcare laws and concepts, including the following:

Corporate practice of medicine doctrine. When representing a client who is interested in acquiring a healthcare business, you should know that some jurisdictions limit the services certain corporate entities can provide. While in most jurisdictions a not-for-profit corporation can employ physicians to provide medical care, in other jurisdictions, a business corporation is prohibited from doing so unless it is appropriately licensed by a state agency. The limitation is known as the prohibition on the “corporate practice of medicine,” and it exists, according to New Jersey’s highest court, “from a perceived need to protect the public from the commercial exploitation of the practice of medicine.” You may have to identify a permissible corporate form to enable your client to operate his or her new business.

Fraud and abuse. If you represent a

vendor that sells goods or services to a healthcare provider, you should know about the collection of laws, safe harbors, and exceptions that govern how healthcare providers can conduct business with each other and third-party vendors. These laws are commonly referred to as the “fraud and abuse laws,” and encompass the federal antikickback statute and the federal Stark Law, which bans physicians from making self-referrals unless an exception applies. One function of the fraud and abuse laws is to prohibit payments intended to induce a provider to overutilize services that are reimbursed by Medicare or Medicaid. Unless an antikickback safe harbor applies, your client, as the vendor, risks criminal prosecution for offering anything of value in order to get a provider to purchase products that will be reimbursed by Medicare or Medicaid.

Health Insurance Portability and Accountability Act (“HIPAA”). This federal law governs the privacy and security of protected health information (“PHI”) and applies to “covered entities,” defined as healthcare providers, health plans, and certain specialized companies that deal with PHI. Your client may not be a covered entity and enter into a contract to perform certain services for or on behalf of a covered entity. HIPAA requires your client to take many of the same steps as the covered entity to safeguard the privacy of PHI, including training staff, accounting for disclosures of PHI, and implementing security measures.

Financing agreements. Lenders usually

require collateral to secure a borrower’s obligation to repay a loan. In the event of default, the lender’s ability to enforce its security interest against the commercial borrower’s assets would be straightforward, absent fraud. When the borrower is a healthcare provider, the collateral typically includes Medicare receivables. Enforcement of a lender’s security interest in Medicare receivables, however, is subject to the anti-assignment statute, which prohibits payment of Medicare funds to anyone other than the provider unless the assignment is made “pursuant to the order of a court of competent jurisdiction.” 42 U.S.C.A. 1395g(c)(1). In counseling the lender, you should know that courts have enforced the lender’s “right” to payment from Medicare receivables but have rejected requests for a lender to file claims for payment directly against Medicare.

Given the breadth and diversity of the healthcare industry, healthcare legal issues can arise in unexpected ways. Knowing laws and concepts like those above will give you a head start in your next healthcare-related case.

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READY RESOURCES

■ *HIPAA Fundamentals* (Audio CD Package). 2006. PC # CET06HPFC. Center for CLE, Health Law Section, Young Lawyers Division.

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