Honigman Miller Schwartz and Cohn's February 2004

# HEALTH LAW FOCUS

## RECOVERY SOUGHT AGAINST ERNST & YOUNG

On January 5, 2004, the United States filed a complaint against Ernst & Young seeking the recovery of more than $900,000 in laboratory payments that were improperly submitted to Medicare by nine hospital clients of Ernst & Young. These hospitals allegedly retained Ernst & Young for the years 1991 - 1995 to obtain billing advice related to the accurate assignment of billing codes to laboratory services.

In a press statement, Ernst & Young stated: "Our work was fully consistent with professional standards and coding guidelines at the time. We received a flat fee for the consulting work and in no way shared in or benefited from reimbursements received by the hospitals." U.S. Attorney for the Eastern District of Pennsylvania, Patrick Meehan, who announced the filing of the complaint, reported: "It is the responsibility of an independent reviewer to be alert to fraud and abuse and certainly not to ignore it. In this case, as the complaint alleges, Ernst & Young kept itself deliberately ignorant of the facts." The outcome of this case will most definitely be of interest to all consultants and their clients. One thing is certain, the advice of billing consultants remains under the watchful eye of the federal government.

*For more information, contact Ann T. Hollenbeck.*

## PEER REVIEW DOES NOT NECESSARILY REQUIRE PEERS

Last year, the Sixth Circuit Court of Appeals decided a case providing immunity under the Health Care Quality Improvement Act ("HCQIA") to Board members acting on various investigative committees in *Meyers v. Columbia/HCA Healthcare Corporation*. Dr. Meyers was denied active staff privileges by the Credentials Committee. The Board committee which reviewed and upheld the denial cited, among other reasons, disruptive behavior, failure to work cooperatively, temper tantrums, and condescending remarks towards women all of which could have an adverse effect on the quality of patient care and inhibit hospital personnel from performing optimally. Dr. Meyers requested a hearing. The medical staff bylaws provided for a five-person hearing committee, including at least three medical staff members "when feasible." The committee appointed by the Board consisted of a judge, an attorney, a dentist, and various business people but no medical staff members. According to the Board, it was not feasible to appoint members of the medical staff because some were "working too many hours to devote adequate time," some had been involved previously in Meyers' peer review, and some had been involved in the incidents under review.

The Court found that HCQIA immunity was not limited to physicians. In granting summary judgment to the Board, the Court essentially found that the Board's decision was made in the reasonable belief that it was furthering health care. Although Dr. Meyers located four members of the medical staff who had not been asked to serve, the Court agreed with the reasons stated by the Board that it was not feasible to have medical staff members on the committee. The Court also found that the bylaws had not been violated and that the Board members were entitled to immunity under HCQIA.

*For additional information concerning peer review and credentialing issues, please contact Michael J. Philbrick.*

## DEAN'S TAX ILLEGAL!

A frequent "hot button" at academic medical centers is the Dean's tax. Many faculty practice plans are required to pay a certain percentage of their revenues to a central fund administered by the Dean for use in academic and research programs. Two opthalmologists in New York recently did what many faculty have considered and many Deans have feared, they refused to pay and went to court (*Odrich v. Columbia University*). The physicians went in looking for a court order to secure their part-time faculty appointments after leaving the university's practice plan. The court supported them, ordering Columbia University to take another look at the applications. It found that Columbia University violated fee splitting laws by refusing the appointments for nonpayment of

## MANAGED CARE WORKSHOP

On Thursday, February 26, 2004, our partner Chris Rossman and Neil Godbey of The Godbey Group will be presenting a free Managed Care Workshop for Hospitals. This workshop will provide tools for successfully negotiating and managing payor contracts, including tools for successful Blue Cross Blue Shield of Michigan appeals. For more information, please visit our website at http://www.honigman.com/knowledge/seminars.asp or contact Chris Rossman.

the Dean's tax. Many states have similar laws on the books, so more cases may follow.

*For more information, contact Gerald M. Griffith, Ann T. Hollenbeck or Linda S. Ross.*

### HOSPITAL LOSES EXEMPTION FIGHT

Even the IRS wins one on occasion, and the tax collectors scored a huge win in Texas late last year (*St. David's v. U.S.*). The IRS had audited St. David's and revoked its tax-exempt status for giving up too much control to an HCA affiliate in a joint venture. In 2002, the hospital won the first round in a fight to regain its tax-exempt status. It won by court order on the very eve of trial. The IRS, however, appealed and was able to get the case sent back down for a full trial. Whatever the outcome at trial, it is likely to affect how the IRS views many joint ventures for years to come.

*For more information and a more detailed case analysis, contact Gerald M. Griffith or Cynthia F. Reaves.*

### IRS SET TO PURSUE *PER SE* EXCESS BENEFITS

The IRS recently issued guidance for its audit agents on enforcing the intermediate sanctions rules on excessive compensation. The guidance focuses on circumstances where those rules will be applied automatically based on poor documentation. Many executives and physicians receiving compensation that is not properly documented could be taxed up to 225% or more, even if total payments might be reasonable otherwise.

*For additional information, contact Gerald M. Griffith, Ann T. Hollenbeck or Cynthia F. Reaves.*

### SARBANES OXLEY FOR NONPROFITS

The news today is full of calls for corporate accountability and transparency. Congress stepped in as the crisis grew on Wall Street, enacting tough governance reforms in the Sarbanes Oxley Act ("SOx"). Aside from certain criminal fraud provisions and whistleblower protections, SOx does not apply to nonprofits directly. That may not last much longer. Massachusetts has joined the growing list of states (and the IRS) looking publicly or privately at cracking down on nonprofit corporate governance. In legislation proposed in January, the Attorney General has targeted the governance structure, financial disclosure and conflicts of interest of nonprofits. Boards and management of nonprofits nationally should take heed, there may be SOx in their futures too. Nonprofits which deal with the SOx standards now may have a leg-up on the competition.

*For additional information regarding the impact of Sarbanes Oxley, please contact Gerald M. Griffith, Ann T. Hollenbeck or Cynthia F. Reaves.*

### MICHIGAN NURSING HOMES PAY FOR QUALITY

Effective December 29, 2003, the Michigan Public Health Code was amended to continue the collection of a Medicaid fee from Michigan nursing homes (the "quality assurance assessment"). The prior version of the Medicaid fee was found to be an illegally designated tax in *Lakeland Neuro-Care Center v. Michigan*. Although the State of Michigan appealed this decision, the Public Health Code was amended to designate the "quality assurance assessment" specifically as a tax levied on a health facility or agency. These amendments likely were initiated to ensure that the State could continue to collect the assessment in light of the current budget issues. While the constitutionality of the "quality assurance assessment" may be subject to judicial challenge, the assessment nonetheless is a tax payable by Michigan nursing homes.

*For more information, please contact Valerie F. Rup.*

### AMENDMENT TO MEDICARE MEDICAL EDUCATION PAYMENTS JEOPARDIZE PAYMENT

In the August 1, 2003 *Federal Register*, the Centers for Medicare and Medicaid Services ("CMS") again amended the regulations governing Medicare Graduate Medical Education ("GME") payment and the Indirect Medical Education ("IME") adjustment. To continue to receive appropriate payment and to avoid compliance issues, the following elements must be satisfied:

- Single Hospital Arrangement Per Teaching Program. CMS has stated that a single hospital must bear all or substantially all of the costs of a nonprovider teaching program.

- Written Agreement. A hospital is required to have in place a "written agreement" with the nonprovider evidencing that the hospital bears all or substantially all of the costs relating to the training program. This requirement has been in effect for cost reporting periods and discharges occurring on or after January 1, 1999.

- Supervising Physician Costs. CMS is now stating that in most instances the supervising physician incurs a cost and the hospital must reimburse the supervising physician for such costs.

In addition, the Intermediary is required to determine whether, as of January 1, 1999, any provider has incurred all or substantially all of the costs relating to the nonprovider teaching setting.

In light of these amendments, a substantial number of full-time equivalent interns and residents rotating to "nonprovider" settings, such as physician offices, risk forfeiture of substantial Medicare payments. In addition to loss of payment, compliance implications may arise. There is, however, still an opportunity to take remedial action to identify, protect and pursue appeal rights and to take preventive actions to avoid future disallowances. Because of the sensitivity of these issues, hospitals are best advised to conduct analyses and activities in the context of the attorney-client privilege. Our attorneys having significant experience in this area have developed an educational program that can be tailored and presented to your organization to apprise necessary individuals of the ramifications of this amendment.

*For further information or to arrange a fixed-fee presentation for your organization, please contact Kenneth R. Marcus.*

## SPEAKING ENGAGEMENTS

HMS&C attorneys are frequently asked to speak at conferences and seminars. A calendar of scheduled upcoming speaking engagements is provided below.

| Topic | Dates(s) | Event / Location | Speakers(s) |
|---|---|---|---|
| Negotiating and Managing Payor Contracts | February 26, 2004 | Managed Care Workshop for Hospitals (in coordination with The Godbey Group) Novi, Michigan | Chris Rossman |
| Emerging Issues in Reimbursement | March 4, 2004 | Michigan Health Law Institute Troy, Michigan | Kenneth R. Marcus |
| Hot Topics in Federal Tax Law | March 4, 2004 | Michigan Health Law Institute Troy, Michigan | Gerald M. Griffith |
| Living With HIPAA | March 4, 2004 | Michigan Health Law Institute Troy, Michigan | Linda S. Ross |
| Implementing and Monitoring Corporate Responsibility | March 5, 2004 | Michigan Health Law Institute Troy, Michigan | Ann T. Hollenbeck |
| Amended Medicare Medical Education Rules Relating to Rotation to Nonprovider Settings | March 17, 2004 | Michigan Association of Medical Education - Spring Conference East Lansing, Michigan | Kenneth R. Marcus |
| Summary of Significant Medicare Payment Developments | March 18, 2004 | Healthcare Financial Management Association - Annual Reimbursement Update Livonia, Michigan | Kenneth R. Marcus |
| Tax Law Update and Excess Benefit Compliance | June 28-30, 2004 | American Health Lawyers Association Annual Meeting New York, New York | Gerald M. Griffith |
| Alternative Risk Financing Options for Hospitals and Physicians | October 18, 2004 | ASHRM Annual Conference, Orlando, FL | Julie E. Robertson |

Honigman Miller Schwartz and Cohn LLP is a general practice law firm headquartered in Detroit, with over 190 attorneys at its three offices in Michigan. Our Health Care Department includes the attorneys listed below. Except as indicated, the attorneys are licensed to practice law in the state of Michigan only.


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Honigman Miller Schwartz and Cohn LLP's Health Law Focus is intended to provide information, but not legal advice, regarding any particular situation. Any reader requiring legal advice regarding a specific situation should contact an attorney. The hiring of an attorney is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Honigman Miller Schwartz and Cohn LLP also publishes newsletters concerning antitrust, corporate, employment, environmental, immigration and tax matters. If you would like further information regarding these publications, please contact Lee Ann Jones at (313) 465-7224 or via email at LJones@honigman.com. Articles and additional information about our firm and its attorneys are included on our web site at www.hongiman.com.


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