HOOPER LUNDY & BOOKMAN, INC.
HEALTH LAW PERSPECTIVES

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Hospital has Right to Make Rational Administrative Decisions; Exclusive Contracts Allowed

After more than three years of litigation, the California Supreme Court has declined review of an appellate court decision affirming a hospital's right to make rational, administrative decisions concerning its operations regardless of the incidental impact it may have on a physician's practice. (*Hoveida v. Scripps Health,* 2005 WL 3484178; CA Sup. Ct. No. S140742).

"The decision is important because it provides additional assurance to hospitals that operational decisions, which are intended to address legitimate administrative concerns, will not be disturbed by the courts simply because they have an adverse impact on an individual physician's practice." said HLB Attorney Blake R. Jones, who defended Scripps Mercy Hospital in the civil action with HLB Attorney Cary W. Miller.

The lawsuit arose from Scripps Mercy Hospital's decision to terminate at-will service contracts with the plaintiff physician and four other non-party internists in favor of another lower-cost provider for the exclusive provision of internal medicine services for unassigned patients at the Hospital's Behavioral Health Unit (BHU). The terminated physician asserted that this decision was primarily intended to retaliate against him for complaints that he had made regarding the hospital's coding practices and was not intended to address any legitimate administrative concerns. In addition, the physician contended that the hospital's decision to switch providers was adjudicatory in nature and gave rise to the same common law right to fair procedure discussed by the California Supreme Court in *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060. Because the hospital had not afforded the physician any type of hearing in connection with its decision to switch providers, the physician claimed that the hospital had violated his purported right to common law fair procedure.

The Complaint, which was filed in San Diego Superior Court in November 2002, primarily asserted claims against the hospital, its specialty physician contractor, and a hospital administrator for: (1) violation of the right to common law fair procedure; (2) intentional interference with right to practice profession; (3) violation of Bus. & Prof. Code § 2056; (4) intentional interference with economic relations; (5) violation of the Cartwright Act (Bus. & Prof. Code section 16700, et seq.); and, (6) unfair competition (Bus. & Prof. Code § 17200).

After nearly a year of discovery, the hospital moved for summary judgment. The trial court granted the motion, finding that the hospital's decision to contract exclusively with a different provider for the provision of certain internal medicine services was intended to address legitimate admin-

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istrative concerns and that the physician had failed to offer any evidence that this decision was intended to target or retaliate against him. As the trial court explained:

> Generally, hospitals must afford doctors minimal fair procedure when rendering decisions concerning staff membership when the denial of such membership would impair the doctor's right to fully practice his or her profession. [citation]. However, a hospital's rational policy decision to adopt a rule of general application to the effect that one of its departments will be operated by the hospital itself through a contractual arrangement with one or more doctors to the exclusion of all other members of the medical staff except those who may be hired by the contracting doctor or doctors is a quasi-legislative or administrative decision of a nonadjudicatory nature. [citation]. Such a policy decision will not be set aside unless it is substantively irrational, unlawful, contrary to established public policy, or procedurally unfair.

The physician subsequently appealed the trial court's decision. In an unpublished opinion, the Fourth Appellate District, Division One, affirmed. (*Hoveida v. Scripps Health,* 2005 WL 3484178). Among other things, the court of appeals similarly found that the hospital's decision to switch providers had been intended to address genuine, administrative concerns and was not aimed at excluding the physician. The appellate court observed:

> Case law establishes that when a hospital has, for legitimate and lawful administrative reasons, decided to close a department and award an exclusive contract to other physicians, while not revoking the staff privileges of the excluded physicians, there is sufficient justification for the decision to defeat a cause of action for interference with practice.

Unsatisfied with the result, the physician subsequently filed a petition for review with the California Supreme Court. On March 22, 2006, Plaintiff's petition was denied, *en banc.*

For additional information on this decision or operating hospital departments on a closed-staff basis, please contact Cary W. Miller or Blake R. Jones at 619.744.7300 in San Diego; Daron Tooch at 310.551.8111 in Los Angeles, or Scott Kiepen 415.875.8500 in San Francisco.

Final HIPAA Enforcement Rule Goes Into Effect

By Matthew Clark

On March 16, 2006, the final rule governing the enforcement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) became effective.

Prior to March 16, there already existed rules governing the investigation of noncompliance with the privacy standards. The final rule applies those existing rules to all of the other requirements and prohibitions established by HIPAA, including the requirements and prohibitions related to financial and administrative transactions, code sets, security of health information, and unique health identifiers. In addition to compelling providers to comply with all of the HIPAA provisions as opposed to simply the privacy rules, the Secretary of Health and Human Services (Secretary) has asserted that such a uniform enforcement system minimizes the potential confusion and burden imposed and maximizes the potential for consistency and fairness in enforcement.

Under the final rule, if the Secretary formally determines that a covered entity violated any of the HIPAA provisions, the Secretary is required to impose a civil money penalty on the covered entity. While the civil money penalty may not exceed one hundred dollars for each violation and cannot be in excess of twenty five thousand dollars for "identical violations" during a calendar year, the way in which the word "violation" is used should cause pause for covered entities. Under the final rule, the Secretary is to determine the number of violations of any provision "based on the nature of the covered entity's obligations to act or not act under the provision that is violated, such as its obligation to act in a certain time, or to act or not act with respect to certain persons."

For example, if a covered entity impermissibly grants an individual access to protected health information for all of its patients, a separate violation has been committed for each of the patients as the covered entity's obligation runs to each individual patient. Additionally, the final rule provides that in those situations where there is an ongoing and continuing violation of a HIPAA provision, "a separate violation occurs each day the covered entity is in violation of the provision." As a result, the number of violations of any given HIPAA provision could quickly escalate.

Moreover, a single act could

result in a finding of a violation of more than one HIPAA rule. While the final rule does provide that if a requirement or prohibition "is repeated in a more general form" in another provision "in the same subpart," then a civil money penalty may only be issued for one of those provisions, the provisions regarding security, privacy, financial and administrative transactions, code sets, and unique health identifiers are not contained within the same subpart. As a result, a single act of a covered entity could be the basis for the violation of multiple provisions if those provisions are contained within different subparts of the regulation.

Despite these provisions that could easily lead to numerous violations, the Secretary has, at his discretion, a number of opportunities prior to formally determining the existence of a violation to resolve the matter without the imposition of a civil money penalty. First, pursuant to the final rule, if the Secretary's investigation of a complaint or compliance review indicates noncompliance with any of the HIPAA provisions, the Secretary is required to attempt to reach a resolution of the matter informally. Such an informal resolution may include the covered entity demonstrating its compliance, completing a corrective action plan, or entering into another agreement with the Secretary. If the matter is informally resolved to the Secretary's satisfaction, the Secretary may exercise his discretion to close the matter prior to making any formal determinations as to the existence of a violation.

Second, in the event that a matter is not resolved by informal means, pursuant to the final rule, the covered entity is given 30 days to provide evidence of affirmative defenses and/or mitigating factors. Of particular importance, the final rule provides that the Secretary may not impose a civil money penalty on a covered entity if it establishes that one of the following affirmative defenses exist: (1) the violation is an act punishable under the criminal law prohibiting disclosure of individually identifiable health information; (2) the covered entity establishes, to the satisfaction of the Secretary, that it did not have knowledge of the violation and, by exercising reasonable diligence, would not have known that the act occurred; or (3) the violation is due to reasonable cause and not willful neglect and is corrected in a timely manner. If the covered entity provides evidence of affirmative defenses and/or mitigating factors, the Secretary may decide to not impose a civil money penalty based upon the evidence provided.

Given the numerous opportunities to resolve compliance issues before a formal determination is made by the Secretary, we believe that involving legal counsel before the Secretary issues a written notice of his intent to impose a penalty may reduce the chances of the imposition of a penalty or the civil money penalty imposed.

Of course, the best way for covered entities to avoid civil money penalties is to act proactively to ensure their compliance with all of the HIPAA provisions. Our experience shows that while most hospitals and large healthcare systems have HIPAA compliance programs, most smaller providers and physicians offices do not. As investigations are still triggered by complaints, which are equally likely to be brought against small providers and physicians, these covered entities may be particular susceptible to liability. If the covered entity does not already have a HIPAA compliance program, legal counsel should be retained to develop such a program.

Moreover, compliance with the privacy and security standards should be audited this year. Much of compliance audit will have to do with operations. For example, has your organization responded properly and timely to patient access requests. Keep in mind that many states, including California, have shorter response times than HIPAA (e.g., in California the provider has 5 business days to provide a copy of a medical and/or billing record, not 30 days). Other parts of compliance with the standards calls for forms or written policies that have specific language. For example, the security standards require approximately two dozen different written policies, if a provider is missing one of them, this is a violation for which the provider could now receive a civil money penalty. As part of the audit, legal counsel should review all forms, policies and procedures and the notice of privacy practices to ensure that the required language is present before an OCR complaint is filed.

For additional information, please contact Elspeth Delaney in Los Angeles at 310.551.8111 or Matthew Clark in San Francisco at 415.875.8500.

CALENDAR

May 2	**Los Angeles County Bar Association.** HLB Attorney Elspeth Delaney presents *Health Care Nuts & Bolts: Fraud & Abuse and Contracting.*
	The American Association of Nurse Attorneys. HLB Attorney Michelle Hackley participates in tele-seminar on *Issues with Chemical and Physical Restraints in the Long Term Care and Acute Care Settings.*
May 5-7	**California Society for Healthcare Attorneys Spring Seminar, Lake Tahoe.** HLB Attorney Daron Tooch presents Workers' Compensation Update. HLB Attorney Elizabeth Saviano presents *Primary Care Access for Vulnerable Populations.*
May 17	**California Association of Health Facilities,** Region IV Owners and Operators of Los Angeles. HLB Attorney Mark Johnson speaks on *Transfer & Discharge Issues*.
May 18	**Healthcare Financial Management Assn.,** San Diego. HLB Attorney Cary Miller participates in a panel discussion on Governance Issues, specifically the *Granada Hills* decision.
June 11	**Employee Pharmacists Assn.,** Los Angeles. HLB Attorneys Stacie Neroni, Hope Levy-Biehl, Mark Hardiman, DEA, Pharmacy Board, present *Inspections, Investigations, and other Regulatory Requirements.*
June 13	**San Francisco Bar Assn.,** HLB Attorney Mark Reagan co-presents *Anatomy of a Health Care Insolvency Case.*
June 14, 28	**California Hospital Assn. Hospital Reimbursement Seminar,** Sacramento, Pasadena, Costa Mesa. HLB Attorneys present all day seminars on *Current Topics in Hospital Reimbursement*.

Hooper Lundy & Bookman, Inc.
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1875 Century Park East, Suite 1600
Los Angeles, California 90067-2799

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