

HOOPER LUNDY & BOOKMAN, INC.

HEALTH LAW PERSPECTIVES

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Inmate Emergency Health Care Reimbursement Limited

According to SB 159, a bill which goes into effect January 1, 2006, local law enforcement agencies that do not have contracts with hospitals for the provision of emergency health care services to inmates will be required to pay for those services at a rate equal to 110 percent of the hospital's actual costs. "Actual costs" are defined as a hospital's actual costs according to the most recent Hospital Annual Financial Data report issued by the Office of Statewide Health Planning and Development, as calculated using a cost-to-charge ratio.

In addition, county sheriff or police departments will be prohibited from releasing inmates from custody for the purpose of seeking medical care, with the intent to re-arrest such individuals, unless the hospital determines the action would enable it to collect from a third-party source.

SB 159 further provides that services provided by ambulance services or other emergency or nonemergency response services without contracts will be reimbursed at a rate established by Medicare. The legislation further prohibits a sheriff or police chief from reimbursing transportation providers without contracts at a rate that exceeds the provider's reasonable and allowable costs, regardless of whether the provider is located within or outside of California. "Reasonable and allowable costs" are defined by CMS publications 15.1 and 15.2.

The intent of the legislation is to "provide county sheriffs, chiefs of police, and directors or administrators of local detention facilities with an incentive to not engage in practices designed to avoid payment of legitimate emergency health care costs for the treatment or examination of persons lawfully in their custody, and to promptly pay those costs as requested by the provider of services." The Legislature set a repeal date of January 1, 2009 for provisions of the bill "and does not intend to delete or extend that date if [local law enforcement costs, agencies] have not complied with the intent of the Legislature."

Finally, the bill requires the California Hospital Association, the University of California, the California State Sheriff's Association and the California Police Chiefs' Association to immediately convene an Inmate Health Care and Medical Provider Fair Pricing Working Group. The working group will be comprised of at least six members from CHA and the UC system and six members from the sheriff's and police chief's Association. The working group will be required to meet at least three times per year to "identify and resolve industry issues that create fiscal barriers to timely and affordable emergency inmate health care." In addition, the working group will be required to address issues including, but not limited to, inmates being admitted for care and later rearrested and any other fiscal barriers to

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HEALTH CARE LAWYERS

hospitals being able to enter into fair market contracts with public agencies.

Hooper, Lundy and Bookman, Inc. has been actively involved in litigation against county sheriff's departments concerning the obligation to pay for healthcare services to pre-arraignment detainees, as well as the amounts that healthcare providers are entitled to be reimbursed for those services.

For additional information, please contact Cary Miller or Mark Johnson in San Diego at 619.744.7300, Daron Tooch in Los Angeles at 310.551.8192 or Craig Cannizzo in San Francisco at 415.875.8511.

HLB Attorneys Honored

HLB Attorneys Elspeth Delaney and Michael Dubin have been recognized as top attorneys.

Ms. Delaney, who specializes in health care regulatory and business transactions in the firm's Los Angeles office, was selected as a Southern California Rising Star by Law and Politics and listed in the September edition of the Los Angeles Magazine' Southern California Super Lawyers - Rising Stars Edition. Ms. Delaney is among only 2.5 percent of Southern California lawyers in Los Angeles and Orange counties to receive this honor.

Mr. Dubin, an attorney in the firm's San Francisco office, was selected by Nightingale's Health Care News as one of the nation's Outstanding Young Healthcare Lawyers. Mr. Dubin is a member of the firm's Long-Term Care Practice Group, Regulatory and Reimbursement Practice Group and Litigation Practice Group.

Recommendations Issued to Congress on Oversight of Nonprofits

By Leon Altman

In October 2004, the U.S. Senate Finance Committee's Chair Senator Charles Grassley (R-NE) requested that Independent Sector (www.independentsector.org), a national coalition of nonprofit and charitable organizations, provide its recommendations to Congress on improving the oversight and governance of charitable entities and addressing instances of abuse in the nonprofit sector. In response, Independent Sector formed the Panel on the Nonprofit Sector (the Panel) which had the primary responsibility to address Senator Grassley's request. The Panel is a 24-member body comprised of leaders of diverse charitable and philanthropic organizations.

In June, 2005, after extensive studies and public comment, the Panel submitted to Congress its Final Report on Governance, Transparency and Accountability of Charitable Organizations. In the Final Report, the Panel identified major areas of nonprofit sector law in need of Congress' regulatory action. A complete copy of the Final Report is available for download at: http://www.nonprofitpanel.org/final/Panel_Final_Report.pdf.

While it is impossible to discuss in detail all of the Panel's findings and almost 120 distinct recommendations within the scope of this article, the following is a brief summary of the most important proposals made by the Panel in the Final Report.

1. Federal and State Enforcement. The Panel recommended more vigorously enforcing federal and

state laws governing charitable organizations, increasing the resources available for tax enforcement and oversight of charitable organizations, and improving sharing of investigative information between federal and state enforcement and regulatory agencies.

2. IRS Reporting. The Panel recommended that the forms used for annual tax returns filed by charitable entities (such as Form 990, 990-EZ and 990-PF) be substantially revised to provide more accurate, complete and timely information about the reporting charitable organization, and, further, recommended electronic submission of income tax returns as a preferential filing method. In addition, the Panel recommended a more careful review of the returns by charities' boards and officers, and greater penalties for knowing misrepresentations.
3. Periodic Review of Tax-Exempt Status. The Panel encouraged the boards of the charitable organizations to undertake periodic reviews of their organization's governing documents and policies to ensure the organization's continuous compliance with the laws and regulations governing tax-exempt entities.
4. Financial Audits and Reviews. The Panel recommended adoption of generally acceptable accounting principles (GAAP) for preparation and auditing of charitable organizations' financial statements and (depending on the size of the organization) either annual audit or at least review of the charity's financial statements by an independent CPA.
5. Disclosure of Performance Data. The Panel recommended that each charitable organization disseminate detailed information

about its operations to the public via its website, annual report and other means.

6. **Donor-Advised Funds.** Donor-advised funds are funds maintained by a public charity under which a donor has the right to make recommendations about the fund's distributions. Due to little regulatory oversight of donor-advised funds they are subject to potential abuse. The Panel recommended substantial overhaul and strengthening of laws and regulations governing such funds, including requirements of minimum annual distributions, prohibiting direct or indirect payments to the fund's donors, requiring a written agreement between the donor and the charity, imposing penalties for violations of these prohibitions and providing more information about donor-advised funds to the public.
7. **Type III Supporting Organizations.** Type III supporting organizations are charities created to support one or more other public charities or governmental entities, where the supported organization has influence, but not control of the supporting charity. The Panel recommended strengthening the laws and regulations to ensure that contributions to Type III supporting organizations are used to benefit the organizations, and not the individual donors, such as requiring minimum annual distributions, prohibiting payments from a Type III supporting organization to or for the benefit of its donors, requiring certain disclosures, and limiting the number of organizations that can be supported by Type III supporting organizations.
8. **Abusive Tax Shelters.** To curb abusive tax shelters (i.e., those transactions, a significant purpose of which is federal income tax evasion, and which result in accuracy-related penalties), the Panel recommended that all tax-exempt organizations be subject to the same reporting requirements as taxable entities with regard to certain transactions listed by the IRS as potentially abusive tax shelters, and imposing harsher penalties for knowing participation in abusive tax shelter schemes.
9. **Non-Cash Contributions.** The Panel recommended tightening the appraisal and valuation rules for tax-deductible contributions of appreciated property, conservation and historic façade easements, and clothing or household items, and increasing penalties on taxpayers and appraisers for knowingly claiming excessive deductions for such non-cash contributions.
10. **Board and Executive Compensation.** The Panel discouraged paying compensation to board members of charitable organizations. However, if a charity, nevertheless, chooses to compensate its board members, the Panel recommended such charity to review information on compensation provided by comparable organizations, and disclose the amounts of and reasons for such compensation and methods used to determine its reasonableness. The Panel's recommendations with respect to the executive compensation include increasing excess benefit transactions penalties, placing the burden on the executives and other "disqualified persons" charged with receiving excessive compensation to demonstrate that their compensation is reasonable, requiring board approval and periodic review of such compensation, and extending penalties im-
- posed on the board members and other managers approving self-dealing and excess benefit transactions beyond the actual knowledge standard to the "should have known" test. In addition, the Panel recommended that the charities, in their annual income tax filings, be required to disclose more clearly and provide greater details about board and executive compensation and distinguish between different kinds of compensations.
11. **Travel Expenses.** The Panel recommended that charities establish and enforce policies providing clear guidance on their travel reimbursement rules and limit reimbursement for travel expenses of spouses or dependents of individuals conducting business on the organization's behalf to a de minimis amount.
12. **Structure, Size and Composition of Governing Boards.** The Panel recommended that 501(c)(3) tax exempt organizations should generally be required to have at least three (3) members on its governing board, and, furthermore, to qualify as a public charity (as opposed to a private foundation), at least 1/3 of the board must be comprised of independent members, whose identities must be disclosed in the organization's annual income tax return filings. Rather than setting a maximum number of directors, the Panel recommended that every charitable organization review its board size periodically to determine the number of directors that would ensure the most effective governance of the organization. In addition, the Panel recommended that all boards establish strong and



effective mechanisms to ensure that they properly carry out their oversight functions and that board members are aware of their legal and ethical responsibilities in the organization's governance. In addition, the Panel recommended that individuals barred from service on corporate boards or convicted of crimes related to breach of fiduciary duty be prohibited from serving on the governing boards of tax-exempt organizations.

13. **Audit Committees.** The Panel recommended that charitable organizations' boards include individuals with some financial literacy; if it may not be achieved, and if state law permits, the board may form an audit committee comprised of

outside advisors who are not on staff or board members.

14. **Conflict of Interest and Misconduct.** The Panel recommended that charitable organizations adopt and enforce conflict of interest policies consistent with the governing state laws and organizational needs, as well as policies and procedures encouraging and protecting individuals who present credible information on illegal practices or violations of adopted policies of the organization.

While the Panel's recommendations are not binding on Congress and merely serve as a starting point for Congress' consideration of nonprofit regulatory overhaul, the topics covered and the nature of the recommendations provide

valuable insight into the likely direction of regulatory developments in this area. Furthermore, some or all of the Panel's recommendations will likely form a base for Congress' legislative action. Thus, charitable organizations' boards and officers would be well-advised to review the Final Report and closely follow any future developments in this area. In addition, we recommend that boards begin to analyze and revising their policies and procedures to prepare their organizations for the inevitable future changes in the area of non-profit governance.

For more information, contact Mr. Altman or Elspeth Delaney in Los Angeles at 310.551.8111, Craig Cannizzo in San Francisco at 415.875.8500, or Mark Johnson in San Diego at 619.744.7300.

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