Health Law Section
The Mississippi Bar

Spring 2019

Message from the Chair

Spring is in the air! Take the day, and come join us for a lagniappe CLE. This Friday, March 29, 2019, the Health Law Section of The Mississippi Bar will offer six (6) hours of CLE, including one (1) hour of ethics. The seminar will highlight key areas of interest to attorneys assisting their healthcare clients.

In this newsletter, both Conner Reeves and Jeffery Cook will give a glimpse into topics to be discussed at the Spring CLE. Conner Reeves addresses Medical Marijuana. Thirty-three (33) states and the District of Columbia have legalized Medical Marijuana. Jeffrey Cook sheds light on the transformation of our health care system and its impact on our hospitals. To hear more, come see them speak March 29, 2019.

The Health Law Section will meet at the MS Bar Annual Meeting in July at 10:00 a.m. The Mississippi Health Law Section will provide 2 hours of CLE for those who attend. Make your plans early. The Mississippi Annual Bar meeting is a great opportunity to meet up with your peers and/or relax with your family.

We hope to see you at this Friday's CLE program and the Annual Meeting. As always, the best way to become involved is to write an article for our Newsletter or volunteer for future program presentations or serve on the Executive Committee. If you are interested, please let us know.

Sincerely,

Julie Mitchell, Your Chair

Julie Mitchell

2019 Health Law Lagniappe

Friday, March 29, 2019 - MS Bar Center - Jackson

The Health Law Section of The Mississippi Bar will offer a CLE Seminar covering a host of current hot topics related to health care and health care law. The "2019 Health Law Lagniappe" will focus on several important issues facing our State and its residents and how attorneys can best advise their clients in this ever-changing climate. This seminar will provide timely information to health care lawyers as well as to general practitioners with health care and non-health care clients.

To download the registration form with additional information, click here.

Health Care Transformation: A Regulatory Change Outlook And Potential Effects On Hospitals

By: Jeffery W. Cook, Forrest General Hospital

Jeffery W. Cook

Adapting to regulatory change is nothing new for hospitals. Most often these regulatory changes have negative financial impacts on a hospitals' bottom lines as payers, particularly Medicare and Medicaid, try to find solutions to increasing health care costs and a growing number of beneficiaries. It has become clear over the last several years that there is major regulatory change on the horizon, spearheaded by CMS, which again seems to place hospital revenues in harm's way by changing the way it will pay for services. Understanding the direction of these regulatory changes provides good reason for Mississippi hospitals to be revamping its strategies and tightening their financial belts.

Regulatory Sprint to Health Care Transformation

All the while, the federal government admits and even promises that the health care system is currently under swift transformation. Alex Azar, Secretary of the Department of Health and Human Services, called it a "regulatory sprint to value-based transformation" during his speech as keynote speaker at the Institute of Medicare and Medicaid Payment Issues presented by American Health Lawyers Association. "Value-based" health care is not just a buzz word but it represents a shift in how care is to be provided in order for hospitals and practitioners to get paid. Per Secretary Azar, the goal of value-based health care transformation is to promote coordinated, patient-centric quality care and to reduce health care costs. Meanwhile, characteristics of the value-based transformation include value over volume, better quality and lower costs, price transparency, and free flow of information to patients and between providers.

This transformation by CMS has been ongoing for some time and has already required hospitals to jump in on certain efforts by tying reimbursement reductions to poor quality and patient satisfaction scores. But, CMS is seemingly doubling down on creating a system where it pays for safety and outcomes rather than for sickness and procedures. CMS is tweaking and moving forward with value-based payment models that pay for episodes of care rather than individual services, some of which have an upside and downside financial risk component. Additionally, CMS is moving ahead with site neutrality reimbursement parity - meaning that CMS will pay a similar rate for a service regardless of whether the site of service is a hospital, an ambulatory surgery center, or in some cases a physician's office-based facility. Notably, hospitals have traditionally been paid more than these others as the site of service. Further, CMS is removing certain procedures from the inpatient only list and listing these procedures on future year Medicare outpatient fee schedules, including cardiovascular and orthopedic procedures which have historically been profitable for hospitals. Lastly, CMS has begun to pay for telemedicine services which allows for better access to care to patients and also incentivizes physicians to coordinate care and provide health maintenance programs through this medium.

Health Care Transformation: A Regulatory Change Outlook And Potential Effects On Hospitals, *continued*

Where does that leave us health care attorneys and our hospitals?

Hospitals should be analyzing the volatile environment and mapping out strategies for success in this changing world. It is within the pursuit of implementing these strategies that hospitals will need legal advice and expertise in a wide array of health law areas. Hospitals will increasingly participate in value-based payment models and likely need to enter into contracts with other health care providers to provide collaborative services to cover an episode of care (i.e. physician services, inpatient services, rehab services, home health services, pain management services, etc.). Hospitals may also find it easier to joint venture with other hospitals or large physician groups and form a separate legal entity to pursue these value-based payment models thereby spreading the risk liability and forming a team of providers which covers a spectrum of services. In addition, hospitals will likely be looking to enter into, or have a larger presence in, the outpatient setting as patient volume is being steered out of the higher cost hospital setting by payers. Hospitals and physician groups may also find that there are common interests to joint venture an outpatient facility as it aligns organizations. However, this likely movement by hospitals to the outpatient setting will have barriers as physician groups are realizing that they can perform procedures in their own ambulatory surgery centers and office-based facilities while cutting the hospital out of the equation.

These certain strategies will continue to be governed by familiar federal law and regulations, including the Physician Self-Referral Law (Stark Law), the Federal Anti-Kickback Statute, and the Beneficiary Inducements CMP Law. However, CMS has acknowledged that these laws and regulations are not conducive to promote value-based payment programs and has recently issued requests for information related to making future updates to these laws and regulations that prominently establishes exceptions and safe-harbors for providers participating in value-based payment models. Furthermore, CMS seems determined to make updates to HIPAA and 42 CMR Part 2 in its attempt to make good on its promise to create a health care system that has a free flow of information.

If you represent hospitals or physician groups, the sprint to value-based payment transformation will have an impact on how you advise your clients. The transformation is presumably going to have a negative financial impact to traditional hospital services. Creative and collaborative strategies will need to be paired with sound legal advice on new or updated law and regulation to best serve Mississippi hospitals.

* Jeffery Cook will be addressing these topics and more at the MS Bar Health Law Section CLE on Friday, March 29th.

An Intro to Medical Marijuana and the Law

By: Conner Reeves, McLaughlin PC

Conner Reeves

As of the writing of this article, 33 states and the District of Columbia have legalized medical marijuana and additional states are actively considering its legalization through legislation and ballot measures. Such legalization is in direct opposition to federal law which still classifies marijuana as a Schedule I drug alongside heroin, LSD, ecstasy, and "magic mushrooms". This classification prohibits the possession, distribution or sale of marijuana even in states which have legalized medical or adult-use marijuana. The state legalization of medical marijuana creates a slew of legal considerations that impact many sectors, but especially healthcare. Regardless of the direction of your moral compass, medical marijuana programs are active in a majority of states and legal guidance is needed for those who are impacted by such programs.

So how are states getting away with operating medical marijuana programs in violation of federal law? Since 2014, Congress has routinely passed riders to the appropriation bills for the Department of Justice which prohibit the expenditure of federal money to interfere with the implementation of state medical marijuana laws. Most recently, President Trump signed HJ Res. 31 into law which extends the same prohibition through September 30, 2019. Generally, business and patients operating under a legal state program are not at risk of prosecution absent other violations of state or federal law. Despite this hall-pass from the Feds, there are still a number of legal issues that arise in states with legal medical marijuana programs.

Because of its Schedule 1 classification, marijuana cannot be prescribed like other pharmaceutical drugs. In states with medical marijuana programs, physicians "recommend" that a patient try medical marijuana to alleviate a particular symptom or "certify" that the patient has a debilitating medical condition that qualifies that patient to access medical marijuana through the state-approved program. These certifications or recommendations are protected by the First Amendment as conversations between the patient and medical provider.

Growers, retailers, vendors, suppliers, landlords and employees face significant barriers that aren't applicable to other industries. For example, businesses that operate in the medical marijuana industry, even indirectly, are often denied the ability to open a bank account. Generally, banks are unwilling to accept the significant legal, operational and regulatory risk associated with servicing these clients since any contact with money that can be traced back to state marijuana operations could be considered money laundering under federal banking law and regulations. In addition, dispensaries cannot accept payment via credit or debit card and insurance companies don't cover medical marijuana expenses, thus creating a huge (and unsafe) cash-only industry. Fortunately, Congress is considering proposals to clarify how banks can serve this industry and remain compliant with federal law.

An Intro to Medical Marijuana and the Law, *continued*

Healthcare businesses face a number of legal and policy decisions that have resulted in a patchwork approach to embracing or resisting their state's medical marijuana programs. Some hospitals are prohibiting their employed physicians from recommending medical marijuana while privately-owned clinics and physician groups are allowing their physicians to consider this treatment option for their patients. Long term care facilities are either allowing their residents to use medical marijuana if administered by an outside caregiver or are prohibiting its presence on their property. Similarly, in-patient hospitals are weighing whether to allow patients to bring their medical marijuana with them as they would with any other regimented medication. Finally, healthcare entities are revising employment policies to address employee use of medical marijuana to ensure patient safety as done with other legal medications. Answers and guidance to these issues are steered by national accrediting bodies, professional associations, lawyers and corporate decisionmakers.

The state-by-state approach to medical marijuana resembles the post-prohibition alcohol industry and has created a regulatory landscape just as varying. The inconsistencies in state laws and evolving federal positions create an opportunity for attorneys to advise clients in, ancillary to, or even outside of the medical marijuana industry in states with legal programs.

*Conner Reeves will be addressing these topics and more at the MS Bar Health Law Section CLE on Friday, March 29th.

Health Law Section

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We are on the web!

Click here

Upcoming Events

Friday, March 29, 2019
Heath Law Section Annual CLE Seminar
MS Bar Center - Jackson, MS
Click here for registration information

Thursday, July 11, 2019
Health Law Section Annual Meeting
Sandestin Hilton - Destin, Florida

Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Conner Reeves at conner@mclaughlinpc.com

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

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