THE FLORIDA BAR HEALTH LAW SECTION
AUGUST/SEPTEMBER 2012 HEALTH LAW SUMMARIES

The following are brief summaries prepared by section volunteers of new developments in Florida health care law that may be of interest to members of the Health Law Section. The summaries are presented for general information only as a courtesy to section members and do not constitute legal advice from The Florida Bar or its Health Law Section.

FRAUD AND ABUSE

U.S. District Court for the Middle District of Florida Unsealed a *Qui Tam* Complaint Alleging Violations of the Stark Law, the Federal False Claims Act, the Anti-Kickback Statute and the Florida False Claims Act.

The US District Court for the Middle District of Florida unsealed a Whistleblower complaint that alleged violations of the Stark Law, the federal False Claims Act ("FCA"), the Anti-Kickback Statute ("AKS") and the Florida False Claims Act (the Florida "FCA"). The Relator, Barbara Schubert, is a former employee of Defendant, Pediatric Physicians Services, Inc. ("PPS"). From 1998 to 2011, Relator was the Director of Operations at PPS. Defendant All Children's Health System, Inc. ("ACHS") owns and operates a hospital, a physician staffing company, and a management company: these entities are All Children's Hospital ("ACH"), PPS, and All Children's Hospital, Inc. ("ACHI"), respectively.

The Relator alleged that ACHS violated the anti-referral prohibition of the Stark Law when it employed as many physicians as possible at salaries that far exceeded fair market value in order to guarantee the physicians' referrals to ACH. The complaint alleged that the total salaries of the PPS physicians exceeded fair market value by approximately $5 million in 2010. In the interest of maintaining their lucrative employment, the physicians were induced to perform a high volume of procedures exclusively at the paying facility. The facility was rewarded for the inducement by being able to bill for facility costs and technical components of each of the physician's procedures.

With regard to the FCA, the Relator alleged that as a result of entering into financial compensation arrangements that far exceeded fair market value, defendants received improper referrals from the employee physicians, and thereafter submitted false claims for reimbursement to the Florida Agency for Health Care Administration ("AHCA"), which in turn submitted claims for reimbursement to the federal Medicaid program. When defendants submitted claims to AHCA, they knew that the State of Florida would submit the claims to the federal government. Therefore, defendants knowingly violated FCA by causing false and fraudulent claims to be presented for payment to the United States.

With respect to the AKS, the Relator alleged that defendants violated the statute by knowingly entering into financial compensation arrangements that were made for the

purpose of inducing referrals to ACH and by submitting false claims as a result of improper referrals.

The Florida FCA was violated when the defendants, while stating that they were in compliance with all state and federal regulations, submitted claims for reimbursement to AHCA for services rendered as a result of improper referrals.

The Relator demanded a jury trial.

United States and State of Florida ex rel. Barbara Schubert v. All Children's Health System, Inc., Case No.: 8:11-cv-01687-JDW-EAJ (M.D. Fla. Filed May 1, 2012).

Reported by: Elena Kohn, Shumaker, Loop & Kendrick, LLP

HEALTH INFORMATION TECHNOLOGY & PRIVACY

Another Data Breach Leads to a Big Penalty

On September 17, 2012, the federal Department of Health and Human Services Office for Civil Rights announced that a Massachusetts health care provider has agreed to pay HHS a $1.5 million settlement related to potential HIPAA Security Rule violations. The settlement is the result of an investigation started by a data breach reported pursuant to the HITECH Act. It involved the theft of an unencrypted laptop. OCR alleged that the entity failed to conduct a thorough risk analysis related to electronic protected health information on portable devices. The entity also allegedly failed to adopt and implement policies and procedures to restrict access to authorized users, and failed to adopt policies relating to security incident identification, response and reporting. Apparently, these failures continued over a long period of time.

More information is available at
http://www.hhs.gov/news/press/2012pres/09/20120917a.html.

Reported by: Shannon Hartsfield Salimone

PROFESSIONAL LICENSURE

1Deviation from Recommended Penalty for Similar Violations

The Board of Dentistry recently found that a practitioner's third record keeping offense was "not as egregious as a standard third record keeping violation" that warranted a deviation from and mitigation of the penalty recommended by the Administrative Law Judge in Department of Health v. Joseph Gaeta, DDS, Case Number 2007-29044, Final Order Number DOH-12-1796-FOF-MQA (Sept. 5, 2012). The respondent was charged with failure to document the type and amount of local anesthetic administered to a patient in 2006. The Practitioner had previously been disciplined for a record keeping violation in a 2003 case, but the discipline in the 2003 case was not imposed until 2009.

According to the Board, the respondent did not receive record keeping remediation in the 2003 case before committing the subsequent record keeping violation. The Board reasoned that the fact that the respondent had not received remediation at the time of the subsequent violation warranted a deviation from and mitigation of the penalty recommended by the Administrative Law Judge. The Recommended Order in the case also contains an interesting discussion on the appropriate standard for expert testimony intended to assist the Administrative Law Judge in determining whether alleged actions are within or below the standard of care and the practice of alleging violations as either a standard of care violation or a recordkeeping violation.

In a recent *per curiam* opinion by the First District Court of Appeal in Florida Board of Engineers v. Joseph Rickett, 37 Fla. L. Weekly D2153 (September 7, 2012), Judge Wetherell, in dicta included within his concurring opinion, goes to great lengths to discuss the appropriate use of the testimony of a single Board member concerning his application of a challenged Board administrative rule. The issue on appeal is whether or not the Board was entitled in a rule challenge proceeding to have the subpoena issued to a Board member who had participated on the Probable Cause Panel in a previous case against Respondent's engineering license. Although Judge Wetherell agreed with the Court's conclusion that the Board was not entitled to the requested relief, he took the time to discuss the lack of relevance of a single Board member's application of the rule in determining the facial validity of the challenged rule and on the permissible uses of such testimony in the underlying proceeding.

Reported By: Allen R. Grossman and Michael L. Smith