Florida Health Law Journal

a publication of the Health Law Section of The Florida Bar
in cooperation with The Florida State University College of Law

Board of Editors
Volume I, Number 1
Winter 2009

FLORIDA HEALTH LAW JOURNAL (ISSN 1948-9511) is published twice a year by the Health Law Section of The Florida Bar in cooperation with The Florida State University College of Law. The inaugural issue is distributed to members of the Health Law Section, faculty at The Florida State University College of Law and to law libraries of law schools in Florida.

The Health Law Section

Established in 1988-1989 as a Section of The Florida Bar, goals of the Health Law Section include providing an organization within The Florida Bar open to members of The Florida Bar and others with an interest in health law and to provide a forum for communication and education leading to the improvement and development of the field of health law. Another goal is serving the bar and the public generally in interpreting and carrying out the professional needs and objectives in the area of health law.

Membership is open to any member of The Florida Bar in good standing and interested in the purposes of the Section. Affiliate membership is open to those who practice a profession dealing with healthcare such as physicians, nurses, administrators and allied health practitioners. To join the Health Law Section, submit an application for regular membership or an application for affiliate membership.

The Florida State University College of Law

Since opening its doors in Winter 1966, the Florida State University College of Law has been committed to advancing the success of its students. National-recognized scholars provide students a superb legal education with a strong liberal arts orientation. The law school's location in Tallahassee provides students many educational and professional opportunities involving the capital city's hundreds of law firms, state and federal courts and governmental agencies and offices.

In recognition and support of the College of Law's efforts, the Health Law Section has funded the Florida Bar Health Law Section Scholarship.

Articles appearing in FLORIDA HEALTH LAW JOURNAL may not be regarded as legal advice. The nature of health law makes it imperative that state and federal law and practice be consulted before advising clients. Statements of fact and opinion are the responsibility of the author and do not imply an opinion or endorsement on part of the officers, Executive Council members of the Health Law Section of The Florida Bar.

Subscriptions to FLORIDA HEALTH LAW JOURNAL are $40.00 per year. Single issues are available for $20.00.

The editorial board of FLORIDA HEALTH LAW JOURNAL invites manuscripts year-round with the following guidelines:

1. Please conform text and endnote citations with the current Bluebook: A Uniform System of Citation compiled by the editors of the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review and The Yale Law Review. www.legalbluebook.com

2. Please include a cover letter, containing the title of your manuscript, your professional affiliation or school, address, telephone and e-mail address.

3. Manuscripts in Word document format can be submitted electronically to the attention of the Editor in Chief at JMBarclay@Comcast.net

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MILESTONES

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ARTICLES

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NOTES

MILESTONES

DEDICATION OF INAUGURAL ISSUE TO BARBARA J. PANKAU

Jeanne Helton, Esq., Immediate Past Chair, Health Law Section**

The first volume of the FLORIDA HEALTH LAW JOURNAL is dedicated to the memory of Barbara Ropes Pankau, Esq. Barbara practiced law in the state of Florida from 1975 through January 10th, 2009, when she had an untimely death.

It is entirely appropriate to dedicate the beginning of the FLORIDA HEALTH LAW JOURNAL in Barbara's memory. After all, she was there in the beginning of most Health Law Section things: its formation, its Certification status, this publication and the Section's consistent growth and maturity over the years to the point where the Section now introduces another beginning, which so aptly honors Barbara: FLORIDA HEALTH LAW JOURNAL.

Professionally, Barbara was an outstanding lawyer. She had an unending thirst for knowledge, coupled with a genuine desire to use her expertise to help others. She was a Board Certified Health Lawyer, designated by The Florida Bar. She was on the Editorial Board of the FLORIDA HEALTH LAW JOURNAL and was committed to using this medium to enhance the professional knowledge of other health lawyers. She was elected to the Board of Directors of the Florida Academy of Healthcare Attorneys in 2007, was selected as one of the Best Lawyers in America,® recognized as a Florida Super Lawyer,® and a consummate professional. Barbara had an unquenchable thirst for knowledge and a tremendous ability to apply facts to complex laws and navigate her clients to a safe destination. She was a lawyer's lawyer. She was tireless in her efforts to improve access to health care and gracious in her commitment to share her expertise and elevate the standards for health lawyers. Her sudden and untimely death in January, 2009 will not erase her mark as a lawyer and an exceptional individual.

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FOREWORD

TROY KISHBAUGH*

This inaugural edition of FLORIDA HEALTH LAW JOURNAL, aptly subtitled as "*The* healthcare law JOURNAL for Florida lawyers," certainly presents a variety of timely and highly relevant articles by seasoned Florida health lawyers.

Chief Administrative Law Judge Robert Cohen traces the evolution of healthcare facility regulation in Florida from pre-Administrative Procedure Act decisions made by the Department of Health and Rehabilitative Services to today's environment in which administrative law judges of the Division of Administrative Hearings make findings of fact and submit recommended orders to the Agency for Health Care Administration for disposition.

Grant Dearborn, formerly Chief Facilities Counsel for the Agency for Health Care Administration, describes recent health care regulatory legislation governing kickbacks, home health agency regulation and health care clinics.

Attorneys selecting an appropriate business entity for a new healthcare enterprise face a daunting series of choices. Richard Jacobs, a private practitioner, outlines those choices and describes reasons why one might be preferable over another.

Sanctioning of errant healthcare providers drew the attention of Tampa attorney Bruce D. Lamb who chronicles administrative portions of the healthcare provider sanctioning process in Florida today.

Finally, professors Jay Wolfson and Nir Menachemi examine the nature and extent of connections between patient safety and fraud and abuse, heralding a possible merger of the two movements.

These articles are representative of the creative and innovative approaches to delivery of healthcare legal services being provided by members of the Health Law Section statewide and are commended for your careful review and consideration.

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INTRODUCTION

JAMES M. BARCLAY*

The Health Law Section of The Florida Bar is a national leader in creating innovative programs for its members. From its inception, the Section has excelled in making high-quality educational programs available to its members, and the public, through live programs.

The natural progression of the Section's early efforts led to robust live and recorded continuing legal educational programs, the development of current Health Law Handbooks, periodic Newsletters, certification of qualified healthcare lawyers and development of a vibrant website.

FLORIDA HEALTH LAW JOURNAL was inevitable. From dedicated Health Law Section leadership inspired by those who formed and nurtured the Section, including the then-novel certification of recognized experts, legendary continuing education programs and publications, came the impetus for this publication, in large measure stemming from Health Law Section activities of Barbara Pankau from its inception to the conference call about this publication the Wednesday before her untimely death the following Saturday.

No project of these proportions is accomplished by a single person, or just a few people, and FLORIDA HEALTH LAW JOURNAL is no exception. Surfacing as a test of the Section's maturity and moving through various stages of conceptualizing, design, staffing and recruitment of authors and editors to publication, FLORIDA HEALTH LAW JOURNAL has enjoyed the unwavering support of leadership at all levels of the Health Law Section, The Florida Bar and The Florida State University College of Law.

Authors and editors, especially the invaluable student editors, were generous beyond gratitude with their time, efforts and energy to prepare, edit and publish FLORIDA HEALTH LAW JOURNAL on schedule. Each of them took a great deal of time from their other pressing tasks to make this publication possible. Their work is very much appreciated.

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Preface

BARBARA DEL CASTILLO*

As its founding Executive Editor, I have the distinct pleasure of introducing this inaugural issue of FLORIDA HEALTH LAW JOURNAL. FLORIDA HEALTH LAW JOURNAL is designed to be "*The* health law JOURNAL for Florida lawyers" and will be published twice a year by the Health Law Section of The Florida Bar, in cooperation with The Florida State University College of Law. The Journal welcomes submissions for publication based upon high-quality legal research, critical thinking and practical experience, in the areas of physician practice and regulation; Medicare and Medicaid compliance; managed care contracting; self-referral, anti-kickback and fraud and abuse; corporate compliance; health care licensing and facilities operations; bioethics; regulatory reform and other innovative topics germane to the practicing health law attorney.

We are fortunate to have had many experienced attorneys who graciously volunteered their time and attention and provided informative papers for this inaugural issue on a variety of interesting and relevant topics. Thank you. We are grateful for your contributions. We are equally as grateful for the contributions of our editorial staff, including our student editors, who so enthusiastically assisted at many levels. First and foremost, however, we wish to acknowledge the contributions of our founding Editor-in-Chief, James M. "Chet" Barclay, who bore significantly more than a yeoman's share of effort in bringing the JOURNAL to publication and inspired us with his knowledge and passion.

We hope FLORIDA HEALTH LAW JOURNAL will continue to explore topics that are provocative and relevant for Florida attorneys, not only for all those practicing health law, but also to others who find it of interest.

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Health Law at the Division of Administrative Hearings

Robert S. Cohen*

The Division of Administrative Hearings ("DOAH") has evolved from one hearing officer in 1974 to a panel of administrative law judges ("ALJ's") handling every type of case from disability claims, child support enforcement, and environmental permitting, to health care certificates of need, physician and other health care professional licensure, and Medicaid audit cases. This article will focus on the evolution of health care practice at DOAH over the past thirty-five years, as well as a look into what the future may bring.

Early Days of DOAH

In the early days of DOAH, agencies were skeptical of a hearing officer's ability to hear "their" cases and further implementation of agency policy and regulation. Under then-applicable administrative adjudication laws and rules, agencies appointed their own hearing officers to take testimony and build a record for agency final decision. There was little separation between hearing officers and agency policymakers. The Administrative Procedure Act enacted in 1974 ensured a

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greater degree of independence on the part of hearing officers from decision-makers at agencies. This is not to say that hearing officers' recommendations were wholeheartedly accepted by agencies. This did, however, mark the beginning of an independent administrative law judiciary.

Over the years, DOAH has strived to fairly adjudicate matters before it and remain completely independent of agencies whose cases it hears. DOAH, while administratively connected to the Department of Management Services, is a separate budget entity, with the director serving as "its agency head for all purposes."[1] The independence granted to DOAH by the Florida Legislature, as well as hiring of attorneys as administrative law judges, has helped foster a professional corps of judges whose interests lie in furthering due process, independent judgment, and pursuit of justice.

Florida, unlike many states that utilize a panel of adjudicators rather than the agency model, enjoys broad subject-matter jurisdiction. In addition to challenges to existing, proposed, and unpromulgated rules, DOAH hears cases in more than twenty different areas referred by Florida agencies, as well as numerous matters referred by counties, municipalities, water management districts, and other local entities who seek an independent adjudication of issues.[2]

Administrative Law Judges at DOAH

DOAH does not handle traffic cases involving implied consent to test for alcohol or drug consumption, unemployment compensation, or matters involving the Public Employees Relations Commission. DOAH hears cases involving virtually all other types of matters considered by state agencies, including workers' compensation appeals through the Office of Judges of Compensation Claims.[3]

DOAH is currently comprised of thirty-five ALJ's and thirty-two judges of compensation claims (workers' compensation adjudicators). The minimum statutory requirement to

become an administrative law judge is the same as for a county or circuit judge in Florida, namely, five years a member of the Florida Bar in good standing.[4] Case assignments for ALJ's are apportioned among three districts, Northern, Middle, and Southern, for even case distribution and consolidated travel so judges do not have to travel unnecessarily from one end of the state to the other. As described more fully below, certain ALJ's are designated "medical specialists" and hear cases involving health care professional licensure cases from the Department of Health.[5] Certificate of Need (CON) hearings are conducted by a small group of ALJ's, experienced with such matters, to ensure their availability for protracted litigation. CON matters are heard in Tallahassee unless a change in location "will facilitate the proceedings."[6]

Health Care Practice at DOAH

Perhaps the areas of health law practice provoking the most legislation and discussion of DOAH's jurisdiction, authority, and ability to render decisions have been licensure of health care professionals and health care CONs. Other than rule challenges brought pursuant to Sections 120.54 or 120.56, Florida Statutes, matters may not be referred by agencies to DOAH unless they involve disputed issues of material fact.[7]

In the area of health care professional licensure cases, licensees are often warned by their attorneys to avoid informal hearings. Informal hearings, pursuant to Subsection 120.57(2), Florida Statutes, limit a licensee's evidence only to mitigation of the penalty and require acceptance of factual allegations made by the professional licensing board as true.[8] However, licensees need to proceed cautiously because statements made at an informal hearing could be taken as mitigation of charges rather than disputed issues of material fact going to the heart of the disciplinary matter.[9] Agencies traditionally had no duty to inform the licensee of any right to a formal hearing if disputed issues of material fact arose. This

burden rested squarely on the shoulders of the professional whose license was at risk.[10]

Pursuant to Section 120.651, Florida Statutes, at least two ALJ's must be designated to preside over actions involving the Department of Health or boards within the Department of Health. These ALJ's are required to have "legal, managerial, or clinical experience in issues related to health care or have attained board certification in health care from the Florida Bar."[11] DOAH has always had at least six ALJ's so designated in order to ensure timely scheduling and hearing of matters involving the Department of Health or its boards.

Prior to medical malpractice legislation passed in 2003, the issue of whether a physician or other health care professional deviated from the applicable standard of care was an issue of fact to be determined by the ALJ.[12] The 2003 Florida Legislature amended Subsection 456.073(5), Florida Statutes, to provide that the determination of whether a health care licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by a board or department. No longer would this be a finding of fact to be determined by an ALJ. The reasoning behind the legislation was to put matters within the special expertise of professionals on health care licensing boards back within their grasp and decision-making ability. Unlike civil Courts, where non-professional members of juries determine whether a physician commits medical malpractice, ALJ's were stripped of similar power. This statutory change has conferred the greatest power on health care professional boards since the creation of DOAH by the APA in 1974.[13]

Certificate of Need Litigation at DOAH

Certificate of Need (CON) adjudication has enjoyed a long and storied history at DOAH. Any practitioner, agency representative, or ALJ who has been involved in a CON matter has

not quickly forgotten the experience. Tales of hearings lasting weeks, even months, are legion, and many participants in CON cases have been wearied by the process, if not the result of their efforts in these protracted cases. At one time, Florida regulated nearly every type of health care facility, whether the matter involved creation of an acute care hospital, a nursing home, a psychiatric or substance abuse facility, or an intermediate care facility for the mentally retarded, to name a few.[14] Also, every secondary and tertiary health care service was covered by the CON program, whether cardiac catheterization, open heart surgery, neonatal intensive care, inpatient psychiatric or substance abuse services, or major medical equipment purchases.[15] Home health agencies were regulated and, more recently, hospice programs came into the mix.[16] The CON process was a mainstay at DOAH from its inception until the last five years. The role of the regulatory agency has changed greatly over the years.

In the early years, questions arose as to whether DOAH should even be involved in the CON process.[17] The occasional writ of mandamus or petition for certiorari was sought to force the agency to act in a CON matter. When a public hearing, as required by then-applicable law , was not held, judicial relief was found rather than seeking an administrative adjudication.[18] However, CON applicants quickly found their way to DOAH where the volume of cases grew until their peak in the mid-to-late 1980s.

The first DOAH CON proceeding involved the six-month extension of a CON for construction of a health care facility. While the case, heard by Hearing Officer (ALJ's were known as "hearing officers" until a 1996 amendment to the APA) Steven Pfeiffer, was not as exciting as what was to follow, the authority of DOAH to hear such matters was established.[19] The Bureau of Community Medical facilities was housed within the Department of Health and Rehabilitative Services (DHRS), the massive agency that encompasses what are now known as

the Agency for Health Care Administration, the Department of Health, and the Department of Children and Family Services. CON applications were reviewed by Areawide Planning Councils, later replaced by District Health Planning Agencies. These organizations reviewed CON applications for conformance with State and Local Health Plans, and even conducted public hearings at the local level to take testimony and comment from the public on proposed projects offered by health care providers. From personal experience, health councils had directors with health planning and health care delivery backgrounds who were able to understand well the projects proposed, as well as local needs of communities for which health care projects were being offered.

The employees of DHRS in Tallahassee were generally not involved at the local level and rarely attended public hearings. Public hearings were generally well attended when a major facility was proposed. Proponents of a service or facility went to great lengths to bring out supporters of projects. The intent of applicants for CONs was to create a strong and favorable impression with local health councils and hope the favorable comments were considered by DHRS staff in Tallahassee. Often, media was invited to attend public hearings in an effort by applicants to impress upon the community a need for the proposed service or facility. Of course, opponents of the project would also attend the public hearings and discuss why the proposal would be duplicative of like and existing services, would not serve needs of the health care consuming public, and would drive up costs of health care in the community.[20] Accessibility to all people, regardless of ability to pay, was often a central argument in CON cases that came before DOAH.[21]

Evolution of Agency Participation in Con Cases

In the first two decades of CON review at DOAH, the agency expended great resources in CON cases, sending nu-

merous witnesses to testify at DOAH hearings on everything from architectural review to financial analysis, to health care planning, to CON review and compliance with letter of intent requirements. It was not uncommon in a CON case to hear testimony from the head of the CON program as well as the CON application reviewer, the plans and construction coordinator, and a health planner. The agency was a major player in the cases and worked in concert with either the existing provider, the applicant, or the intervenor, depending upon the preliminary decision of the CON office. Agency witnesses, who were usually qualified as experts, were necessary when the parties refused to stipulate to many of the review criteria contained in Rule 10-5.11, Florida Administrative Code.[22]

Over the years, DOAH has become involved in disputes concerning letters of intent to submit CON applications.[23] In the early 1980s, cases were heard by DOAH hearing officers concerning failure to either timely file the letter of intent with DHRS when it was filed with the health systems agency (HSA) or local health council (LHC), or filed with DHRS, but not with the HSA or LHC. Some of these matters resulted in a finding of excusable neglect or no adverse harm being proven as a result of the failure to file the letter in both places.[24] Others resulted in a finding that CON applications could not be accepted in the absence of timely filed letters of intent with both DHRS and the LHCs.[25]

As time progressed, the letter of intent issue became increasingly interesting. A CON applicant could have its application denied for having a different entity listed as the applicant in the CON application than was set forth in the letter of intent.[26] However, where the CON applicant was a subsidiary of the parent corporation that was listed as the applicant in the letter of intent, the applicant might lose its hearing when financial statements failed to take into consideration all the capital projects of the parent.[27] By 1990, many applications never made it to the complete review stage due to failure to

follow the exact requirements of the letter of intent rule and the doctrine of equitable estoppel was deemed not to apply in this context.[28] In rare occasions, hearing officers have found that technical adherence to letter of intent requirements have truly reached the point of form over substance. Sanctions have even been awarded.[29]

By the late 1990s, the Agency for Health Care Administration, the successor agency to DHRS for CON review, had begun to rely far more heavily on testimony and evidence produced by competing applicants, rather than producing a full complement of witnesses to testify at final hearing.[30] The agency by necessity produced multiple witnesses when faced with only one applicant and no co-respondents or intervenors to support the agency's position.[31]

With the dawn of a new millennium, AHCA continued its practice of relying upon existing providers as intervenors to present expert testimony, and, sometimes, even agency personnel.[32] Since 2000, there are far fewer DOAH CON cases than in the previous 25 years, and most involve applications for specialty hospitals, satellite or small hospitals in newly-developed parts of the state, and hospice programs.[33]

The reasons for AHCA's evolution to limited involvement in CON hearings may be a sign of agency cutbacks in personnel ability to assign staff to hearings which last for several days or weeks. The reason may be that the intervenors' witnesses have the time (for which they are certainly compensated) to spend in hearing, whether waiting to testify, or actually on the witness stand, while AHCA professionals have expanded duties and a heavy workload due to personnel cutbacks and funding shortfalls. Perhaps AHCA has even abdicated its responsibility, to an extent, to vigorously defend its cases by assigning overworked and less experienced attorneys to cases than in the past. If the agency has a competent, qualified law firm, complete with top-ranked lawyers to help experts prepare for and to testify at hearing, why duplicate the efforts with agency

experts? All of these suggested reasons are speculative, but not implausible. The marketplace, through existing providers serving as guardians of their turf and market share, and through use of experts hired by major providers of health care in areas where new facilities and services are proposed, has supplemented if not supplanted agency regulation to a significant extent. With the Florida legislature deregulating so much of health care that was previously subject to CON review, with construction costs so high, and market saturation so great, the numbers of CON matters that actually make their way to DOAH for hearing have declined each year for the past decade. As AHCA continues to regulate health care facilities and providers through licensure rather than CON, the downward trend in CON cases at DOAH is expected to continue.[34]

Use of Technology at DOAH

DOAH has long been known for its online docket that allows members of the public to view, at no charge, any pleadings, orders, or other filings that are not exempt from public record. This has traditionally allowed the public to find cases by subject matter; by ALJ writing the recommended or final order; by names of the attorneys handling particular matters; and even by word or term search much like other commercially available online search engines. The online docket has improved greatly over the past three years and has reached the point where documents filed manually are available online generally within the hour if not the same day as filed.

Through its electronic filing capabilities, DOAH has significantly increased availability of public documents. Registration is accomplished by a process that takes minutes, costs the user nothing, and allows the e-filer to electronically submit pleadings for immediate filing day or night. Once the document has been electronically filed, it may be viewed by the public online at any time. Electronic filing has allowed agencies to electronically file initial referrals with DOAH. The

system is voluntary, but DOAH seeks to have the Legislature make e-filing mandatory in the near future. Electronic service of all pleadings and orders is also available and will be greatly expanded in the coming years.

DOAH has been pleased with usage of electronic filing by health care related agencies, as well as attorneys handling health care matters. The system and its capabilities are constantly being updated to handle increased capacity and to allow more efficient online searches for research and information purposes.

All Florida agencies are required to keep their final orders and declaratory statements indexed so the public may inspect past decisions on various agency cases. In the past, agencies kept notebooks that were available to the public, with final orders generally kept in chronological order, rather than by subject matter. This was unwieldy and not user-friendly. If an agency chooses not to serve as its own reporter, DOAH may be designated the official reporter for purposes of keeping and indexing agencies' final order decisions.[35] While none of the health care agencies have yet selected DOAH to be their reporter, other agencies have begun electronically transmitting final orders to DOAH for indexing and publication on its website. DOAH expects to be designated the official reporter for most agencies decisions within the next several years as agencies realize the cost savings of a centralized reporter.

The Future of Health Care Cases at DOAH

While it is impossible to accurately predict the future of DOAH, some assumptions may be made. DOAH will continue to refine and improve its electronic filing and search capabilities as a cost saving measure for agencies, attorneys, and the general public. Health care matters will continue to play a significant role at DOAH as professional licensing boards look for ways to handle large numbers of disciplinary cases. CON cases should continue to decline as AHCA moves to greater

regulation through licensure, rather than through the CON process.

Whether the health care industry will become totally deregulated in Florida in terms of CONs remains to be seen, but Florida has advanced far beyond those states that continue to regulate through their CON programs all types of health care facilities, services, and capital expenditures.[36] Florida is not expected to seek greater regulation, based upon the steady deregulation that has taken place for the past 20 years.[37] Regulation in Florida is accomplished now through licensure, through availability of reimbursement from government, commercial, and private payor sources. Effects that national health care reform may have on regulation of health care professionals and facilities in Florida, and, in turn, on the number and types of cases that come to DOAH remain to be seen. Regardless of changes in the health care delivery system, the state regulatory scheme, or how professionals are licensed and disciplined, DOAH will evolve and mold itself to serve the needs of those who come before it seeking due process in adjudicating their disputes.

Endnotes:

[1] Fla. Stat. §120.65(1), (2008). This section also states that DOAH "shall not be subject to control, supervision, or direction by the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters."

[2] Selected types of cases handled by DOAH include rule challenges: emergency, proposed, existing; bid protests; summary hearings; Medicaid waiver cases; Senate claims bills; child support enforcement; convicted vendors; delinquent DOT contractors; motor vehicle dealer cases; CON's; Medicaid overpayment; building code amendments; summary suspension of pari-mutuel licenses; exceptional education cases; Florida Birth Related Neurological Compensation Plan cases; comprehensive plan amendments not in compliance; electric power plant siting; teacher termination; medical malpractice arbitration; and professional licensure matters.

[3] Fla. Stat. §440.45 (2008).

[4] Fla. Stat. §120.65(2) (2008).

[5] Fla. Stat. §120.561 (2008).

[6] Fla. Stat. §408.039(5)(b) (2008).

[7] Fla. Stat. §§ 120.569 and 120.57(1) (2008).

[8] Traditionally, based upon Rule 28-106.305(2), Florida Administrative Code, professional licensees who sought informal hearings would ask that the informal proceedings be terminated when it appeared that disputed issues of material fact arose. Under this rule, if during the course of the proceeding a disputed issue of material fact arises, then, unless waived by all parties, the proceeding under this Part shall be terminated and a proceeding under Part II shall be conducted. The above provision could still be found in the Model Rules of Administrative Procedure, even after the medical malpractice reform amendments to Chapter 456 in 2003 until its removal effective in January 2007. The post-2006 version of Rule 28-106.305 deletes subsection (2).

[9] Cohen v. Board of Optometry, 407 So.2d 621 (Fla. 3d DCA 1982).

[10] Steuber v. Gallagher,812 So.2d 454 (Fla. 5th DCA 2002).

[11] Id.

[12] See, e.g., Gross v. Dept. of Health, 819 So.2d 997 (Fla. 5th DCA 2002); Hoover v. Agency for Health Care Administration, 676 So.2d 1380 (Fla. 3d DCA 1996); and Nest v. Board of Medical Examiners, 490 So.2d 987 (Fla. 1st DCA 1986).

[13] This does not mean that the ALJ's findings of fact have no weight. Findings related to matters other than standard of care are entitled to the same deference as previously, and will not be disturbed unless not supported by competent substantial evidence. Fox v. Dept. of Health, 994 So.2d 416, 418 (Fla. 1st DCA 2008).

[14] The Florida Legislature steadily deregulated these areas from 1987 through 2000, with major eliminations of services from CON review taking place in 1987, 1997, and 2000.

[15] Id.

[16] Medicare home health agencies were removed from CON review in 2000.

[17] General Care Corp. v. Forehand, 329 So.2d 49 (Fla. 1st DCA 1976).

[18] Humana of Florida, Inc. v. Keller, 329 So.2d 420 (Fla. 1st DCA 1976). Prior to amendments to the APA effective January 1, 1975, quasi-judicial orders of agencies were subject to review by certiorari. Id. at 421.

[19] In re: The Extension of Lemon Bay Hospital's Certificate of Need by the Bureau of Community Medical Facilities, DOAH Case No. 75-1753 (Rec. Order Feb 17, 1976).

[20] Local Health Councils were removed from the CON review process in 2004.

[21] See Ambulatory Service Center of West Palm Beach, Governor Witt, M.D. v. DHRS, DOAH Case No. 76-1595 (Rec. Order Nov. 16, 1976), for a description of a hearing involving compliance with state and local health plans, as well as accessibility of all persons regardless of payor class.

[22] Rule 10-5.11 was the precursor to Rule 59C-1.030, Florida Administrative Code.

[23] Section 381.494(5), Florida Statutes (1980) and Rule 10-5.08(1)(b), Florida Administrative Code, require the filing of a letter of intent to file a CON application at least 30 days prior to the application filing date.

[24] See, e.g., First Hospital Corporation v. DHRS, DOAH Case No. 83-3086 (Rec. Order Oct. 26, 1983 (invoking the doctrine of equitable estoppel); Martin Memorial Hospital Association, Inc. v. DHRS and Lawnwood Medical Center, DOAH Case No. 83-010 (Rec. Order July 8, 1983).

[25] Health Care and Retirement Corporation of America v. DHRS, DOAH Case No. 83-1775 (Rec. Order Jan. 12, 1984).

[26] Ocala Healthcare Associates v. DHRS, DOAH Case No. 89-0103 (Rec. Order June 2, 1989). The existence of a different entity between letter of intent and CON application was excused due to the de novo nature of a CON proceeding at DOAH.

[27] St. Joseph's Hospital v. DHRS et al., DOAH Case No. 88-4364 (Rec. Order April 18, 1989). Application letter of intent requirements set forth in Section 381.709, and application content requirements of Section 381.707, Florida Statutes (1988).

[28] University Community Hospital v. DHRS et al., DOAH Case No. 90-5990 (Rec. Order May 10, 1991) (the requirements for the letter of intent must be strictly adhered to); Humhosco, Inc. d/b/a Humana Hospital Brandon v. DHRS et al., 561 So.2d 388 (Fla. 1st DCA 1990) (The estoppel doctrine is not applicable. Humana knew the agency's acceptance of the letter of intent is only preliminary when a de novo hearing is to occur in the future at which the letter may be subject to challenge). See also Martin Memorial Hospital Association, Inc. v. DHRS, DOAH Case No. 91-2230 (Rec. Order June 3, 1991) (applying the strict requirements of Section 381.709(2)(c), Florida Statutes (1990), and Rule 10-5.008, Florida Administrative Code).

[29] NME Hospitals, Inc. d/b/a Palms of Pasadena Hospital, et al. v. AHCA and Galencare, Inc. d/b/a Northside Hospital, DOAH Case No. 94-313F (Final Order Dec. 8, 1994).

[30] See, e.g., Beverly Enterprises, et al. v. AHCA, DOAH Case Nos. 97-5432, 97-5434, 97-5435, 97-5436, 97-5437, 97-5438, 97-5439, 97-5441, 97-5443, 97-5698, and 97-5699 (Rec. Order Nov. 9, 1998). (AHCA called no witnesses and offered one exhibit). Sawgrass Care Center, Inc., et al. v. AHCA, DOAH Case Nos. 99-2088, 99-2194, 99-2195, and 99-2757 (Rec. Order Aug. 14, 2000) (AHCA called no witnesses and offered three exhibits).

[31] Bert Fish Medical Center, Inc. d/b/a Bert Fish Medical Center v. AHCA, DOAH Case No. 97-4290 (Rec. Order Mar. 12, 1998) (AHCA called four witnesses and offered seven exhibits). Vencor Hospitals South, Inc. v. AHCA, DOAH Case No. 97-1181 (Rec. Order Mar. 3, 1998) (AHCA Called two witnesses, one of whom was an expert, and offered four exhibits).

[32] See, e.g., Select Specialty-Marion County and Kindred Hospitals East, LLC v. AHCA, DOAH Case Nos. 03-2481CON and 03-2810CON (Rec. Order July 14, 2004) (AHCA offered no witnesses of its own and offered one exhibit, but its CON expert was called by another party and his testimony was adopted by the agency as its case-in-chief).

[33] See, e.g., Id. (build a new long-term acute care hospital); Morton Plant Hospital Association, Inc., d/b/a North Bay Hospital, et al. v. AHCA, et al., DOAH Case Nos. 02-3232CON, 02-3234CON, 02-3235CON, 02-3236CON, 02-3237CON, and 02-3515CON (Rec. Order Mar. 19, 2004) (build a replacement hospital); Big Bend Hospice, Inc. v. AHCA and Covenant Hospice, Inc., and Covenant Hospice, Inc. v. AHCA, DOAH Case Nos. 02-0455CON and 02-0880CON (Rec. Order Nov. 7, 2002) (Initiate new hospice services).

[34] Southeastern Health Planning Symposium, October 9, 2007, Columbia, SC, Presentation by Elizabeth Dudek, Deputy Secretary, Division of Health Quality Assurance AHCA.

[35] Fla. Stat. §120.53(2)(a) (2008).

[36] See, e.g., Title 44, Code of Laws of So. Car.; N.C. Gen. Stat. Ch. 131E; O.C.G.A. §§31-6-1 et seq. South Carolina, North Carolina, and Georgia all regulate health care facilities, services, and capital expenditures at a far greater level than Florida.

[37] Southeastern Health Planning Symposium 2007, E. Dudek, Id.

State Healthcare Facility Anti-Fraud Licensure Laws

Grant Patrick Dearborn*

When one speaks of anti-fraud laws or kickback prohibitions, we often only think of the prohibitions in federal law. Nevertheless, the Florida statutes and administrative code contain numerous anti-fraud provisions and kickback prohibitions. For the healthcare industry, these prohibitions affect hospitals, physicians, pharmacies, nursing homes, home health agencies and generically most providers of healthcare items or services.[1] This article will focus on the provisions relating to home health agencies, hospitals, nursing homes, assisted living facilities, laboratories and health care clinics.

Home Health Agency law Amendments of 2008

When HB 7083 was enacted into law, a wide variety of significant changes altered the world of home health agencies (hereinafter "HHA"). These changes included prohibitions on *any* remuneration to certain persons, elevated standards for licensure application approval and elevated professional requirements.[2] The Agency for Health Care Administration

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(AHCA) is tasked with enforcing these provisions. The reasons for these changes are contained in a 2008 presentation that was given jointly by AHCA and the Health Care Association of Florida ("HCAF").[3] The stated purpose for enacting this legislation was the attempt to combat fraud.[4] This article addresses some of the more significant changes.

Application Provisions

First, amended Section 400.471, Florida Statutes, requires applicants to provide a business plan, evidence of contingency funding, documents demonstrating a financial ability to operate (compiled and signed by a certified public accountant), a list of all other ownership interests in health care entities for each of the applicant's controlling interests, proof of application for or accreditation from an approved accrediting organization for initial HHA licensure, and upon request, proof that the applicant's controlling interests are not controlling interests in another HHA that is located within 10 miles and the same county. Interestingly, the statute does not define the terms "controlling interest," "ownership interests" or "business plan." Nonetheless, "controlling interest" is defined in Section 408.803(7),[5] Florida Statutes, and one would assume that the other two terms will be defined by their common meanings.[6]

It should be noted that AHCA considers a change of ownership ("CHOW") application as an "initial" application, and therefore any sale or transfer of an HHA or HHA interest that meets the definition of a CHOW in Section 408.803(5), Florida Statutes, will require accreditation or proof of application for accreditation in order to comply with the statute.[7]

Fraudulent Documentation/Billing Provisions

Amended Section 400.474, Florida Statutes, expressly provides for administrative sanctions against an HHA for "preparing or maintaining fraudulent patient records," failing to

provide a patient service for 60 days, falsifying documentation of training, falsifying health statements of direct care staff, a pattern of billing any provider for services not provided, and a demonstrated pattern of failing to provide a contracted service or a service included in a plan of care unless the reduction is mandated by Medicare or Medicaid. The statute defines what constitutes a "pattern."[8] With respect to falsified documents or entries, the definition of "pattern" requires a showing of at least 3 fraudulent entries or documents.[9] This would require a showing of intention and not mere negligence. Notably, the statute is less clear as to whether the same showing of intention is required for proving a pattern of billing for services that were not provided.[10] This section does not use the term "fraudulent" but it does use the phrase "falsely billed."[11] The dictionary defines "false" as "not genuine; intentionally untrue; adjusted or made so as to deceive."[12] Arguably, they are similar enough to require the same standard of proof or the same "intent" element.

Anti-Remuneration Provisions

Amended Section 400.474 prohibits an HHA from providing "remuneration"[13] to another HHA or health services pool for staffing services if formal or informal patient referral transactions or arrangements are in place between the two entities unless an exception applies.[14] Also, an HHA cannot provide "remuneration to a case manager, discharge planner, facility-based staff member, or third party vendor who is involved in discharge planning at a hospital or entity licensed under Florida Statutes Chapter 400 from which an HHA receives referrals.[15] Moreover, amended Section 400.474 provides for sanctions if an HHA gives remuneration to a physician who does not have an appropriate medical director contract with an HHA, and an HHA is also prohibited from giving remuneration to a referring physician other than a medical director with a qualifying contract, a referring physician's office staff

or a referring physician's immediate family member.[16] "Referring physician" means a physician who has made a referral to an HHA in the preceding 12 months. The statute broadly defines "remuneration" as "any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind."[17] Unlike Stark or federal anti-kickback laws, the remuneration definition had no exceptions or safe harbors. According to one of the primary drafters of the legislation, the exclusion of exceptions was intended but "referral" is not defined in the statute nor in AHCA rules.[18] AN HHA is also prohibited from providing any cash or its equivalent to Medicaid and Medicare beneficiaries.[19]

An HHA may not provide staffing services to an assisted living facility or provide services to an assisted living facility resident unless an HHA receives fair market value compensation for the service or staffing.[20] "Fair market value" (FMV) is defined to mean the price one would pay in an arms-length transaction in which the value of other generated business is omitted from the setting of the price.[21] This definition may prove to be somewhat circular in that a licensee will argue that it bargained for that price so it must be FMV. Unfortunately, an investigator then has to attempt to decipher the degree of bargaining that occurred by reviewing draft documents and communications between the parties. To further complicate this analysis, the information may be confidential or a protected trade secret. As federal authorities have discovered while enforcing Stark and the anti-kickback laws, FMV is a sometimes an elusive concept without a bright line test.

Arguably, these 2008 provisions prohibited a referring doctor from renting equipment or space to an HHA.[22] This is obviously more restrictive than the federal anti-kickback law which allows rentals if the rental agreement meets a safe harbor.[23] Moreover, the 2008 HHA amendment would be interpreted to prohibit an HHA from employing a referring phy-

sician's immediate family member or employing a referring physician except as a qualified contracted medical director.[24] This too is potentially more restrictive than the federal anti-kickback statute.[25] At some point, an HHA will undoubtedly raise federal preemption as a possible defense. It is also possible that some of these sections may be interpreted to not include an intent element and the sections may thereby be akin to a strict liability statute.[26] Unlike statutes that have been construed to contain an "intent" element, these sections do not include "knowing," "intentionally" or similar terms. The provision may be setting forth a violation by the mere "giving" of the remuneration, and the statute may not require a focus on the intended result of the giving. If this were the state's interpretation, then this standard would also be more restrictive than the federal anti-kickback statute.

After State v. Harden,[27] it is clear that federal Medicare law preempts state Medicaid law,[28] but it is not yet clear whether federal Medicare law preempts state licensure law.[29] In State v. Rubio,[30] the defendants argued points similar to those raised in Harden, and the defendants contended that for those reasons the Patient Brokering Act was also unconstitutional.[31] The Rubio Court however found that this was not so, and found that the Patient Brokering Act was not unconstitutional.[32] In making its determination, the Rubio Court stated that a state statute may be preempted if it "presents an obstacle to the accomplishments of the purposes of the federal law" and that this "impediment" must be "severe and not merely modest."[33] Additionally, the Rubio Court stated that one purpose of the federal antikickback law was to protect lawful or inadvertent conduct.[34] The issue that will at some point have to be decided by a court is whether the Florida Legislature's failure to include an "intent" element and safe harbors in this law will be viewed as impeding the purpose of the federal statute. There is obviously an overlap in the statutes as most licensees would provide services to patients who are

under federal healthcare programs, self-pay and commercial payors.[35] Yet, as there exists a conflict as to what would be allowable under the different statutes, it is possible that Harden applies to licensure statutes.

Services

The 2008 bill also provided AHCA with the ability to sanction an HHA for "failing to provide at lease one service directly to a patient for a period of 60 days."[36] The available sanctions include revocation.[37]

Professional Provisions

Amended Section 400.476, Florida Statutes, requires that an HHA not only have an administrator and director of nursing, but it limits the number of HHA entities that a director of nursing and administrator can serve.[38]

Reporting Provision

The bill requires that an HHA report quarterly certain information to AHCA.[39] This information includes the "number of insulin-dependent diabetic patients receiving insulin injection services...," number of dual hospice and HHA patients, total number of HHA patients and the names and license numbers of nurses who primarily serve HHA patients and are paid more that $25,000 per quarter.[40]

Finally as to HHA provisions, AHCA has denied applications and issued administrative complaints to enforce these sections. For example, in New Vision Health Services, Inc. v. AHCA,[41] AHCA denied a licensure application on various grounds including the fact that the proof of financial ability by the certified public accountant verification was 7 months old. Also, in AHCA v. Comprehensive Wellness Services, Inc. d/b/a Comprehensive Home Care of Broward,[42] AHCA cited an HHA and sought a fine of $5000 for failing to have written proof

that it had terminated 2 of its 3 medical directors. Additionally, in AHCA v. United Homecare Services of Southwest Florida, Inc.,[43] AHCA sought a fine of $5000 against an HHA for providing yogurt and juice to physicians as part of a meet and greet and educational session. These administrative actions show that AHCA is serious about enforcing these provisions. AHCA has tried to offer some guidance through its website. The site contains a "frequently asked questions" section.[44]

2009 Home Health Agency Legislation

Senate Bill 1986 is an extremely broad healthcare bill.[45] The bill's title and section 1 suggest that it is targeted at healthcare fraud. The bill makes a significant number of changes that affect HHAs. First, it amends the CHOW definition to close a loophole that allowed membership interests in limited liability companies to be bought and sold without triggering the requirements of a CHOW.[46] This is particularly important for HHAs as a CHOW requires that an HHA meet certain requirements, the most notable of which is that an HHA become accredited or apply for accreditation.[47] The bill also bars the renewal of an HHA license if the county within which it operates is over the set limit of HHAs per population and an HHA applicant or controlling interest has been sanctioned for certain acts within the previous two years.[48] Also, the bill prohibits the issuance of an initial or CHOW license in a county where certain set of HHA to population ratios are exceeded.[49] Additionally, licensure action can now be taken if an HHA has a pattern of billing Medicaid for medically unnecessary services and such is determined by final order.[50] Most importantly, the bill provides for certain exceptions to the 2008 anti-remuneration provisions.[51] It is unclear how much authority the Legislature granted AHCA to write rules for these 2008 or 2009 sections. Though a review of the Administrative Procedure Act makes it appear that AHCA has no authority to write rules regarding these amendments.[52]

Anti-Kickback Healthcare Licensure Laws

There are several similar healthcare facility anti-kick licensure laws.[53] For instance, the licensing laws for hospitals, nursing homes, assisted living facilities, and laboratories all contain prohibitions against paying or receiving "any commission, bonus, kickback," "rebate" and from participating in a split-fee arrangement.[54] The term "kickback" is only defined in some of these statutes.[55] It is intriguing that those that do contain definitions that vary in significant ways.[56] However, "commission," "bonus," "rebate" and "split-fee" are not defined in any of the statutes.[57] This is troubling as what constitutes a bonus, commission, split-fee arrangement or rebate could vary widely in the eye of the (government) beholder.[58] This is most obviously demonstrated by the variety of opinions that have been issued by the judiciary and government regarding split-fee arrangements.[59] For example, the Board of Medicine has oversight of the provision in the medical practice licensure statute that prohibits physician split-fee arrangements (which provision is similar to the provision under discussion).[60] In the matter of In Re Petition of Dr. Gary R. Johnson, M.D. and the Green Clinic, a partnership of Professional Associates,[61] the Board declared that paying a percentage of professional fees in exchange for a referring clinic providing certain overhead services was an illegal fee-splitting arrangement. However, the Board approved an arrangement that involved a 50% management fee in the matter of In Re Petition of Rew, Rogers and Silver, MD, PA.[62] These Board opinions did seem to prohibit an agreement to split revenue with a "marketer."[63] However, in the case of Practice Management Associates v. Orman,[64] the court defined "fee-split" arrangement to mean:

> Fee splitting: "a dividing of a professional fee for specialist's medical services with the recommending physician," *Webster Third New International Dictionary* 835 (1961); "[d]ivision of legal fees between

> attorney who handles matters and attorney who referred such to him or her," *Black's Law Dictionary* 616 (6th ed. 1990); "where a member of a profession divides the compensation he receives from a patient with another member of same profession or any person who has sent patient to him or has called him into consultation," 39A *Words and Phrases,* "Splitting of Fees" (1953).

The Court seemed to be stating that fee-splitting was a patient specific transaction.[65] Also, in Practice Management Associates, Inc. v. Gulley,[66] the Court found that fee-splitting was only illegal if the remuneration were paid to a referral source. But in several cases, fee-splitting has been raised as a defense by an insurer, and some of the decisions have been contradictory.[67]

With respect to rebates and bonuses, the question arises as to how one determines whether purchasing X number of items for $1000 is inclusive of a bonus or rebate.[68] How does one determine whether they as a purchaser are getting a good deal that may raise the eyebrows of a government surveyor or investigator. Still, in commerce generally, we all realize that a large health system is going to pay less per unit for healthcare items than a small neighborhood entity would. One has to wonder will high volume purchasing with its lower price per unit become confused with a bonus or rebate when in actually the healthcare system is only paying fair market value for a purchase of that quantity. These terms may well lead to arbitrary and capricious interpretations and the reliance on unpromulgated rules in violation of Florida Statutes Chapter 120.[69]

The statutes also prohibit direct and indirect activities. The term "indirect" is not defined or limited in any manner. This leads one to ask at what point is the "pay" so remote that it should no longer be considered as related. One must conjecture as to how many distant transactions could be considered "indirectly" connected even when an actual connection does

not exist. This is especially a problem in healthcare where most transactions are part of a web of commerce. It should be noted that the term "referred" in the phrase "for patients referred to a licensed facility" is undefined. One must consider whether "referred" means a formal referral by a healthcare practitioner acting within her scope of practice, an informal recommendation or both. It should be noted that an HHA statute uses language that clearly covers informal or formal "referrals."[70] Additionally, the Medicaid Provider Fraud statute Section 409.920(2)(e) prohibits remuneration in connection with "recommending" an item or service. Arguably, the difference are intended and must be given meaning. This could be interpreted to mean that these statutes should only encompass medical professional referrals.

However, it should be noted that unlike the federal laws these statutes relate to all named services or items regardless of the payor. This not only makes the statutes broader in scope, but it could also lead to insurers and other contracting parties using violations as grounds for refusing to pay claims or for setting aside contracts. Furthermore, Sections 408.815(1)(c) and 408.813 provide that any violation of a licensee's "authorizing act" is also a violation of the "Health Care Licensing Procedures Act, Chapter 408 part II.[71]

Hospital Statute

Variations also exist in these anti-kickback licensure statutes. Specifically, in the hospital statute, Section 395.0185, Florida Statutes, states in part:

> (1) It is unlawful for any person to pay or receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangement, in any form whatsoever, with any physician, surgeon, organization, or person, either directly or indirectly, for patients referred to a licensed facility.

Section 395.002 provides the definitions for Chapter 395. Subsection (22) states "person" means "any individual, partnership, corporation, association, or governmental unit."[72] Because the statute states that it is illegal for "any person to pay or receive," the definition of "person" is material to determining whether a violation occurred. By omitting entities such as limited liability companies, this definition is not all inclusive, and this exclusion must have been an unintended omission. As licensure actions are penal in nature with the burden clearly falling on the state enforcing agency,[73] one must contemplate whether this omission would prohibit the sanctioning of an entity that falls outside the chapter 395 definition of "person." However, unlike the nursing home statute,[74] the hospital statute does not include terms like "intent" in its written language. One could argue that the statute does seem to require that there be an "intent" for the payment (or receipt) to be a motivation for a referral. This opinion is supported by Practice Management Associates, Inc. v. Gulley,[75] wherein the Court declared that for the similarly worded chiropractor statute fee-splitting is only illegal if tied to patient referrals. The Gully court declared that the plain meaning of the statute required that the payee be a referral source in order for a violation to occur.[76] Also in Agency for Health Care Administration v. Leroy Smith, M.D.,[77] the administrative law judge (ALJ) opined that in determining whether a licensure anti-kickback statute was violated the statute must be strictly construed against the State and that only those behaviors reasonably and unambiguously proscribed by the statute should be the subject of a licensure sanction (citing Lester v. Department of Professional and Occupational Regulation.[78] Furthermore, the ALJ in Leroy recommended that the charge be dismissed as the State had failed to prove a nexus between any payment and a referral.[79]

Nursing Home Statute

The nursing home statute has two sections that prohibit

kickbacks. First, Section 400.17, Florida Statutes provides the following definitions:

> (a) "Bribe" means any consideration corruptly given, received, promised, solicited, or offered to any individual with intent or purpose to influence the performance of any act or omission.
>
> (b) "Kickback" means that part of the payment for items or services which is returned to the payor by the provider of such items or services with the intent or purpose to induce the payor to purchase the items or services from the provider.
>
> > (2) Whoever furnishes items or services directly or indirectly to a nursing home resident and solicits, offers, or receives any: (a) Kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment; or (b) Return of part of an amount given in payment for referring any such individual to another person for the furnishing of such items or services; is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or by fine not exceeding $5,000, or both.

For this section, the definition of "kickback" requires that a "payment" be made and that part of that payment be returned to the payor. The plain meaning of "payment" would infer that money or its equivalent was involved.[80] These requirements limit the definition in a manner that would not encompass certain quid pro quo "exchange" arrangements. For instance, an airline ticket provided to a payor in return for a purchase would not constitute a return of part of a money payment. However, "bribe" will probably include more arrangements as it is defined in broad terms such as "consideration." Both definitions clearly make "intent" an underlying

element of the offense, and the term "bribe" in fact includes a condition that it be "corruptly given."[81] However, the use of the phrase "corruptly given" in the definition of "bribe" may raise the standard of proof to one similar to fraud. As a practical matter, these definitional limitations provide gaps between the definitions of "bribe" and "kickback."

Second, Section 400.176(1), Florida Statutes, states that "it is unlawful for any person to pay or receive any commission, bonus, kickback or rebate or engage in any split-fee arrangement in any form whatsoever with any physician, surgeon, organization, agency, or person, either directly or indirectly, for residents referred to a nursing home licensed under this part." Section 400.023 also states in part that "Nothing in this part shall be interpreted to create strict liability."[82] While this section may not have been intended to apply to the anti-kickback provision, the plain language makes it applicable to the entire the nursing home statute part. This conclusively delineates that "intent" is required to find a violation of either of the above sections.

In Sandstrom v. Leader,[83] the appellate court was asked to determine whether the lower court had correctly determined that Section 400.17 was unconstitutionally vague. The lower court declared that subsections (1) and (2) were internally inconsistent with another part of the statute, the subsections not provide reasonable notice as to what was prohibited and that the statute could encompass innocent behaviors.[84] The Florida Supreme Court determined that the statute as applied was not unconstitutionally vague.[85]

ALF Statute

Within the assisted living facility licensing provisions, Section 429.195(1), Florida Statutes, states:

> It is unlawful for any assisted living facility licensed under this part to contract or promise to pay or receive any commission, bonus, kickback or rebate

> or engage in any split-fee arrangement in any form whatsoever with any physician, surgeon, organization, agency, or person, either directly or indirectly, for residents referred to an assisted living facility licensed under this part. A facility may employ or contract with persons to market the facility, provided the employee or contract provider clearly indicates that he or she represents the facility. A person or agency independent of the facility may provide placement or referral services for a fee to individuals seeking assistance in finding a suitable facility; however, any fee paid for placement or referral services must be paid by the individual looking for a facility, not by the facility.

This section includes exceptions that other anti-kickback provisions do not include. These exceptions provide carve-outs for certain placement and marketing activities. Moreover, Section 429.195(2), Florida Statutes, directs that a violation of this section is "considered patient brokering and is punishable as provided in 815.505." Arguably, one could surmise that the reference to the Patient Brokering Act then acts to incorporate the exceptions provided for within the Patient Brokering Act into this provision. These exceptions in the Patient Brokering Act include but are not limited to the safe harbors found in the federal anti-kickback statute and regulations.[86] Additionally, Section 429.29(2) asserts that nothing in this part shall be considered to "create strict liability." The statute thereby proclaims definitively the requirement of intent relating to proof of a violation of the above section.

Lab Statute

The state laboratory licensing statute and rules contain some of the most detailed kickback prohibitions. Section 483.245, Florida Statutes, titled "Rebates prohibited; penalties," states in part:

> (1) It is unlawful for any person to pay or receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangement in any form whatsoever with any dialysis facility, physician, surgeon, organization, agency, or person, either directly or indirectly, for patients referred to a clinical laboratory licensed under this part.

Furthermore, Section 483.825, Florida Statutes, specifies in part the grounds for disciplinary action:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in Section 456.072(2):
>
> > (q) Paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly for patients referred to providers of health care goods and services including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a clinical laboratory professional from receiving a fee for professional consultation services.

The statute seems to be more encompassing than the other discussed statutes in that the terms of subpart (q) cover referrals to a wider range of healthcare providers. Nonetheless, the reference to violations of Section 456.072, Florida Statutes, is seemingly out of place as Section 456.072 provides authority for a Department of Health licensing Board or the Department of Health[87] to sanction a licensee, and labs are not licensed by either. Section 456.072(2) requires that violations be "substantial," and this may also be by this cross reference introducing the requirement that the violation be "substantial."[88]

Also, these statutes are given more detail in Section 59A-7.020, Florida Administrative Code, which sets forth in part:

> "Definitions. In addition to definitions set forth in Section 483.041, F.S., as used in this chapter the following terms shall mean:
>
> (15) Kickback -- a remuneration, payment back, or other inducement, direct or indirect, in cash or in kind, pursuant to an investment interest, compensation arrangement, or otherwise, made by any person as defined in Section 483.041(7), F.S., including any clinical laboratory as defined in Section 483.041(2), F.S., to any physician, surgeon, organization, agency, or person as an incentive or inducement to refer any individual or specimen to a laboratory licensed under Chapter 483, Part I, F.S., such as the following:
>
> (a) Provision of an actual payment or investment interest;
>
> (b) Rental of real estate or equipment where the lease agreement does not comply with the criteria set forth in Section 455.236, F.S.;(FN)
>
> (c) Provision of computer equipment and office supplies, except for those items, devices or supplies that are for the sole purpose of the following:
>
> 1. Collecting, processing, storing and transporting specimens to the laboratory;
>
> 2. Transmitting laboratory information to the laboratory; or
>
> 3. Ordering or communicating laboratory tests or results and other patient information between the physi-

> cian, surgeon, organization, agency, or person and the laboratory;(FN-these might not meet federal safe harbor)
>
> (d) Removal and disposal of biomedical waste generated by the physician, surgeon, organization, agency, or person or any employees, representatives or agents of any such physician, surgeon, organization, agency, or person;
>
> (e) Provision of personal protection supplies and equipment, except that gloves are permitted to be provided;(FN-gloves might not comply with safe harbor)
>
> (f) Provision of test kits, systems or other laboratory supplies, except as provided in paragraph (c) above; or
>
> (g) Provision of personnel or assistance of any kind to perform any duties for the collection or processing of specimens. Such personnel or assistance is authorized to be provided on a temporary basis for the collection of specimens at a patient's residence. These collections must meet the requirements of Chapter 59A-7, F.A.C.

Subsection (15) references an incorrect section for the definition of "person," and the reference to Section 455.236 in subsection (15)(b) should be a reference to Section 456.053, Florida Statutes. Additionally, Section 59A-7.037 provides the following:

> Rebates Prohibited -- Penalties.
>
> (1) No owner, director, administrator, physician, surgeon, consultant, employee, organization, agency, representative, or person either directly or indi-

> rectly, shall pay or receive any commission, bonus, kickback, rebate or gratuity or engage in any split fee arrangement in any form whatsoever for the referral of a patient. Any violation of Rule 59A-7.037 by a clinical laboratory or administrator, physician, surgeon, consultant, employee, organization, agency, representative, or person acting on behalf of the clinical laboratory will result in action by the agency under s. 483.221, F.S., up to and including revocation of the license of the clinical laboratory. In the case of any party or individual not licensed by the agency acting in violation of this Rule, a fine not exceeding $1,000 shall be levied and, as applicable, the agency shall recommend that disciplinary action be taken by the entity responsible for licensure of such party or individual.

However, the "exceptions" provided in the Florida lab statute and rule do not mirror federal anti-kickback safe harbors, and therefore, any provider who bills federal healthcare payors would have to take additional steps to have any hope of fitting a Florida lab exception into a federal safe harbor.[89] It is important to know that AHCA has issued three declaratory statements regarding the laboratory licensure laws.

On July 8, 2008, AHCA issued a final order In Re: Petition for Declaratory Statement of Dominion Diagnostics, LLC determining that a lab that provided specimen cups that contained a built in testing strip to physicians free of charge was potentially violating the state laboratory licensure law, and that a lab "providing free personnel who would assist physicians with specimen collection duties" is also potentially a violation.[90] In effect, AHCA was determining that these items and services were potentially kickbacks. Additionally, in the matters of In Re: Petition for Declaratory Statement of: American Health Associates Clinical Laboratory, Inc., AHCA was asked whether a lab providing rebates to a nursing home for services provided by the lab for Medicare part A residents in

order to obtain access to Medicare part B residents was a violation of lab licensure law, and AHCA declared in case numbers 2008004635 and 2008011757 "that Florida law generally prohibits a quid pro quo arrangement for the referral of business in exchange for discounts."[91] Also, AHCA refrained from making a determination as to whether the lab licensure kickback statute was preempted by the federal anti-kickback statute.[92] Most notably, in matter #2008004635 AHCA defined "rebate"[93] as "a deduction from an amount to be paid or a return of part of an amount given in payment."[94]

Health Care Clinics

The Health Care Clinic Act, Florida Statutes Chapter 400 Part X, was created in 2003 to combat "significant cost and harm to consumers."[95] The general definition of health care clinic encompasses any person or entity that would offer healthcare services and bill a third party payor.[96] But for the extensive exceptions to the general definition, most healthcare providers would be required to maintain a clinic registration in addition to its general license to practice.[97] Interestingly, the statute contains very little regulation related to healthcare quality.[98]

The Health Care Clinic Act (HCCA) requires that each clinic appoint a medical or clinic director ("director").[99] The Act places a great deal of fraud prevention on the shoulders of this individual.[100] The Act requires that the director insure that professionals are properly licensed and certified, personally review patient referral contracts, insure recordkeeping compliance, reporting compliance, and personally review clinic billings for illegality or fraud.[101] Rules adopted pursuant to the HCCA prohibit a director from acting as such for more than 5 clinics with no more than 200 employees or contractors, and no clinic can be more than 200 miles from another supervised clinic.[102] The HCCA requires a number of elements in the clinic license application.[103] These include providing

proof of financial ability to operate or posting a bond.[104] Also, the HCCA requires background screening, including screening of the director and chief financial officer, and disclosures of certain additional information.[105] The Act also makes any bill for services provided by an unlicensed clinic or a clinic that is not in compliance with the act unenforceable and non-compensable.[106]

HHAs, Home Medical Equipment Providers and Health Care Clinics,

Section 408.8065[107]

Senate Bill 1986 creates a new section 408.8065, Florida Statutes. This section applies to HHAs, home medical equipment providers and health care clinics.[108] This bill creates additional licensure application standards for HHAs, home medical equipment providers and health care clinics.[109] Initial license applicants and CHOW applicants will have to provide a number of items including but not limited to proof of financial ability to operate and "statements of cashflows."[110] These new requirements must be provided in document form, the documents have to be prepared in accord with generally accepted accounting principles and must be signed by a certified public accountant.[111] Additionally, all licensure applicants and controlling interests who are a non-immigrant alien must post a $500,000 bond.[112] The bill provides that fraudulent practices related to these types of applications and unlicensed activity is a felony.[113]

Patient Brokering Act

Even though the Patient Brokering Act[114] is not a licensure statute, the State will use this act against licensees and others as a method to combat healthcare fraud. The Act states:

> Patient brokering prohibited; exceptions; penalties.
>
> (1) It is unlawful for any person, including any health

care provider or health care facility, to:

(a) Offer or pay any commission, bonus, rebate, kickback**,** or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage to or from a health care provider or health care facility;

(b) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to or from a health care provider or health care facility;

(c) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for the acceptance or acknowledgement of treatment from a health care provider or health care facility; or

(d) Aid, abet, advise, or otherwise participate in the conduct prohibited under paragraph (a), paragraph (b), or paragraph (c).

(2) This section shall not apply to:

(a) Any discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder.

(b) Any payment, compensation, or financial arrangement within a group practice as defined in Section 456.053, provided such payment, compensation, or arrangement is not to or from persons who are not members of

the group practice.

(c) Payments to a health care provider or health care facility for professional consultation services.

(d) Commissions, fees, or other remuneration lawfully paid to insurance agents as provided under the insurance code.

(e) Payments by a health insurer who reimburses, provides, offers to provide, or administers health, mental health, or substance abuse goods or services under a health benefit plan.

(f) Payments to or by a health care provider or health care facility, or a health care provider network entity, that has contracted with a health insurer, a health care purchasing group, or the Medicare or Medicaid program to provide health, mental health, or substance abuse goods or services under a health benefit plan when such payments are for goods or services under the plan. However, nothing in this section affects whether a health care provider network entity is an insurer required to be licensed under the Florida Insurance Code.

(g) Insurance advertising gifts lawfully permitted under s. 626.9541(1)(m).

(h) Commissions or fees paid to a nurse registry licensed under s. 400.506 for referring persons providing health care services to clients of the nurse registry.

(i) Payments by a health care provider or health care facility to a health, mental health, or substance abuse information service that provides information upon request and

without charge to consumers about providers of health care goods or services to enable consumers to select appropriate providers or facilities, provided that such information service:

1. Does not attempt through its standard questions for solicitation of consumer criteria or through any other means to steer or lead a consumer to select or consider selection of a particular health care provider or health care facility;

2. Does not provide or represent itself as providing diagnostic or counseling services or assessments of illness or injury and does not make any promises of cure or guarantees of treatment;

3. Does not provide or arrange for transportation of a consumer to or from the location of a health care provider or health care facility; and

4. Charges and collects fees from a health care provider or health care facility participating in its services that are set in advance, are consistent with the fair market value for those information services, and are not based on the potential value of a patient or patients to a health care provider or health care facility or of the goods or services provided by the health care provider or health care facility

(4) Any person, including an officer, partner, agent,

> attorney, or other representative of a firm, joint venture, partnership, business trust, syndicate, corporation, or other business entity, who violates any provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (5) Notwithstanding the existence or pursuit of any other remedy, the Attorney General or the state attorney of the judicial circuit in which any part of the offense occurred may maintain an action for injunctive or other process to enforce the provisions of this section.
>
> (6) The party bringing an action under this section may recover reasonable expenses in obtaining injunctive relief, including, but not limited to, investigative costs, court costs, reasonable attorney's fees, witness costs, and deposition expenses.
> (7) The provisions of this section are in addition to any other civil, administrative, or criminal actions provided by law and may be imposed against both corporate and individual defendants.

Subsection 1 uses the terms "induce" and "return" which infers that a *quid pro quo* "intent" must exist in order for a violation to occur.[115] Additionally, subsection 3 provides for a significant list of exceptions including the federal anti-kickback safe harbors[116] and other exceptions that are broader than the federal safe harbors. Subsection 7 provides that the penalties under this section are in addition to any other civil, administrative or criminal actions, thereby placing a licensee in jeopardy on two fronts.[117]

Conclusion

As HB 7083 and SB 1986 show, the Florida Legislature is becoming more involved in the fight against healthcare fraud. With these changes Florida healthcare licensure agencies

will undoubtedly become more active. This may well lead to not only licensees being sanctioned under the "newer" laws but it may also bring greater enforcement of the "older" anti-fraud laws. This will doubly be so for those areas related to state healthcare programs that every citizen realizes are cash strapped. All of this leaves the common licensee to have to make an even greater effort to ensure compliance with not only the federal anti-fraud laws, but also Florida state licensure laws.

Endnotes;

[1] These provisions encompass the sections referenced in this article and others including but not limited to FS 459.013, 459.015 as to osteopathic medicine; Fla. Stat. sections 462.14 as to naturopathy, 465.185 as to pharmacy, 466.0235 as to dental charting, 468.217 as to occupational therapy, 468.365 as to respiratory therapist, 490.009, 491.009 as to psychological/ counseling, and 390.025 as to an abortion referral or counseling agency.

[2] Fla. Stat. sections 400.471, 400.474, and 400.476 (2008).

[3] This presentation can be found at http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Home_Care/definitions.shtml#a.

[4] Section 1, House Bill 7083 (2008).

[5] It is not clear that AHCA can use a definition from Fla. Stat. section 408.803 in applying an HHA licensure law even though chapter 408, part II is to be read in conjunction with the licensure statutes regulated by AHCA.

[6] Plain meaning of a term should control. Valdes v. State, 3 So.2d 1067, 1076 (Fla. 2009).

[7] Fla. Stat. 408.806(2)(b) (2008).

[8] Fla. Stat. sections 400.474(3) and (5) (2008).

[9] Fla. Stat. section 400.474(3) (2008).

[10] Fla. Stat. section 400.474(3), (4) and (5) (2008).

[11] Fla. Stat. section 400.474(4) (2008).

[12] (2009). In Merriam-Webster Online Dictionary.Retrieved June 26, 2009, from http://www.merriam-webster.com/dictionary/false.

[13] Fla. Stat. section 400.462(27) (2008).

[14] Fla. Stat. section 400.474(6)(a) (2008).

[15] Fla. Stat. section 400.474(6)(e) (2008).

[16] Fla. Stat. sections 400.474(6)(h) and (i) (2008).

[17] Fla. Stat. section 400.462(27) (2008).

[18] This comment was made during the presentation in Miami that accompanied the powerpoint referenced in footnote 3.

[19] Fla. Stat. section 400.474(6)(g) (2008)

[20] Fla. Stat. sections 400.474(6)(b) and (c) (2008).

[21] Fla. Stat. section 400.462(11) (2008).

[22] Fla. Stat. sections 4 00.474(6)(h) and (i) (2008).

[23] 42 USCA section 1320a-7b (2008); 42 CFR section 1001.952 (2008).

[24] Fla. Stat. sections 400.474(6)(h) and (i) (2008)

[25] 42 USCA section 1320a-7b; 42 CFR section 1001.952.

[26] 42 USCA section 1395nn.

[27] 938 So.2d 480 (Fla. 2006)

[28] The Harden defendants contended that as the state Medicaid fraud statute contained a different intent element and did not contain the federal safe harbors the state statute criminalized behavior that was allowable under the federal statute.

[29] In Re: Petition for Declaratory Statement of Dominion Diagnostics, LLC, AHCA case number 2008008228 (2008).

[30] 967 So.2d 768 (Fla. 2007).

[31] Id at 776; See also Prosper Diagnostic Centers, Inc. v. Allstate Ins. Co., 964 So.2d 763 (Fla. 4DCA 2007).

[32] Id. at 776.

[33] Id. at 773-4.

[34] Id. at 773.

35 This discussion would in part also apply to other anti-fraud licensure provisions as the majority do not include safe harbors.

[36] Fla. Stat. section 400.474(2)(e) (2008).

[37] Fla. Stat. section 400.474(2) (2008).

[38] Fla. Stat. sections 400.476(1) and (2) (2008).

[39] Fla. Stat. section 400.474(6)(f) (2008).

[40] Fla. Stat. section 400.474(6)(f) (2008).

[41] DOAH # 09-2843 (2009).

[42] DOAH # 09-2581 (2009).

[43] DOAH # 09-1756 (2009).

[44] The website is http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Home_Care/docs/hha_faq.html.

[45] According to the Florida Senate website SB1986 amends or creates 70 sections of the Florida Statutes.

[46] Fla. Stat. 408.803(5) (2008) stated in part: “Change of ownership means an event in which the licensee changes to a different legal entity or in which 45 percent or more of the ownership, voting

shares, or controlling interest in a corporation whose shares are not publicly traded...." Notice that the change in ownership language is only related to corporations.

[47] Fla. Stat. section 408.803(5) (2009) and 400.471(2)(h) (2009).

[48] Fla. Stat. section 400.471(10) (2009).

[49] Fla. Stat. section 400.471(11) (2009).

[50] Fla. Stat. section 400.474(6)(l) (2009).

[51] Fla. Stat. section 400.474(6) (2009).

[52] The specific authority required by the Administrative Procedure Act does not seem to be present. See section 120.536(1).

[53] Fla. Stat. sections 395.0185, 400.17, 400.176, 429.195, 483.245 and 483.825 (2008).

[54] Fla. Stat. sections 395.0185, 400.17, 400.176, 429.195, 483.245 and 483.825 (2008). These prohibitions are also included in the Patient Brokering Act.

[55] See Fla. Stat. section 400.17 (2008) and 59A-7.020, Fla. Admin. Code (2008). However, for those sections without a definition in law, a contest will of course arise as to the plain meaning of "kickback." It should be noted that in U.S. v. Porter, 591 F.2d 1048, 1054 ((5 Cir. 1979), the court stated that "In ordinary parlance, a kickback is the secret return to an earlier possessor of part of a sum received."

[56] See Fla. Stat. section 400.17 (2008) and 59A-7.020, Fla. Admin. Code (2008).

[57] Fla. Stat. sections 395.0185, 400.17, 400.176, 429.195, 483.245 and 483.825 (2008).

[58] In Re The Petition for Declaratory Statement of Christopher Soprenuk, M.D., 17 FALR 4393 (1995), the Board of Medicine could not seemingly distinguish whether a practice was a commission, rebate or bonus. See also Advanced Health Law Topics and Certification Review 2008, The Florida Bar Continuing Legal Education Committee and the Health Law Section, "Florida Physician Self-Referral and Fee-Splitting Restrictions" by Steven Siegel.

[59] Advanced Health Law Topics and Certification Review 2008, The Florida Bar Continuing Legal Education Committee and the Health Law Section, "Florida Physician Self-Referral and Fee-Splitting Restrictions" by Steven Siegel.

[60] Fla. Stat. section 456.054 (2008) states in part:

> (1) As used in this section, the term "kickback" means a remuneration or payment, by or on behalf of a provider of health care services or items, to any person as an incentive or inducement to refer patients for past or future services or items, when the payment is not tax deductible as an ordinary and necessary expense.
>
> (2) It is unlawful for any health care provider or any provider of health care services to offer, pay, solicit, or receive a kickback directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.
>
> (3) Violations of this section shall be considered patient brokering and shall be punishable as provided in s. 817.505. See also Harris v. Gonzalez, App. 4 Dist., 789 So.2d 405 (2001). See Fla. Stat. section 458.331 (2008) for sanction.

[61] Advanced Health Law Topics and Certification Review 2008, The Florida Bar Continuing Legal Education Committee and the Health Law Section, "Florida Physician Self-Referral and Fee-Splitting Restrictions" by Steven Siegel, citing 14 FALR 3935 (1992).

[62] Advanced Health Law Topics and Certification Review 2008, The Florida Bar Continuing Legal Education Committee and the Health Law Section, "Florida Physician Self-Referral and Fee-Splitting Restrictions" by Steven Siegel, citing In Re Petition of Rew, Rogers and Silver, MD, PA, DOH-99-0977-D.S.-MDA.

[63] See Gold, Vann & White, P.A. v. Friedenstab,831 So.2d 692 (Fla. 4DCA 2002) for a discussion of several Board opinions.

[64] 614 So.2d 1135,1137, Fn.3 (Fla.2d DCA 1993).

[65] See Orman, p.1137 "Traditionally, fee splitting is patient specific in the health care field and case or client specific in the legal field." Also, in Department of Professional Regulation, Board of Medicine, v. Vinger, DOAH case # 90-0841, paragraph 31, (1990), the administrative law judge stated that as to the physician split-fee prohibition that "(t)he gravamen of a violation of this section is a referral for a fee."

[66] 618 So.2d 259 (Fla 2DCA 1993).

[67] See Regional MRI of Orlando, Inc. v. Nationwide Mutual Fire Ins. Co., 884 So.2d 1102 (Fla. 5DCA 2004); Medical Management Group of Orlando, Inc. v. State Farm Mut. Automobile Ins., 811 So.2d 705 (Fla. 5DCA 2002); Professional Consulting Services, Inc. v. Hartford Life and Accident Ins. Co.,849 So.2d 446 (Fla. 2DCA 2003); Prosper Diagnostic Centers, Inc. v. Allstate Ins. Co., 964 So.2d 763 (Fla. 4DCA 2007); In re Voltarel, Bkrtcy.M.D.Fla.1999,

236 B.R. 464.

[68] In Re: Petition for Declaratory Statement of: American Health Associates Clinical Laboratory, Inc., matter #2008004635 (2008).

[69] Fla. Stat. sections 120.536, 120.54, 120.56 and 120.52(8) (2008).

[70] Fla. Stat. section 400.474 (2008).

[71] Fla. Stat. 408 part II (2008) applies to approximately 30 different healthcare licensure types.

[72] This as opposed to the very broad definition of "person" in Fla. Stat. section 483.041(8) (2008)of the lab statute.

[73] See Lester v. Department of Professional and Occupational Regulation, 348 So.2d 923, 925 (Fla. 1DCA 1977); Nair v. Department of Business and Professional Regulation, 654 So.2d 205 (Fla. 1DCA 1995).

[74] Fla. Stat. section 400.17 (2008).

[75] 618 So.2d 259 (Fla. 2dca 1993).

[76] Id. at 260.

[77] DOAH case # 94-4292 (1994).

[78] 348 So.2d 923, 925 (Fla. 1DCA 1977).

[79] Agency for Health Care Administration v. Leroy Smith, M.D., DOAH case # 94-4292 (1994).

[80] "Pay" is defined as "to engage for money."(2009). In Merriam-Webster Online Dictionary.Retrieved June 26, 2009, from http://www.merriam-webster.com/dictionary/pay.

[81] Fla. Stat. section 400.17(a) (2008).

[82] Fla. Stat. section 400.023(2) (2008).

[83] 370 So.2d 3 (Fla. 1979).

[84] Sandstrom at 4

[85] Sandstrom at 6-7.

[86] 42 USCA section 1320a-7b (2008); 42 CFR section 1001.95 (2008).

[87] In Fla. Stat. section 456.001 (2008) definitions of "Board" and "Department" both relate only to the Department of Health.

[88] Fla. Stat. section 456.072 (2008) states in part: "(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a

substantial violation of subsection (1)...."

[89] 42 USCA section 1320a-7b; 42 CFR section 1001.952.

[90] In Re: Petition for Declaratory Statement of Dominion Diagnostics, LLC, AHCA case number 2008008228 (2008).

[91] In Re: Petition for Declaratory Statement of: American Health Associates Clinical Laboratory, Inc., AHCA case numbers 2008004635 and 2008011757 (2008).

[92] In Re: Petition for Declaratory Statement of: American Health Associates Clinical Laboratory, Inc., AHCA case number 2008011757 (2008).

[93] An AHCA definition is important because AHCA regulates numerous healthcare licensees including hospitals, nursing homes and assisted living facilities.

[94] In Re: Petition for Declaratory Statement of: American Health Associates Clinical Laboratory, Inc., AHCA case number 2008004635 (2008).

[95] Fla. Stat. section 400.990 (2008).

[96] Fla. Stat. section 400.9905 (2008).

[97] Fla. Stat. section 400.9905 (2008).

[98] Fla. Stat. section 400.9905 (2008).

[99] Fla. Stat. section 400.9935, section59A-33.008, Fla. Admin. Code (2008).

[100] Fla. Stat. section 400.9935, (2008).

[101] Fla. Stat. section 400.9935 (2008)

[102] Section 59A-33.013, Fla. Admin. Code (2008).

[103] Fla. Stat. section 400.991 (2008).

[104] Fla. Stat. section 400.991 (2008).

[105] Fla. Stat. section 400.991 (2008).

[106] Fla. Stat. section 400.9935 (2008); See also Active Spine Center, LLC v. State Farm Fire and Cas. Co., 911 So2d 241(Fla. 3DCA 2005).

[107] Created by Senate Bill 1986(2009).

[108] Fla. Stat. section 408.8065 (2009).

[109] Fla. Stat. section statute

[110] Fla. Stat. section 408.8065(1) (2009).

[111] Fla. Stat. section 408.8065(1)(c) (2009).

[112] Fla. Stat. section 408.8065(2) (2009).

[113] Fla. Stat. section 408,8065(3) (2009).

[114] Fla. Stat. section 817.505 (2008).

[115] State v. Rubio, 967 So.2d 768 (2007), revised on rehearing.

[116] Fla. Stat. section 817.505 (2008); 42 USCA section 1320a-7b; 42 CFR section 1001.952.

[117] Fla. Stat. section 817.505 (2008); 42 USCA section 1320a-7b; 42 CFR section 1001.952.

Professional Limited Liability Company: The Entity of Choice

Frequently-Overlooked Issues when Organizing Medical Practice Entities

Richard O. Jacobs* and Michael Igel**

Forming a corporation or limited liability company today is a snap. Anyone can do it on the web. When it comes to entity agreements, from resolutions to operating agreements, a form is but a click away.

The simplicity, however, does not remove the need for careful thought and preparation. There are a bevy of legal requirements that can trap the unwary. The purpose of this discussion is to point out professional entity formation issues that can be significant, but easily overlooked, and to offer permissible entity creation approaches worthy of consideration.

Summary

Physicians in group practices, and even solo practices, are best served when their entities are organized as professional

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limited liability companies under Chapter 621 of the Florida Statutes ("Chapter 621").

If a practice entity has been organized as a non-professional business entity under Chapters 607 or 608 of the Florida Statutes, or as a professional corporation under Chapter 621, the practice entity can be "converted" to a professional limited liability company without adverse income tax effect by using today's "check-a-box" tax elections. However, using the "off-the-shelf" computer-generated forms provided by the state for the entity organizational documents omits important provisions that should be included in those documents. This article provides recommendations regarding these important provisions.

Background: The Corporate Practice of Medicine Doctrine, the Health Care Clinic Act, and the Patient Self Referral Act of 1992

Corporate Practice. The application of the corporate practice of medicine doctrine, which prohibits the practice of medicine by entities organized under §§ 607 or 608, and which also prohibits the ownership of medical practices by persons who are not licensed as physicians has never been finally decided by the Florida courts. However, the adoption by Florida of the Health Care Clinic Act, Florida Statutes section 400.990, et. seq. (hereinafter "Clinic Act"), may revoke the doctrine by implication, at least under circumstances where the Clinic Act grants exceptions or provides licensure.[1]

A 1955 opinion from the Attorney General of Florida ("Attorney General") and the limited applicable case law from the 1960s refer in dicta to the fact that the common law prohibiting the corporate practice of medicine prevails in Florida. Under the common law, as referenced by the Attorney General and the cases touching on the subject, the corporate practice of medicine is prohibited except through professional corporations and professional limited liability companies formed

under Chapter 621, which requires professional corporations and professional limited liability companies practicing medicine to be owned exclusively by licensed physicians.

Prior to the adoption of Chapter 621, the Professional Service Corporation Act, now the Professional Service Corporation and Limited Liability Company Act (hereinafter referred to as the "PA Act" or "Chapter 621"), the Attorney General opined in 1955 that a business corporation may not practice medicine directly or indirectly by hiring licensed members of the medical profession to do professional work.[2]

A few years later, Florida and all other states adopted professional corporation laws that allowed physicians and other professionals to incorporate. States enacted these laws primarily to overcome the contrary position taken by the Internal Revenue Service, which refused to recognize the rights of physicians and other professionals to incorporate, a necessary step at the time to have a retirement plan.[3]

When called upon to approve Florida lawyers incorporating under the PA Act, the Florida Supreme Court in In Re Florida Bar[4] approved professional corporation law practice, commenting:

> "The basic purpose of these enactments is to enable those engaged in various professions to form corporations or associations for the practice of their professions. The statutes apply particularly to numerous professional and other self-employed groups which previously were not permitted to incorporate. Traditionally, the so-called learned professions have not been permitted to practice as corporate entities. 13 Am.Jur., Corporations, Section 837, page 835; 5 Am.Jur., Attorneys at Law, Section 25, page 276. ... Traditionally, prohibition against the practice of a profession through the corporate entity has been grounded on the essentially personal relationship existing between the lawyer and his client, or the doctor and his patient."

In Parker v. Panama City,[5] the District Court of Appeal stated:

> "It is the general rule that in the absence of express statutory authority a corporation cannot lawfully engage in the practice of the learned professions.(emphasis added) 13 Am.Jur., Corporations, Sec. 837, p. 838. However, Chapter 621, Florida Statutes 1961, F.S.A., known as the Professional Service Corporation Act, provides a vehicle for the incorporation in this state of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.... The organization of a professional service corporation is limited to persons who are duly licensed or otherwise legally authorized to render professional services within this state and the corporate power is limited to the sole and specific purpose of rendering the same and specific professional service authorized by such license or otherwise legally authorized to be performed (F.S. § 621.05, F.S.A.)."

However, almost 25 years later, the Florida Board of Medicine ("Board") issued two Declaratory Statements approving the employment of doctors by business corporations regardless of the ownership of those entities. These Declaratory Statements remain unchallenged. As a result, the use of business corporations for medical practice has become commonplace.

In its Declaratory Statements, drafted during the heyday of medical practice consolidation and publicly-owned physician practice management companies, the Board approved the employment of physicians by business corporations on narrow grounds. The Board did not address the Florida Professional Service Corporation and Limited Liability Act,[6] the holdings of the courts, the opinion of the Attorney General, or

the common law corporate practice prohibition.

In The Petition for Declaratory Statement of John W. Lister,[7] the Board was asked "whether a corporation operating under the facts set forth above would be deemed to be practicing medicine without a license." The Board concluded:

> "It is the Board's interpretation that Section 458.327(1) (a), F.S., which prohibits the unlicensed practice of medicine, does not prohibit the practice of medicine by duly licensed medical doctors as employees of a corporation, as described herein."

The Board then added a caution:

> "The conclusions by the Board that the proposal submitted does not constitute the unauthorized practice of medicine is not a comment on whether or not the proposal may violate other provisions of Chapter 458, F.S., or other related obligations of physicians."

In The Petition for Declaratory Statement of Conrad Goulet, M.D, 15 F.A.L.R (1989), the Board made a similar conclusion, confirming the narrow holdings as well as the lack of total review of all relevant issues.

In 1995, the Board addressed the issue of whether or not physicians could practice medicine as employees of limited liability companies organized under the Limited Liability Company Act, § 608, rather than under the PA Act. In In re Petition for Declaratory Statement of Steven B. Cohen, M.D., AHCA 95-00645, the Board concluded:

> However, nothing set forth in chapter [sic] 458, Florida Statutes, prohibits the ownership of a medical practice or the employment of a physician by someone other than a licensed physician

Health Care Clinic Act. In 2003, the Florida legislature enacted the Clinic Act. The Clinic Act provides that a health

care clinic that is owned in whole or in part by non-licensed professionals must obtain a clinic license from Florida's Agency for Health Care Administration ("AHCA"). Medical practice clinics that are owned only by licensed physicians, or defined family members, as long as the family's physician member is also an owner at the same time, are exempt from the Clinic Act's licensure requirements.[8] The Clinic Act, granting authority to clinics with non-physician owners to practice medicine, can be viewed as the implied revocation of the corporate practice of medicine doctrine in Florida, provided that the non-physician clinic owner obtains a license.[9]

The prime purpose of the Clinic Act appears to be directed at protecting the interests of third-party payers and not patients, as the Clinic Act has been interpreted as not applicable to a clinic, such as a weight loss clinic, that does a "cash only" patient fee-for-services business, without insurer or other third-party reimbursement.

The licensure requirements under the Clinic Act require the owners of a non-exempt facility to file a formal application with the AHCA, be fingerprinted, provide a background screen, prove the financial ability to operate the clinic, post a $500,000 surety bond, and have the clinic employ a medical director who agrees to specific statutory duties designed to "ensure" compliance with the Clinic Act's requirements.[10]

The statutory duties of a physician agreeing to be medical director of a licensed clinic are significant and include "ensuring" that the billing and recordkeeping activities are within regulations and that billings are not "fraudulent or unlawful."[11] Furthermore, a medical director is prohibited from referring patients to the clinic for MRIs, CTs, or PET scans, as Florida Statutes section 400.9935 provides that referrals by the physician medical director are a third-degree felony.

Ironically, a licensed clinic must also appoint the medical director as "patient records owner,"[12] which may impinge on the clinic's ability to protect itself from competition when the

relationship is terminated. The clinic must also post a notice in its office offering rewards to patients who provide information that leads to the arrest and conviction of statutory violators.[13]

Section 400.993 of the Clinic Act provides that unlicensed activity is a third degree felony and each day of unlicensed activity is a separate offense. Section 400.995 also provides for administrative fines of up to $5,000 per day for violations of the Clinic Act.

Section 400.9935(3) of the Clinic Act provides that any patient charge by an unlicensed clinic is unlawful and unenforceable. As noted below, insurers have sued unlicensed clinics for refunds of fees paid for professional services.[14]

The Patient Self-Referral Act of 1992. Shortly after the federal government proposed regulations under 42 USC § 1395nn, Limitation on certain physician referrals (the "Stark Law"), Florida adopted the Patient Self-Referral Act of 1992 (the "Self-Referral Act").[15] The Self-Referral Act prohibits physician referrals of health care services to entities in which the physician has an ownership interest unless there is a statutory exception. There is an exception from the definition of referrals for "a health care provider who is the sole provider or a member of a group practice" when the referral is solely for patients of the health care provider or the group practice.[16] A "'group practice' means a group of two or more health care providers legally organized as a partnership, professional corporation or similar association ..."[17] What is a "similar association" for purposes of the Self-Referral Act? A professional limited liability company would be a "similar association," since the PA Act specifically authorizes the practice of medicine. Neither a court nor the Board has decided that a corporation or a limited liability company not organized under the PA Act is a "similar association." Thus, whether or not the definition of "group practice" for purposes of referrals is limited to group practices owned solely by physicians or whether the definition permits non-physician ownership is not clearly defined.

However, the Self-Referral Act does make physician referral exceptions for referrals to a variety of entities without regard to ownership, including radiation oncology, radiology, laboratories, surgery centers, and renal dialysis facilities.[18] Subsection (5) of the Self-Referral Act also includes provisions permitting public company ownership and private investor ownership when the outside investors are not in a position to make health care referrals. Thus, though not totally clear, the Self-Referral Act appears more supportive of the demise of the corporate practice of medicine doctrine than it is supportive of its continued efficacy.

Significant Organizational Issues Facing Medical Practice Clinics and other Health Care Clinics

Death. In Active Spine Centers, LLC v. State Farm Fire and Cas. Co.,[19] Dr. Michael Scholtz was the sole owner of Active Spine Centers, LLC prior to his death. Thus, his clinic was exempt from licensure under the Clinic Act. Unfortunately, the Clinic Act does not provide a licensure exception or statutory procedure regarding a physician's death. The Clinic Act simply provides that when a medical practice or other health care clinic is not 100% owned by a licensed physician the clinic is not licensed and can no longer engage in a health care activity without a license.

The Clinic Act does allow members of a physician's immediate family to be co-owners with the physician, but once the physician dies or is no longer licensed, the clinic must stop practicing medicine and can no longer bill for professional services unless a timely license is applied for by the physician's estate or family members if they were co-owners during the physician's lifetime. Regulations issued by AHCA provide:

> "When a change to the exempt status occurs to an exempt facility ...a license application must be submitted within 5 days .... Failure to timely file the ap-

> plication within 5 days of becoming a health care clinic will render the health care clinic unlicensed and subject the owners, medical or clinic directors and the health care clinic to sanctions under the Clinic Act."[20]

When Dr. Scholtz died, his estate became the successor-owner of the clinic and his personal representative caused the clinic to employ the services of another licensed practitioner to continue patient care, not recognizing the exemption was lost when the clinic owner died. Notably, Dr. Scholtz's estate did not apply for a license under the Clinic Act within the required five-day time period. State Farm refused to pay fees to the clinic, claiming the clinic could not bill for professional services since it had no license. The court held for State Farm, observing that the Clinic Act "does not seem to contemplate the sudden and unexpected death of an owner/licensed supervising healthcare professional."[21]

A similar result would have occurred if Dr. Scholtz had owned Active Spine Centers, LLC jointly with his spouse while he was alive. At his death, his spouse would become the sole owner of the Center, and the exemption becomes lost because § 400.9905(4)(g) of the Clinic Act only permits spousal, or immediate family, ownership while the licensed professional is alive and "is supervising the business activities and is legally responsible for the entity's compliance with all federal and state laws." The limiting language in the Clinic Act, requiring the licensed professional whose family members are co-owners to "supervise" the medical practice and its business activities, also implies that unlicensed family members must have limited management roles regarding medical practice activities of the organization. Thus, unlicensed family members cannot be managers of medical practice activities.

Clinic Licensure and Group Practice Buy-Sell Options. Although *Active Spine Centers* is the only case to address the

issue of licensure following a practitioner's death, and Dr. Scholtz was the sole owner of the clinic, a similar circumstance faces a group practice when the group practice does not have in place a buy-sell agreement providing for the immediate redemption or purchase of the shares of stock or membership interest of a deceased practitioner.

For example, many shareholder or owner agreements provide that upon a practitioner's death, the clinic has, or the continuing clinic shareholders or members have, a period of time, e.g. 90 days, to "elect" to purchase the shares or ownership interest of a deceased owner.

If the purchase option is not exercised and the ownership interest transferred to licensed physicians or redeemed by the company upon death, the estate of the deceased becomes an interim owner of the departing physician's shares until the option is exercised and closed. Under such circumstances, the Clinic Act will require the clinic to cease practicing medicine until the option is exercised or until the clinic is licensed.[22]

Judgment Creditor's Rights Regarding Debtor's Shares of Stock. Although only licensed practitioners can own professional corporations, creditors of practitioners with liens on practitioner's shares may be able to foreclose or levy on the practitioner's shares when the lien is unsatisfied.

Florida's Supreme Court held in Street v. Sugerman[23] that "it is our judgment that Chapter 621, Florida Statutes, F.S.A., does not serve to prevent an execution and sale, by law, of shares of stock in a professional service corporation for satisfaction of a judgment creditor." The court commented, but did not decide, on a non-professional's "scope of rights" in professional corporation stock that might fall into his or her hands. However, the court provided as dicta:

> "It is our impression that this matter could no doubt be effectively dealt with under the provision for dissolution set forth in Chapter 608, Florida Statutes, F.S.A., or Chapter 621, Florida Statutes, F.S.A., or by

> a bill in equity in aid of execution. This seems to be within the contemplation of ...Section 621.10...."

Section 621.10 of the Florida Statutes provides for charter forfeiture when shares of stock of a professional corporation fall into the hands of a non-licensed professional.[24]

However, when dealing with a levy on professional corporation stock, the bankruptcy court for the Middle District of Florida recognized Chapter 621 limitations as to who can lawfully own or acquire shares of professional corporation stock. In In re Six,[25] a 1995 bankruptcy case involving a professional corporation, the Bankruptcy Court for the Middle District of Florida held that stock in a professional corporation could only be sold to an individual who was licensed within the same profession.

The In re Six case also holds that a creditor's rights rise no higher than a debtor's rights. In In re Six, the shareholders, including the physician debtor-shareholder, were bound by stock transfer restriction agreements, and the court held them enforceable. That holding is consistent with Florida and federal law, respecting the integrity of prior existing contract rights.[26]

However, for practitioners that choose to organize a medical practice as a business corporation instead of a professional corporation, a lien-holder can proceed to levy and foreclose on the stock ownership interest of non-physicians, and that substantially raises the issues of loss of licensure exemption under the Clinic Act, unless the practice files quickly for a clinic license when lien rights are exercised in regard to any of the clinic's shares of capital stock.[27]

Judgment Creditor's Rights Regarding Debtor's Limited Liability Membership Interests or Partnership Interests. The rights of judgment creditors in regard to limited liability company interests and partnership interests are far more restrictive than judgment creditor rights regarding shares of stock.

The rights regarding limited partnership and general partnership interests are similar to the judgment creditor's rights regarding limited liability company interests, but there are a few twists:

- *Group Practice Limited Liability Companies*. Although a judgment creditor can ultimately force the sale of a debtor's shares of stock to satisfy the judgment lien, no such right exists for a judgment creditor as to a debtor's membership interest in a limited liability company or a professional limited liability company, at least when there are multiple unrelated members, which is typical in a group practice.

  The rights of the judgment creditor of a member of a limited liability or professional limited liability company are limited to obtaining a "charging order" under § 608.433(4).[28] Under the statute, the rights of the judgment creditor are those of an assignee of the limited liability company member's interest. Under § 608.432(2)(a), an assignee of a member's interest is prohibited from voting or participating in limited liability company management, except as provided in the articles of organization, the operating agreement, or by the approval of all of limited liability company members. The rights of the assignee under § 608.432(2)(b) are limited to the right to share in profits and losses and to receive an allocation of income, gain, loss, deduction, or credit allocable to the debtor member.

  Thus, the judgment creditors rights in regard to the debtor's membership interests are limited to economic allocations and distributions, and the judgment creditor is only entitled to economic distributions related to the membership interest, when and as made.[29]

- Single Member Limited Liability Companies. The owners of single member limited liability com-

panies, however, are not as well protected as are limited liability company group practice members. In In re: Ashley Albright,[30] a Colorado bankruptcy court ruled for that the assets of a single member limited liability company could be used to pay Ashley Albright's creditors. Thus, single member limited liability companies and professional limited liability companies do not appear protected by the charging order limitation on rights that should apply to group practices or multi-entity owners. A similar question has been certified to Florida's Supreme Court.[31]

• *Group Practice Partnerships.* A charging-lien remedy is also provided under Florida statutes for judgment creditors in regard to the partnership interests of debtor general and limited partners, although there is a difference in regard to the treatment of limited and general partnership interests.

Exclusivity of Remedies. Some state courts have taken the position that the charging-lien remedy provided in regard to partnership interests is not an exclusive remedy. As a result of those positions, Florida's Partnership Act was revised in 2005 to provide for exclusivity of judgment creditors' remedies in regard to partnership interests in limited and general partnerships.[32] The Limited Liability Company Act, which applies to both professional and business limited liability companies in regard to the remedies available to judgment creditors, was not amended.

However, the Limited Liability Company Act is quite clear that no transferee, including a creditor of a member, can become a member without the consent of all members of the company. And, of course, in the case of a professional limited liability company, only licensed professionals in the same field can become members. Thus, the rights of a judgment creditor in regards to a member's interest in a multi-member

professional limited liability company specified in the Limited Liability Company Act should be the exclusive rights; however, there is limited judicial authority in that regard.[33]

• *Limited Partnerships*. Limited Partnerships are rarely used as professional practice operating entities, but limited partnerships are frequently used to hold practice real estate and other significant assets. These limited partnerships will then lease the assets to the professional practice. The rights of judgment creditors regarding limited partnership interests are governed exclusively by Florida Statutes section 620.1703. Similar to the rights of a judgment creditor in regard to a limited liability company membership interest, § 608.1703 provides that the rights of a limited partner judgment creditor are only the rights of a transferee provided under § 620.1702. By the 2005 amendment, § 608.1703(3) specifically provides that foreclosure is not an available remedy for a creditor. The rights and limitations appear to apply to both limited partner and general partner interests in a limited partnership.

• *General Partnerships*. The rights of judgment creditors over debtor-partners in a general partnership are governed exclusively by Florida Statutes section 620.8504. Again, the judgment creditor has the rights of a transferee, which are similar to the rights for judgment creditors regarding limited liability company and limited partnership interests. However, unlike the Limited Liability Company Act or the Limited Partnership Act, § 620.8504(2) specifically provides that a court can order foreclosure of the general partner's "interest subject to the charging order. The purchaser at the foreclosure sale has the rights of a transferee."

The rights of a transferee of a general partner's in-

> terest are addressed in Florida Statutes section 620.8503. The rights include the rights to allocations and distributions, similar to the rights of a transferee of a limited liability company's interest and a transferee of a limited partnership interest. However, an additional right is provided under § 608.8503(2)(c), and that is the right to seek court dissolution of the general partnership "under § 620.839(6)." However, no such statutory section exists, and there are no court cases applying the section.

Compensation versus Distributions. If the group practice member whose membership or partnership interest is subject to a judgment creditor's lien is employed by the limited liability company or partnership, and the group practice member is paid fair market value compensation for professional services, the compensation should not be characterized as profit distributions subject to a charging-lien, at least where the payment of compensation has been an ongoing practice. For those practices stopping or reducing member or partner profits distributions upon the filing of a lien and "converting" what had been distributions to compensation after the filing of the lien, the creditors may be able to set aside the conversion of member distributions to compensation as a fraudulent conveyance.[34]

Creditor's Rights Regarding Practice Assets. The statutory limitation on the rights of creditors to foreclose on membership or partnership interests does not limit the rights of creditors of the practice to pursue the assets of the practice. Thus, a person with a judgment against the practice can pursue the assets of the practice to the extent the assets are not already encumbered.

Practitioner Loss of License. When a practitioner who is a medical practice shareholder, LLC member or partner loses his or her license, if the ownership interest is not immediately terminated, the Clinic Act requires that a clinic license be obtained, and AHCA's regulations require that licensure

application be filed within five days after the loss of professional license, as noted above.[35] When a practitioner fails to renew his or her license when due, the license is placed on a "delinquent-active" status for one year. During that one year period, the Clinic Act does not appear to be violated since the license remains in existence, but the PA Act is violated if there is not an immediate transfer of the ownership interest of the delinquent physician since he or she cannot practice within the State of Florida.[36] When the practitioner whose license is lost or suspended is subject to liens on the practitioner's practice ownership interest, further complications arise as noted next.

Florida Statutes section 818.01: a troubling, very old law. Another twist under the Clinic Act is raised by an old statute of ambiguous current effect. Section 818.01 was adopted in 1893, long before electronic communication and recording statutes, and was intended to protect creditors against unknown transfers of assets subject to a lien that could defeat their lien rights. The statute, which is a criminal statute, provides:

> "Whoever shall pledge, mortgage, sell, or otherwise dispose of any personal property to him or her belonging, or which shall be in his or her possession, and which shall be subject to any written lien, or which shall be subject to any statutory lien, whether written or not, or which shall be the subject of any written conditional sale contract under which the title is retained by the vendor, without the written consent of the person holding such lien, or retaining such title; and whoever shall remove or cause to be removed beyond the limits of the county where such lien was created or such conditional sale contract was entered into, any such property, without the consent aforesaid, or shall hide, conceal or transfer, such property with intent to defeat, hinder or delay

> the enforcement of such lien, or the recovery of such property by the vendor, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

Though the law remains in force, since its adoption, Florida has adopted the Uniform Commercial Code, and more recently, Florida Statutes section 55.202, which provides for statewide lien perfection and notice by recording personal property judgment liens with the State of Florida. In 1971, the Attorney General ruled that the Uniform Commercial Code superseded § 818.01 by implication, as there is no direct statutory § 818.01 revocation language.[37] A Florida Court of Appeals reached a similar conclusion in Flanigan's Enterprises, Inc. v. Barnett Bank of Naples.[38] However, the Supreme Court upheld the Flanigan's Enterprise decision on other grounds.[39] Thus, there is no clear judicial or legislative support that Florida's UCC or § 55.202 repeal or supersede § 818.01.

What is the effect of § 818.01, when it collides with the Clinic Act? Consider the following example, based upon an actual case. Dr. Jones owed his ex-wife a substantial amount of alimony reflected in a judgment filed with the state under § 55.202, creating a lien on his professional corporation shares of stock. To avoid paying the judgment, Dr. Jones leaves his group practice and flees to a foreign country. He does not renew his license. The practice's continuing shareholders seek to repurchase his shares, all of which are subject to the lien. Since the lien amount substantially exceeds the practice's valuation of the shares, Dr. Jones's ex-wife relies on § 818.01 and refuses to release her lien, or authorize the purchase of the shares of stock subject to the lien, without a full payment of the amount of her judgment, which substantially exceeds the purchase price for the shares under the corporation's agreements. The spouse's refusal to allow the practice to reacquire the shares of the physician, who is now no longer licensed, requires the practice to obtain a license under the Clinic Act; however, the licensure

procedure requires all principals to be fingerprinted. The non-compliant physician, now overseas and still a shareholder of more than 5% of the practice, refuses to be fingerprinted, blocking the clinic's attempt at compliance.

The practice sued Dr. Jones's wife to force the release of Dr. Jones's shares from her lien upon payment of a purchase price determined under the practice's professional corporation bylaws. The court held that the lien-holder was within her rights to block the transfer, and that § 818.01 was not superseded by subsequent law. The issues raised by the collision of statutes with differing objectives require a clear solution and care in documentary preparation.[40]

Similarly, under the PA Act, since the physician is no longer qualified to practice medicine in Florida, the practice runs the risk of the Florida Attorney General bringing an enforcement action.[41]

Supervisory Responsibility. Under both state and federal health care law, medical procedures not directly performed by a physician may require physician supervision. The level of supervision required under various circumstances is beyond the scope of this paper. However, procedural supervision requirements typically fall under one of three levels:

- *General Supervision*. When procedures require "general supervision," the procedure is furnished under a physician's overall direction and control, but the physician's presence is not required during the performance of the procedure.

- *Direct Supervision*. When procedures require "direct supervision" the physician must be immediately available to furnish assistance and direction throughout the performance of the procedure. The physician need not be in the procedure room, but must be nearby.

- *Personal Supervision*. When procedures require

"personal supervision" the physician must be physically present in the procedure room when the procedure is being performed.

The potential supervisory liability of a physician for procedures performed by others may also influence entity selection and is discussed in the next section of this paper.

Why Professional Corporations and Professional Limited Liability Companies Make Sense

Regardless of whether the corporate practice of medicine doctrine will ever be enforced in Florida, we are strong believers that professional corporations and professional limited liability companies should be used for the establishment or reorganization of a medical practice. There are several reasons for reaching this conclusion, beyond the obvious reading of Chapter 621, which authorizes an organization owned by licensed physicians to engage in the practice of medicine.

- *Anti-kickback Safe Harbor*. The Anti-kickback Statute safe harbors provide a safe harbor for "investments in group practice."[42] Meeting its requirements protects a physician buying or selling an interest in a medical practice from prosecution under the anti-kickback laws. Violation is a criminal offense. One of its prime requirements is that licensed professionals engaging in the practice are the sole owners of the practice. Utilizing an entity organized on Chapter 621, which can only be owned by licensed professional, is a good starting point for compliance.

- *Health Care Clinic Act*. The Clinic Act also contains a licensure exception for entities solely-owned by licensed professionals. Because a professional corporation or professional limited liability company can only be owned by licensed professionals, these kinds of entities provide a good starting place

for protection against the Clinic Act.

• *Statutory Liability Limitation.* Chapter 621 contains the following provision, unique to the statute and not including under Florida's general corporation or professional limited liability company acts. The significant portion is underlined:

> 621.07 Liability of officers, agents, employees, shareholders, members, and corporation or limited liability company.-- Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct; provided, however, that any officer, agent, member, manager, or employee of a corporation or limited liability company organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by that person, or by any person under that person's **direct supervision and control** [emphasis added], while rendering professional service on behalf of the corporation or limited liability company to the person for whom such professional services were being rendered (emphasis added); and provided further that the personal liability of shareholders of a corporation or members of a limited liability company, organized under this act, in their capacity as shareholders or members of such corporation or limited liability company, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under

chapter 607 or a member-employee of a limited liability company organized under chapter 608. The corporation or limited liability company shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, members, managers, or employees while they are engaged on behalf of the corporation or limited liability company in the rendering of professional services.

A Florida Supreme Court case, Gershuny v. Martin McFall Messenger Anesthesia Professional Association[43] illustrates the power of the statutory liability limitation. The primary issue in the case was whether or not any of the physician owners of the professional corporation were personally liable for the negligent acts of an employed nurse anesthetist. Citing Florida Statutes section 621.07, the court held there was no liability since the nurse was acting independently and was not under the direct supervision of any of the practice's physicians at the time of the incident. The court concluded,

"Thus under section 621.07, the group of physicians comprising the Association could be held personally liable in their capacity as physicians only if the negligence or wrongful act was committed by them or by someone under their direct supervision and control. Otherwise, the liability of physicians is no greater than that of a shareholder-employee of any domestic business corporation.... When a corporate entity is sued, the courts will not look behind that entity to hold individuals who compose it absent fraud or some illegal purpose."

Gershuny was decided in 1989, prior to Florida's adoption of the Self-Referral Act. Under the Self-Referral Act, any referral by a physician of a patient to an entity in which the physician has an ownership interest is prohibited unless the referral falls under an exception. An exception is provided for a referral to the physician's practice under Florida Statutes section 456.053(3) (o) 3.f:

> f. By a health care provider who is the sole provider or member of a group practice for designated health services or other health care items or services that are prescribed or provided solely for such referring health care provider's or group practice's own patients, and that are provided or performed by or under the direct supervision of such referring health care provider or group practice (emphasis added); provided, however, that effective July 1, 1999, a physician licensed pursuant to chapter 458, chapter 459, chapter 460, or chapter 461 may refer a patient to a sole provider or group practice for diagnostic imaging services, excluding radiation therapy services, for which the sole provider or group practice billed both the technical and the professional fee for or on behalf of the patient, if the referring physician has no investment interest in the practice. The diagnostic imaging service referred to a group practice or sole provider must be a diagnostic imaging service normally provided within the scope of practice to the patients of the group practice or sole provider. The group practice or sole provider may accept no more than 15 percent of their patients receiving diagnostic imaging services from outside referrals, excluding radiation therapy services.

The Patient Self-Referral Act is poorly drafted, and it is based on proposed regulations under the federal self-referral law, known as the "Stark Law." The federal rules were never adopted in the form proposed, as they were totally unworkable.

There are no cases regarding the Self-Referral Act's supervision requirements, although there is a Declaratory Statement from the Board holding that a physician could not refer a patient to a sleep lab in which the physician had a financial interest when the sleep lab test was not "directly supervised" by the physician.[44] In making its decision, the Board of Medicine pointed out:

> "The Board recognizes that under current Medicare guidelines, physicians are only required to provide "general" supervision of sleep studies, which means the physician is not required to be physically present during the testing. See, Medicare Carriers Manual Part 3, Section 2070. However, in order to benefit from the exception set forth in Section 45(6).053(30(o)3.f., Florida Statutes, the services must be provided under the "direct supervision" of the referring health care provider. ... 'Direct supervision' is defined in Section 458.053(3)(e) ... (as) ... supervision by a physician who is present in the office suite and immediately available to provide assistance and direction through the time services are being provided."

Few, if any medical practices operate in strict compliance with the Self-Referral Act. Its strict, irrational requirement of direct supervision, originally proposed in the Stark Law, simply does not work, but it is the law of Florida until it is overturned or legislated out of existence.

There does not appear to be a "patient's right of action" under the Self-Referral Act, but its violation may add an arrow to the quiver of insurers not wanting to pay for services or lawyers assembling causes of action in a malpractice case. In that regard, the "no direct supervision" protection of § 621.07 may be limited when it comes to protecting physicians from the unsupervised work of the practitioner's nurses and other staff. However, despite the Self-Referral Act's requirement of

"direct supervision," there are many instances when licensed and qualified nurses, advanced registered nurse practitioners, and physician assistants will be able to deal with patients directly under their licensure requirements when a direct referral from a physician is not involved. Furthermore, there are conflicting laws regarding supervision of advanced registered nurse practitioners and physician assistants and the "direct supervision" requirements of the Self-Referral Act. For example, Florida Statutes section 458.348 provides requirements for supervision of advanced registered nurse practitioners or physician assistants at locations other than the primary practice location of the physician, which therefore, could not be direct. Florida Statutes section 456.347 provides further requirements for the supervision of physician assistants by physicians and direct supervision is not required. In each instance, no distinction is made as to the supervisory requirements between owned and non-owned practices. Modifications to these laws have been made after the adoption of the Self-Referral Act, and may, by implication, amend the law.

Clearly, in situations where a physician member of a group practice commits malpractice, the Chapter 621 statutory protection remains available to the physician's partners, limiting personal liability, and that is an important consideration in today's environment.[45]

Thus, the statutory liability limitation contained in § 621.07, limiting the liability of the professional for his or her own acts and for the acts of other persons under the professional's "direct supervision and control," continues to be an important factor influencing the selection of the entity for professional practice, favoring entities organized under Chapter 621.

Organizational Documents Addressing the Issues

In order to maximize the ability of the practice to continue its practice when faced with adverse circumstances that

can come into play, professional practices and their advisors should carefully consider the documentation and organization of the practice. Careful documentation and structuring of the entity will minimize the adverse impact of the Clinic Act and the requirements of the PA Act.

We are not advocates of using regular business corporations, or business limited liability companies, because greater protection is afforded the professional under Chapter 621, as we discussed above. We are advocates of organizing professional practices under Chapter 621, as we point out in the remainder of this paper. In particular, we believe that in today's environment the professional limited liability company offers the greater protection for professionals.

The following items are worthy of careful consideration:

Documentation

Articles of Incorporation. First and foremost, medical practices and other clinics organized as professional corporations or professional limited liability companies should include provisions in their articles of incorporation or articles of organization to address the issue of non-licensure, and those provisions should be self-actuating. For example, consider the following provisions to be included in the entity's articles of incorporation:

Loss of License; Severance and Termination of Employment

A. If a person who has been rendering professional services to the public becomes legally disqualified to render such professional services as a physician within the State of Florida or accepts employment that, pursuant to existing law, places restrictions or limitations upon that person's continued rendering of such professional services (each a **Disqualification Event**), that person (the **Disqualified Per-**

son) shall sever all employment with, and financial interests[46] in, the Corporation forthwith.

B. In the event a shareholder becomes a Disqualified Person, the Disqualified Person's shares in the Corporation are redeemed and shall be deemed to have been redeemed and cancelled effective as of the Disqualification Event. No shares held by the shareholder who is a Disqualified Person shall be considered outstanding upon and after the Disqualification Event, the Disqualified Person who is a shareholder shall not be entitled to vote or participate in any Corporation or shareholder action and shall cease to be a shareholder, manager, employee, officer, or director, of the Corporation immediately effective as of the Disqualification Event, and the sole right and entitlement of the shareholder who is a Disqualified Person shall be to receive the Redemption Price for the shareholder's shares (the **Redeemed Shares**).

C. The Redemption Price for the Redeemed Shares shall be as set forth in the bylaws or other shareholders' agreement, if any, and if not, by mutual agreement or, if no such agreement can be reached within a reasonable time under the circumstances (and any event within thirty (30) days), then by arbitration in accordance with the Florida Arbitration Code. Any delay in the determination of the price shall not constitute grounds for the shareholder who is Disqualified Person to continue as a shareholder and his or her status shall be solely that of a creditor.

D. The Redemption Price for the Redeemed Shares shall be paid in accordance with the provisions of the applicable bylaws or shareholders' agreement, if any, and if not, at the election of the Corporation, shall be paid in cash or in not more than sixty (60) monthly installments of principal and interest with interest computed at the Applicable Federal Rate.

The closing shall occur within thirty (30) days after the Corporation first acquires actual knowledge of the Disqualification Event or, if later, within five (5) days after determination of the Redemption Price by arbitration if submitted to arbitration.

E. Provided, however, if the sole shareholder of this Corporation is or becomes a Disqualified Person the Corporation shall promptly amend these articles or take such other legal action as shall be necessary or appropriate to cause the Corporation to change its business purpose from the rendering of professional service to provide for any other lawful purpose by amending its articles of incorporation in the manner required for an original incorporation under Chapter 608, Florida Statutes, the Corporation shall be removed from the provisions of Chapter 621, Florida Statutes, including, but not limited to, the right to practice a profession.

F. If at the time a shareholder becomes a Disqualified Person, the Corporation provides, or the shareholder is required to provide, professional liability insurance, upon the Disqualification Event, the shareholder who has become a Disqualified Person shall promptly provide an extended coverage endorsement ("tail coverage") in regard to the shareholder's professional liability insurance policy then in effect, with the same coverage limits and for a period of not less than four years, or if less the maximum period available under the professional liability insurance policy then in effect.

G. Upon a failure of the shareholder to provide the Corporation with a valid and binding certificate of tail coverage from the insurer, the Corporation may, in the discretion of a majority vote of its shareholder(s) who are not Disqualified Persons, purchase such coverage and offset the premium therefore against

> the Redemption Price, to the extent of the Redemption Price, with the shareholder remaining liable for any excess premium.

Articles of Organization: The following is an example of a similar provision in articles of organization of a professional limited liability company:

> **Members and Disqualified Members**
>
> A. Persons who have interests in the capital of the Company are referred to herein as "Members." The interests of a Member in the Company are referred to as "Shares."
>
> B. Additional Members may be admitted upon the approval of the Members of the Company in the manner set forth in the "Operating Agreement" between the Company and its Members or as otherwise agreed by all of the Members; however, no one may be admitted as a Member unless such person is a physician licensed to practice medicine in Florida under chapters 458 or 459, or their successor chapters.
>
> C. No transfer of a Member's Shares shall be permitted except in accordance with the Operating Agreement and applicable law.
>
> D. If a physician, who has been rendering professional services to the public becomes legally disqualified to render such professional services within the State of Florida or accepts employment that, pursuant to existing law, places restrictions or limitations upon that person's continued rendering of such professional services (each a **Disqualification Event**), that person (the **Disqualified Person**) shall sever all employment with, and financial interests in, the Company forthwith.
>
> E. In the event a Member becomes a Disquali-

fied Person, the Disqualified Person's Shares in the Company are redeemed and shall be deemed to have been redeemed and cancelled effective as of the Disqualification Event. No Shares held by the Member who is a Disqualified Person shall be considered outstanding upon and after the Disqualification Event, the Disqualified Person who is a Member shall not be entitled to vote or participate in any Company or Member action and shall cease to be a Member, manager, employee, officer, or director, of the Company immediately effective as of the Disqualification Event, and the sole right and entitlement of the Member who is a Disqualified Person shall be to receive the Redemption Price for the Member's shares (the **Redeemed Shares**).

F. The Redemption Price for the Redeemed Shares shall be as set forth in the Operating Agreement or other Members' agreement, if any, and if not, by mutual agreement or, if no such agreement can be reached within a reasonable time under the circumstances (and any event within thirty (30) days), then by arbitration in accordance with the Florida Arbitration Code. Any delay in the determination of the price shall not constitute grounds for the Member who is Disqualified Person to continue as a Member and his or her status shall be that solely of a creditor.

G. The Redemption Price for the Redeemed Shares shall be paid in accordance with the provisions of the applicable Operating Agreement or Members' agreement, if any, and if not, at the election of the Company, shall be paid in cash or in not more than sixty (60) monthly installments of principal and interest with interest computed at the Applicable Federal Rate. The closing shall occur within thirty (30) days after the Company first acquires actual knowledge of the Disqualification Event or, if later, within five (5)

days after determination of the Redemption Price by arbitration if submitted to arbitration.

H. Provided, however, if the sole Member of this Company is or becomes a Disqualified Person the Company shall promptly amend these articles or take such other legal action as shall be necessary or appropriate to cause the company to change its business purpose from the rendering of professional service to provide for any other lawful purpose by amending its articles of incorporation in the manner required for an original incorporation under Chapter 608, Florida Statutes, the Company shall be removed from the provisions of Chapter 621, Florida Statutes, including, but not limited to, the right to practice a profession.

I. If at the time a Member becomes a Disqualified Person, the Company provides, or the Member is required to provide, professional liability insurance, upon the Disqualification Event, the Member who has become a Disqualified Person shall promptly provide an extended coverage endorsement ("tail coverage") in regard to the Member's professional liability insurance policy then in effect, with the same coverage limits and for a period of not less than four years, or if less the maximum period available under the professional liability insurance policy then in effect.

J. Upon a failure of the Member to provide the Company with a valid and binding certificate of tail coverage from the insurer, the Company may, in the discretion of a majority vote of its Member(s) who are not Disqualified Persons, purchase such coverage and offset the premium therefore against the Redemption Price, to the extent of the Redemption Price, with the Member remaining liable for any excess premium.

Bylaws. Consider the following provisions in the professional corporation's bylaws:

> **Corporate Purpose and Legal Requirements**
>
> This Corporation is organized for pecuniary profit for the sole and specific purpose of engaging in the practice of medicine and, to the extent permitted by law, may invest its funds in real estate, mortgages, stocks, bonds, or any other type of investments, may own real or personal property necessary for the rendering of professional services, and may otherwise engage in any lawful activity or business permitted to be engaged in by a professional corporation under Florida law. These Bylaws shall be subject to the provisions of the Professional Service Corporation and Limited Liability Company Act, Chapter 621, Florida Statutes, governing professional corporations. As prescribed by the Professional Service Corporation and Limited Liability Company Act, no shareholder of this corporation may sell or transfer her or his shares in this Corporation except to another professional corporation, professional limited liability company, or individual, each of which must be eligible to be a shareholder of this Corporation under the Professional Service Corporation and Limited Liability Company Act. As provided by the Professional Service Corporation and Limited Liability Company Act, this Corporation may not issue any of its capital stock to anyone other than a professional corporation, a professional limited liability company, or an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the Corporation was incorporated. Further, as provided by the Professional Service Corporation and Limited Liability Company Act, no shareholder of this Corporation shall enter into a voting trust agreement or any other type agreement vesting another person with the author-

ity to exercise the voting power of any or all of that person's stock.

Disqualified Shareholder

As provided by the Professional Service Corporation and Limited Liability Company Act, Chapter 621, Florida Statutes, if a shareholder of the Corporation who has been rendering professional service to the public becomes legally disqualified to render such professional services within the state of Florida or accepts employment that, pursuant to existing law, places restrictions or limitations upon that person's continued rendering of such professional services (each a **Disqualification Event**), that person (the **Disqualified Shareholder**) shall sever all employment with, and financial interests in, the Corporation forthwith immediately.

Shares Redeemed and Cancelled

In the event a shareholder of the Corporation becomes a Disqualified Shareholder, the Disqualified Shareholder's shares in the Corporation are redeemed and shall be deemed to have been redeemed and cancelled effective as of the Disqualification Event, the shares held by the Disqualified Shareholder shall not be considered outstanding upon and after the Disqualification Event, the Disqualified Shareholder shall not be entitled to vote or participate in any corporate or shareholder action and shall cease to be an employee, officer, director, and/or shareholder of the Corporation effective as of the Disqualification Event, and the Disqualified Shareholder's sole right and entitlement shall be to receive the Redemption Price for those redeemed shares (the **Redeemed Shares**).

Share Price

If the Disqualified Shareholder is a party to an agree-

ment with the other Shareholders and the Corporation, the Redeemed Shares shall be priced in accordance with the Agreement. If the Disqualified Shareholder is not a party to such separate agreement, the Redemption Price for the Redeemed Shares shall be an amount equal to the Adjusted Book Value of the Redeemed Shares. The term "Adjusted Book Value" means the shareholders' equity based on historical cost, as reflected on a balance sheet of the Corporation as determined as of the date of the Disqualification Event, without audit, by the Corporation's regularly engaged accountants, employing the accrual method of accounting, regardless of the method of accounting actually used by the Corporation, and generally accepted accounting principles in the United States; subject, however, to the following adjustments:

(a) No allowance of any kind shall be made for goodwill, any trade name or any similar intangible asset not arising from an acquisition of the Corporation.

(b) All accounts payable shall be valued at face amounts, less discounts and allowances thereon.

(c) All other liabilities shall be valued at face amount, unless a contractual right to a discount has been obtained.

(d) No discount, or valuation adjustment, shall be made for favorable or unfavorable financing terms or interest rates.

(e) All unpaid and accrued federal, state and local taxes, including, but not limited to sales, payroll, unemployment, excise, franchise and income taxes (but only to the extent then applicable to the Corporation) shall be accrued.

(f) Reserves for contingent or undetermined liabilities shall not be treated as liabilities except in accordance with the following:

(i) Contributions to any qualified pension, profit sharing or other qualified retirement plan for the benefit of Corporation employees for the fiscal year of the Corporation in which the date of determination falls shall be accrued as a liability and shall be prorated for such fiscal year to the valuation date.

(ii) In the event there are pending or known claims for liability not fully covered by insurance, the accountant shall accrue any estimated loss as a liability of the Corporation, when accrual is required under the current Statement of Financial Accounting Standards applicable to Accounting for Contingencies.

(g) Accounts receivable shall be valued at face value, less a reasonable reserve for doubtful accounts, and reduced by any accounts payable directly associated therewith, and an income tax accrual at 35% for any gain associated therewith. Provided, however, if in the future the Corporation adopts a salary continuation plan from its accounts receivable from physician's personal services to compensate physicians following termination of employment by the Corporation, the accounts receivable from physicians' personal services shall be disregarded when calculating adjusted book value.

(h) If the Corporation is operating as an S

corporation pursuant to the Internal Revenue Code, book value shall be adjusted to take into account the Corporation's undistributed income or loss for the year in question using the "closing of the books" method and accrual accounting as of the valuation date.

(i) If the Corporation is not an S Corporation, a special accrual adjustment for Corporation income taxes or tax credits, if applicable, shall be made concerning any losses or gains related to the adjusted value of assets or liabilities.

(j) The value of any life insurance or disability buy-out insurance on the lives of the Shareholders owned by the Corporation for the purposes of funding a corporate buy-out pursuant to this Agreement shall be limited to the cash surrender value, if any, of such policy or policies.

(k) Any supply inventory shall be valued at the lower of cost or market value, and as part of the income tax adjustments, if the inventory has been expensed for income tax purposes, the value shall be reduced by the tax benefit of the expense deduction.

(l) Traded securities shall be valued at fair market value.

(m) Investments in subsidiaries, whether corporate, limited liability company, partnership, or other form, that are subject to agreements among the owners shall be valued in accordance with the applicable agreements, but if there are no such agreements, at fair market value.

(n) Furniture, furnishings, leasehold improvements, machinery and equipment shall be valued book value. In this regard, book value shall be calculated using a straight line method of depreciation over the useful life of such assets, regardless of the method of depreciation or expensing used by the Corporation.

(o) Land and buildings titled in the Corporation shall be valued at fair market value.

(p) When fair market value of property is to be determined, the following shall apply:

(i) Fair market value is the value of the property determined in arm's length transactions consistent with the general market value, as defined Section 1877 of the Social Security Act, as amplified in 42 C.F.R. § 411.351, and other applicable federal and state laws, rules and regulations regulating physicians, physician practices and transactions among physicians.

(ii) If the assets are marketable securities, the published market value shall be used and shall be the average of the bid and asked price at the close of the valuation day, or the preceding business day, if applicable.

(iii) Fair market value shall otherwise be determined by appraisal.

(iv) As part of the income tax adjustments, fair market value shall be reduced for the income tax applicable to any gain and shall reflect the tax benefit of any loss, projected as if

there was a hypothetical sale or disposition of appraised assets on the valuation date.

If the Disqualified Shareholder's Shares are being redeemed is, at the time of a sale, indebted to the Corporation, the Corporation shall offset and reduce the purchase price payable by the amount of such indebtedness. To the extent the indebtedness is offset against the purchase price, the indebtedness shall be deemed paid; but any indebtedness in excess of the sum offset against the purchase price shall remain due and owing according to its terms. Unless the indebtedness specifically provides that this provision shall not apply, this right of offset shall apply to all indebtedness due the Corporation by the Disqualified Shareholder, even though the indebtedness shall not by its terms have matured at the time of the sale.

Stock Transfer Restrictions ("Buy-Sell") Agreements. These agreements also should address the issues, making transactions mandatory and not optional, and restricting the rights of creditors who take shares of stock as collateral.

Pledge or Other Hypothecation

Except as otherwise proscribed by law, this Agreement shall not restrict a pledge or other hypothecation of Stock by a Shareholder as collateral to secure a loan or other indebtedness, but a sale or other realization upon the collateral under such pledge or other hypothecation shall be subject to all of the provisions of this Agreement, and any transferee

of the Stock shall take such Stock subject to all the provisions of this Agreement, which shall apply in all respects thereto, and shall, upon demand of the Corporation, join in the execution and delivery of this Agreement. No pledge shall be valid or binding unless the pledgee agrees in writing to waive any application of Fl. Stat. §818.01 and agrees that the provisions of this Agreement prevail.

Shareholder's Death

Upon the death of a Shareholder (hereinafter referred to as the decedent), the Corporation shall purchase from the decedent's personal representatives, and the decedent's personal representative shall sell to the Corporation, all of the Stock of the Corporation owned by the decedent and to which the decedent and/or the decedent's personal representatives shall be entitled at the purchase price specified in section _____ of this Agreement. The closing of such purchase and sale shall be effective as of the date of death, and shall take place at the principal business office of the Corporation in the State of Florida, at a date selected by the Corporation upon not less than five (5) days' notice to the seller (the decedent's personal representative), which date shall be not more than one hundred eighty (180) days after the date of the qualification of the decedent's personal representative and not less than ninety (90) days after such date. The purchase price shall be payable in accordance with the provisions of section ____ of this Agreement.

Shareholder's Termination of Employment

Upon the termination of employment of a Shareholder employed by the Corporation (other than by reason of a death covered by section _ or by reason of ceasing to be a Qualified Person covered by section

_), by either party, whether voluntary or involuntary (the terminated Shareholder is referred to as the "Terminated Shareholder"), the Corporation shall purchase from the Terminated Shareholder, and the Terminated Shareholder shall sell to the Corporation, all of the Stock of the Corporation owned by the Terminated Shareholder and to which the Terminated Shareholder shall be entitled at the purchase price specified in section ____ of this Agreement. The closing of such purchase and sale shall be effective as of the date of termination, and shall take place at the principal business office of the Corporation in the State of Florida at a date selected by the Corporation upon not less than five (5) days' notice to the seller (the Terminated Shareholder), which date shall be not more than one hundred eighty (180) days after the date of termination and not less than ninety (90) days after such date. The provisions of this section shall not apply to a Shareholder who is deceased, and section ___ shall apply in that event. The provisions of this section shall also not apply to a Shareholder who is no longer a Qualified Person, and section ___ shall apply in that event.

Failure to Retain Qualified Person Status

Stock held by any Shareholder who ceases to be a Qualified Person is without further action redeemed by the Corporation as of the Disqualification Event, and the Redemption Price for that Stock is the Agreed Value as determined pursuant to section ___ _, and is payable in accordance with the provisions of section ___ of this Agreement. No Stock of the Disqualified Shareholder shall be deemed to be outstanding upon and after the Disqualification Event, and the Disqualified Shareholder is not entitled to vote or participate in any corporate or shareholder action and ceases to be an employee, officer, director, and/or shareholder of the Corporation effective

as of the Disqualification Event. The Disqualified Shareholder's sole right and entitlement is to receive the Redemption Price for the Redeemed Shares, and all other provisions of this Agreement apply to the redemption and purchase of the Redeemed Shares. The closing of any purchase pursuant to the provisions of this section __ shall take place at the principal business office of the Corporation in the State of Florida on or prior to sixty (60) days after the date that a Shareholder ceases to be a Qualified Person or, if later, thirty (30) days after the date the Corporation first has actual knowledge that the Shareholder has ceased to be a Qualified Person. Capitalized terms used in this section that are not otherwise defined in this Agreement have the meaning assigned to those terms in the Corporation's Bylaws, as amended from time to time.

Purchase of Stock Upon Bankruptcy of a Shareholder

If a Shareholder files a voluntary petition in bankruptcy, is adjudged a bankrupt or insolvent, or has entered against the Shareholder an order for any relief in any bankruptcy or insolvency proceeding, the Corporation shall purchase all the Stock of the Corporation then owned by such Shareholder at the purchase price determined pursuant to the provisions of section ____, and subject to the terms, conditions, and other provisions set forth in section _____. The closing of any purchase pursuant to the provisions of this section shall take place at the principal business office of the Corporation in the State of Florida on or prior to sixty (60) days after the date that a Shareholder files a voluntary petition in bankruptcy, is adjudged a bankrupt or insolvent, or has entered against him an order for any relief in any bankruptcy or insolvency proceeding.

Professional Limited Liability Company Operating Agreements. Professional limited liability company operating agreements should contain operative provisions. For example, consider:

> **Business Purpose and Legal Requirements**
>
> This Company is organized for pecuniary profit for the sole and specific purpose of engaging in the practice of medicine and, to the extent permitted by law, may invest its funds in real estate, mortgages, stocks, bonds, or any other type of investments, may own real or personal property necessary for the rendering of professional services, and may otherwise engage in any lawful activity or business permitted to be engaged in by a professional limited liability company under Florida law. This Operating Agreement shall be subject to the provisions of the Professional Service Company and Limited Liability Company Act, Chapter 621, Florida Statutes, governing professional limited liability companies.
>
> **Disqualified Member**
>
> As provided by the Professional Service Company and Limited Liability Company Act, Chapter 621, Florida Statutes, if a Member of the Company who has been rendering professional service to the public becomes legally disqualified to render such professional services within the state of Florida or accepts employment that, pursuant to existing law, places restrictions or limitations upon that person's continued rendering of such professional services (each a **Disqualification Event**), that person (the **Disqualified Member**) shall sever all employment with, and financial interests in, the Company forthwith immediately.
>
> **Shares Redeemed and Cancelled**
>
> In the event a Member of the Company becomes a

Disqualified Member, the Disqualified Member's Shares in the Company are redeemed and shall be deemed to have been redeemed and cancelled effective as of the Disqualification Event, the Shares held by the Disqualified Member shall not be considered outstanding upon and after the Disqualification Event, the Disqualified Member shall not be entitled to vote or participate in any company or Member action and shall cease to be an employee, officer, manager, and/or Member of the Company effective as of the Disqualification Event, and the Disqualified Member's sole right and entitlement shall be to receive the Redemption Price for those redeemed shares (the **Redeemed Shares**).

Redemption Price

The Redemption Price for the Redeemed Shares shall be an amount equal to the Adjusted Book Value of the Redeemed Shares. The term "Adjusted Book Value" means the Members' equity based on historical cost, as reflected on a balance sheet of the Company as determined as of the date of the Disqualification Event, without audit, by the Company's regularly engaged accountants, employing the accrual method of accounting, regardless of the method of accounting actually used by the Company, and generally accepted accounting principles in the United States; subject, however, to the following adjustments:

[See the Bylaw provisions previously provided, which would be similar]

Member's Death

Upon the death of a Member (hereinafter referred to as the decedent), the Company shall purchase from the decedent's personal representatives, and the decedent's personal representative shall sell to the Company, all of the Shares of the Company owned

by the decedent and to which the decedent and/or the decedent's personal representatives shall be entitled at the purchase price specified in section ___ of this Agreement. The closing of such purchase and sale shall be effective as of the date of death, and shall take place at the principal business office of the Company in the State of Florida, at a date selected by the Company upon not less than five (5) days' notice to the seller (the decedent's personal representative), which date shall be not more than one hundred eighty (180) days after the date of the qualification of the decedent's personal representative and not less than ninety (90) days after such date. The purchase price shall be payable in accordance with the provisions of section ____ of this Agreement.

Member's Termination of Employment

Upon the termination of employment of a Member employed by the Company (other than by reason of a death covered by section _ or by reason of ceasing to be a Qualified Person covered by section _), by either party, whether voluntary or involuntary (the terminated Member is referred to as the "Terminated Member"), the Company shall purchase from the Terminated Member, and the Terminated Member shall sell to the Company, all of the Shares of the Company owned by the Terminated Member and to which the Terminated Member shall be entitled at the purchase price specified in section ____ ___ of this Agreement. The closing of such purchase and sale shall be effective as of the date of termination, and shall take place at the principal business office of the Company in the State of Florida at a date selected by the Company upon not less than five (5) days' notice to the seller (the Terminated Member), which date shall be not more than one hundred eighty (180) days after the date of termination and not less than ninety (90) days after such

date. The provisions of this section shall not apply to a Member who is deceased, and section ___ shall apply in that event. The provisions of this section shall also not apply to a Member who is no longer a Qualified Person, and section ___ shall apply in that event.

Failure to Retain Qualified Person Status

Shares held by any Member who ceases to be a Qualified Person is without further action redeemed by the Company as of the Disqualification Event, and the Redemption Price for that Shares is the Agreed Value as determined pursuant to section ____, and is payable in accordance with the provisions of section _____ of this Agreement. No Shares of the Disqualified Member shall be deemed to be outstanding upon and after the Disqualification Event, and the Disqualified Member is not entitled to vote or participate in any corporate or Member action and ceases to be an employee, officer, director, and/or Member of the Company effective as of the Disqualification Event. The Disqualified Member's sole right and entitlement is to receive the Redemption Price for the Redeemed Shares, and all other provisions of this Agreement apply to the redemption and purchase of the Redeemed Shares. The closing of any purchase pursuant to the provisions of this section _ shall take place at the principal business office of the Company in the State of Florida on or prior to sixty (60) days after the date that a Member ceases to be a Qualified Person or, if later, thirty (30) days after the date the Company first has actual knowledge that the Member has ceased to be a Qualified Person. Capitalized terms used in this section that are not otherwise defined in this Agreement have the meaning assigned to those terms in the Company's Bylaws, as amended from time to time.

Purchase of Shares Upon Bankruptcy of a Member

If a Member files a voluntary petition in bankruptcy, is adjudged a bankrupt or insolvent, or has entered against the Member an order for any relief in any bankruptcy or insolvency proceeding, the Company shall purchase all the Shares of the Company then owned by such Member at the purchase price determined pursuant to the provisions of section ____, and subject to the terms, conditions, and other provisions set forth in section _____. The closing of any purchase pursuant to the provisions of this section shall take place at the principal business office of the Company in the State of Florida on or prior to sixty (60) days after the date that a Member files a voluntary petition in bankruptcy, is adjudged a bankrupt or insolvent, or has entered against him an order for any relief in any bankruptcy or insolvency proceeding.

Voting Members Shares

Only Members have the right to vote on any Company matter for which a vote of the Members is required or permitted under the Articles of Organization, this Agreement or by law. No Person who has not been admitted as a Member of the Company in accordance with the provisions of this Agreement shall be entitled to vote on any Company matter. No Member may enter into a voting trust or other agreement vesting another Person with the authority to exercise the voting power of any or all of the Member's Shares.

Alienation of Interest.

General Prohibition

Except as otherwise expressly permitted by the Articles of Organization, this Agreement, or as other-

wise prescribed by law, the membership interest of a Member, including the Shares of a Member, in this Company is not subject to voluntary or involuntary alienation, in whole or in part, prior to the dissolution and winding up of the Company and no Member has any right to dispose of all or any part of a Member's membership interest in the Company.

Assignment of Shares

No disposition of a Member's membership interest in the Company, including a Member's Shares, may be made without the recommendation of the Managers to the Members, and the consent of all Members.

When Documentation Is Lacking

Coverage Agreement for Single Owner Practices. The documentation provided above provides protection for a group practice. However, sole practitioners must consider other approaches, particularly upon the death of the practice owner.

- If the practitioner owner is the only physician employed, the practice can be liquidated. Liquidation, however, will produce minimal value for the practitioner's heirs.

- The practice can enter into a coverage agreement with other practices to provide patient coverage for a time period, usually six months, following death, disability or other calamity. The practice providing the coverage could lease facilities from the deceased physician's practice or use its own facilities, and it would treat patients and bill for its services directly. Any lease arrangement should be at a fixed rental amount that meets the Anti-Kickback Statute safe harbor and the Stark Law exception for rental arrangements. The coverage agreement could include

covenants to protect the practice of the deceased physician should an opportunity arise to sell the practice to a group other than the covering group.

- If the solely-owned practice has a physician employee, a "buy-sell" agreement can provide for an immediate sale of the practice upon death. A stumbling block could be the financial ability of the employed physician to buy the practice at a fair value. If that is an issue, the practice can insure its owner and combine a stock redemption with a sale to the employed physician. For example, if we assume a practice has a fair value of $250,000, and that the practice has the owner's life insured, upon the owner's death, the practice can redeem $249,000 of the owner's stock or membership interest, paying with insurance, and the employed physician can purchase the remaining ownership interest for $1,000 and by so doing, become the sole owner. Stock options must be compliant with Internal Revenue Code §83 and §409A.

Reverse Merger. If a group practice is "trapped" because it has a potential or actual unlicensed physician owner and agreements are lacking, the licensed physician owners, if they have voting control, can form a new entity and acquire the entity with the practice by merger. To avoid the time involved in obtaining new provider numbers, a "reverse merger" under Florida Statutes section 607 can be used. The terms of the reverse merger would require the "cash out" of the interest of any shareholder who is not licensed. The unlicensed physician would have the right to debate the value paid for his or her shares in a statutory "appraisal process" under § 607.1301. Although this process can quickly offset unlicensed activity, if an owner of the clinic is in fact unlicensed, until the merger is completed, the clinic is required to stop its activities.

Reduction of Unlicensed Ownership Interest Below 5%. Florida Statutes section 400.991 sets forth the licensure re-

quirements under the Clinic Act. It defines the "applicant" under subjection (5) (a) as including "individuals owning or controlling, directly or indirectly, 5 percent or more of an interest in a clinic...." Thus, if the unlicensed or potentially unlicensed physician owns more than 5% of the clinic, unless there are agreements to give him or her veto power, the clinic can sell additional ownership interests to the licensed practitioners to reduce the percentage ownership of the unlicensed person. Doing so does not eliminate the need for a clinic license, but it does prevent blockage of the application process. Furthermore, there is the unexpected expense of purchasing additional equity in the practice entity.

Why Professional Limited Liability Companies?

Within the framework of the PA Act, we believe that the professional limited liability company is the entity of choice for most practices, largely because of (i) the limited rights of creditors with liens on members' interests, (ii) the vagaries surrounding the application of § 818.01, which impedes the transfer of ownership interests subject to liens and (iii) the requirements of the Clinic Act. As a result of the foregoing, professional limited liability companies become particularly appealing for group practices.

Under today's corporate and limited liability company laws, converting an existing company to a limited liability company can be accomplished with statutory authority.[47] Normally, a conversion from corporate status to partnership status is a taxable event; however, today, it is possible for limited liability companies to elect to be taxed as a corporation. Thus, an existing practice entity can be converted or "reorganized" into a professional limited liability company and elect corporate tax treatment, achieving the protection offered by professional limited liability companies without adverse income tax effect.[48]

Well-drafted agreements providing the practice entity

with redemption rights along the lines we suggest in this paper should prevail over the application of § 818.01 because the statute should not diminish prior existing contract rights.[49] Furthermore, when it comes to creditor's rights in regard to liens on stock or on membership interests, the foreclosure or other lien rights of creditors are clearly more limited in the group practice context when it comes to a limited liability company membership interest than they are when dealing with shares of stock.

The effect of the statutory language surrounding a charging order is that it creates a lien, but not a levy, on the debtor's distributions or transferable partnership or membership interest. Accordingly, the creditor cannot exercise management or voting rights, and the creditor's rights are limited to those granted by the applicable statute. These rights do not include access to information, participation in management, or the right to accelerate distributions.[50]

Thus, the professional limited liability company provides one additional layer of protection for practice members, subject to a caveat discussed below as to a practice member in bankruptcy. If the only right of a creditor with a lien on the professional limited liability company membership interest is to receive monies when and as distributed, and the creditor cannot vote or exercise membership rights, there is a good argument that the Clinic Act does not come into play merely because the creditor has the rights to distributions. Any transfer of other rights, e.g. management and voting rights, requires the approval of all members, but is not available to the creditor. Therefore, creditor approval or disapproval of a transfer of a limited portion of the "bundle" of property rights should be of no effect.

Will the limitations that are applicable to a professional limited liability company work in the context of a professional in bankruptcy? The rights of the creditors of a physician or other professional in bankruptcy should rise no higher than

the rights of the physician or professional, and that conclusion has been confirmed in In re Six, cited previously in this paper.[51] The *In re Six* bankruptcy court recognized that the shares of stock in the professional corporation were subject to levy, but concluded that any sale of the shares by the bankruptcy court must be to a licensed physician to be compliant with Chapter 621 and when a prior agreement among the practice's shareholders, including the debtor, provided for the rights in the corporation, or its shareholders, to buy the debtor's shares, the agreement was binding and the court would honor such a purchase of the shares by the corporation or its shareholders from the debtor.

The issue with a limited liability company membership interest, however, is slightly different, in that the statute creates the charging lien, which should prohibit the creditor from foreclosing.[52] If there is no right of foreclosure, there can be no levy on the interest and no sale of the interest. That means that the debtor professional could continue as a voting member of the professional limited liability company and his or her partners, or the company, should not have to expend money to reacquire the debtor's membership interest.[53] However, should profit distributions, but not fair market value wages to members who are employees for services rendered, be paid to members, the distributions for the debtor would have to be paid to the debtor's creditors holding the charging-lien.[54]

Should the court permit a foreclosure sale, however, the logic of In re Six should prevail and a well-documented professional limited liability company should be able to redeem the debtor member's interest. However, Section 541 of the U.S. Bankruptcy Code ("§ 541") must be considered. Section 541 applies to the bankrupt partner whose interest is governed by non-executory partnership agreement provisions. When § 541 applies, the membership interest becomes part of the debtor's estate in bankruptcy notwithstanding "any provision in an

agreement, transfer instrument, or applicable nonbankruptcy law." Whether or not there is a § 541 override of the contractual rights provided in the governing documents of a limited liability company, partnership, or corporation, including professional partnerships, professional limited liability companies, and professional corporations is an issue that must be addressed.

In In re Ehmann,[55] the bankruptcy court distinguished the differing rights of creditors when the debtor's membership interest is a "non-executory" partnership interest and not an "executory" interest. Basically, non-executory partnership or membership interests, which are partnership interests held by partners who are passive and have no substantive ongoing responsibilities, become assets of the bankrupt partner's estate by application of § 541. Similarly, the bankruptcy court in In re Garrison-Ashburn, LC[56] held that § 541 applied to the limited liability company's operating agreement, bringing the membership interest into the bankruptcy estate because there was "no obligation to provide additional capital; no obligation to participate in management; and no obligation to provide any personal expertise or service to the company."

If partnership interests in a professional partnership or membership interests in a professional limited liability company are "non-executory" then the shares or interests in the entity, as well as any other asset, can be sold by the bankruptcy court. Under these circumstances, the bankruptcy court should recognize the statutory limitation posed by the court in In re Six,[57] limiting a sale of the professional entity interests to other licensed professionals and recognizing the rights or the company and other members under prior agreements. However, if the practice does not have adequate documentation, the bankruptcy could follow the Florida Supreme Court's dicta in Street v. Sugerman,[58]which implies that Chapter 621 does not limit the market to licensed professionals, and conjectures that if a sale is made to a non-

licensed individual, then the Attorney General could cause the professional company to stop its professional practice. Of course, if a foreclosure sale was made to a non-licensed buyer, the Clinic Act would require immediate licensure. The pressure from a creditor on the practice under such circumstance could be enormous.

Fortunately, there is an exception from the reach of § 541 for "executory" ownership interests, i.e. an ownership interest bound by agreements with future, ongoing responsibilities. The executory c provides that the bankruptcy trustee "may not assume or assign any executory contract or unexpired lease of the debtor ... if (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignment ...."

In In re Ehmann and In re Garrison-Ashburn, LC, and other similar cases, the courts denied the availability of § 365(c) when the duties of the member in bankruptcy were passive. Thus, it is important to gain the full benefit of the utility of a professional limited liability company to craft the responsibilities of members to clearly indicate their executory nature.

In addition to the utilization of the organizational document provisions described above, further structural considerations include:

- All members should be members of the professional limited liability company's management committee if the company is "manager managed." Alternatively, the company should be member managed.

- Only members of the same licensed profession should be allowed to be members or managers and all managers and members must be acceptable to all members.

- All members should be voting members and should be required to attend regular management meetings.
- All members should be required to be employed by the entity as practicing and licensed professionals.
- All members should have fiduciary duties to the company and other members.
- Consideration should be given as to the obligation to make future capital calls for specified purposes, perhaps with a cap.

A provision can be included in the operating agreement along the following lines: contract exception is found in § 365(c) of the Bankruptcy Code ("§365(c)").[59]

> This Agreement constitutes an executory agreement with respect to all Members' Shares issued by the Company. In the event of the bankruptcy of a Member, the parties intend that the Members' Shares be governed by 11 U.S.C. § 365(c), as amended from time to time, or under any other comparable statute. This Agreement imposes on each Member the following affirmative duties (each of which constitutes a material unperformed, future obligation): (i) the duty and obligation not to withdraw or dissociate from the Company as set forth in Section __; (ii) the duty and obligation to maintain a Florida license without restrictions and in good standing to practice medicine, and to practice medicine as an employee of the Company's group medical practice, (iii) the duty and obligation to serve as a member of the Company's Board of Managers in accordance with Section __; (iv) the duty and obligation not to transfer Shares in the Company except in accordance with Article __; (v) the duty and obligation not to bring any action for dissolution of the Company in accordance with

> Section ____; (v) the duty and obligation not to bring any action for partition with respect to any assets of the Company in accordance with Section ___; and the (vi) the duty to exercise fiduciary responsibilities in accordance with Section ____. Fl. Stat. §608.433(4) shall govern the rights of any voluntary or involuntary assignee or successor-in-interest in regard to the Shares of a Member.

Professional Limited Liability Companies Tax Elections: A Closing Word

In the preceding section, we discussed the ability of practitioners and their advisors to elect whether or not a professional limited liability company is taxed as a partnership or a corporation, and that the election can be utilized to accomplish a tax-free conversion of a corporation to a professional limited liability company.[60] An election for a professional limited liability company to be taxed as an S corporation also has operational and structural effects worthy of discussion.

If an S corporation tax election is not made. If a group practice professional limited liability company does not elect to be taxed as an S corporation, its income will be taxable as partnership income. If the professional limited liability company is a single-member company, its income will be taxable as proprietorship income.

Under applicable provisions of the Internal Revenue Code, related regulations, and proposed regulations[61] "self-employment income subject to Federal Insurance Contribution Act ("FICA") tax in the proprietorship and partnership contexts is based on the individual's "net earnings from self-employment." Professional practice trade or business income, including partnership income, less business deductions, fits the definition of net earnings from self-employment unless it meets one of the exceptions provided in the Code and Regulations, which include:

- Rents from real estate and personally property not received as a dealer.[62]
- Dividends and interest not received as a dealer.[63]
- Gains and losses from capital assets other than inventory and property held for sale in the ordinary course of business.[64]
- A "limited partner's" share of distributable income, other than guaranteed payments for services provided.[65]

Under the proposed regulations, the "limited partner" exception does not apply to income paid to a service partner from a service partnership, which includes medical practices. Thus, essentially, all medical practice income from the rendition of professional services in the partnership or limited liability company context is subject to FICA tax.

If an S corporation tax election is made. If the check-a-box regulations are utilized so that the professional limited liability company is taxed as an S corporation, a different result is possible in regard to the FICA tax.

Frequently, the S election is made to "convert" income that would otherwise be taxed as wages under FICA to distributions of profits and dividends not subject to FICA tax. Although there is a "wage limit" ($106,800 in 2009) on the Old Age, Survivor and Disability Insurance ("OASDI") portion of the FICA tax, there is no limitation on the Medicare Hospital Insurance ("HI") portion. The HI tax is 1.45% on the employer's portion and 1.45% on the employee's portion. Making the S election allows a limited liability company to make profit distributions not subject to FICA, and in particular, not subject to the HI tax.[66] However, care is required in deciding what practice income is or is not wages subject to FICA tax or is available for distributions as S corporation income not subject to tax. Misclassifying income from personal services

as S distributions can be challenged by the Internal Revenue Service and reclassified when the allocation is unreasonable under the circumstances.[67] Similarly, misclassifying non-personal service income as compensation can also be challenged by the Internal Revenue Service and reclassified as dividend, i.e. non-wage, income.[68] A successful challenge can destroy the entity's S election if the income treated as wages is ultimately classified as S corporation income and had not been distributed among the entity's members in proportion to their investment interest in the entity.

Misclassification has repercussions beyond FICA tax and income tax penalties. The valuation formulas for valuing ownership interests can be adversely affected. Furthermore, S corporation distributions, like partnership and limited liability company distributions, are not asset protected under Florida law as are wages. For example, if $500,000 of practice income is available for physician compensation or as distributions, and only $300,000 is paid as wages, the additional $200,000 distributed as S corporation, or partnership, distributions is not asset protected.[69] Furthermore, the S distributions will not count in the wage formula used to determine maximum retirement plan contributions. Retirement plans are both tax-sheltered and asset protected under Florida law as well as the Bankruptcy Code.[70] Thus, an opportunity to tax shelter and asset protect additional retirement plan allocations may be lost.

Health law compliance must also be considered when making an allocation between wages and distributable income. Under Florida law, physician compensation based on revenues from technical fees, payments for referrals and fee-splitting is prohibited.[71] Similarly, the Stark Law[72] prohibits or restricts compensation based on revenue sources other than personally performed services or compensation as payments for referrals. Thus, compensation formulas must identify, and be based upon, personally performed service income.

Practice income from technical fees or "profits" from services provided by employed physicians should not be included in the compensation paid to senior practice members. Technical service income and profits from services of non-owner physicians should be the subject of S corporation or partnership distributions or otherwise utilized by the practice. Thus, from an asset protection, regulatory and tax point-of-view, the following seems to make sense:

- The professional limited liability company should elect to report income and expense as an S corporation.
- Services from personal services should be allocated as physician compensation, subject to FICA tax. It will remain asset protected and eligible in the retirement plan calculation formula.
- Net practice income from technical fees and from services provided by nurses and employed physicians should be used for practice expenses, reserves, or distributed as S cororation distributions.

Endnotes:

[1] The law is clear that the corporate practice of medicine doctrine does prohibit non-professional ownership of dental and optometry practices. See Fl. Stat. § 466.028(h) (2009) (dentists); and §463.014(1) (2009) (optometrists). A less limiting version applies to chiropractic practices. See Fl. Stat. §460.4167 (2009) (chiropractors).

[2] See Fla. Op. Att'y Gen. No. 055-71 (Mar. 25, 1955).

[3] See In Re Florida Bar, 133 So. 2d.554 (Fla. 1962); *see also* Richard Jacobs, *Florida's Professional Corporation Act (In Light of TD 6797),* 42 Fl. Bar Journal 3, page 149 (March 1968).

[4] See In Re Florida Bar, supra note 3, at 555 and 556.

[5] Parker v. Panama City, 151 So.2d 469 (Fla. 1st Dist. Ct. App.. 1963).

[6] The Professional Service Corporation and Limited Liability Act is quite clear in its pronouncements. Perhaps the most telling is included in § 621.13(3): "(3) A professional corporation or limited liability company heretofore or hereafter organized under this act may change its business purpose from the rendering of professional service to provide for any other lawful purpose by amending its certificate of incorporation in the manner required for an original incorporation under Chapter 607 or by amending its certificate of organization in the manner required for an original organization under Chapter 608. *However, such an amendment, when filed with and accepted by the Department of State, shall remove such corporation or limited liability company from the provisions of this chapter including, but not limited to, the right to practice a profession."* (emphasis added)

[7] 8 F.A.L.R 6299 (1987).

[8] Fl. Stat. § 400.9905(4)(g) (2009). The Agency for Health Care Administration website provides a directory of licensed entities. The directory is several pages long, indicating that 100s of entities providing health care have licenses because they are owned in whole or in part by non-licensed professionals. Thus, it is highly unlikely that the legislature authorized clinic licensure, or specified exceptions to clinic licensure, if the compliant entities were to remain at risk under the common law corporate practice of medicine doctrine.

9 The Florida courts have concluded on other matters that new legislation, such as the Health Care Clinic Act, can revoke prior inconsistent law by implication. See, *Atty. General 071-6* (January 25, 1971), as to the Uniform Commercial Code impliedly revoking

Fl. Stat. §818.01. See also, Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 614 So. 2d 1198 (Fla. 5th Dist. Ct. App. 1993), on the same issue (upheld on other grounds in 639 So. 2d 617 (Fla. 1994))

[10] Fl. Stat. § 400.991 (2009).

[11] Fl. Stat. § 400.9935 (2009).

[12] Fl. Stat. § 400.9935(1)(e) (2009).

[13] Fl. Stat. § 400.9935(9) (2009).

[14] Case law is sparse on the issues. Most case appear to have been settled. See, for example, Progressive Express Insurance Company, et al vs. Total Rehabilitation and Medical Center, Inc., et al, Case no. 03012199CACE09, 17th Judicial Circuit, Broward County, FL.

[15] Fl. Stat. § 456.053 (2009).

[16] Fl. Stat. § 456.053(3)(o)3(f) (2009).

[17] Fl. Stat. § 456.053(3)(h) (2009).

[18] Fl. Stat. § 456.053(3)(o) (2009).

[19] Active Spine Centers, LLC v. State Farm Fire and Cas. Co., 911 So. 2d 241 (Fla. 3d Dist. Ct. App. 2005).

[20] Fla. Admin. Code § 59A-33.006(3) (2009). This regulation became effective August 28, 2006. At that time, Fl. Stat. § 990.9935(2) (2006), the authority for the regulation, provided that a clinic must file for a license within five days after becoming a clinic. The five-day requirement for license application contained in Fl. Stat. § 990.9935(2) was revoked in 2007, as were §§ 990.9935(7) and (8), which provided the agency with authority to investigate noncompliance and levy fines and penalties. However, violation of licensure requirements remains a felony under Fl. Stat. §400.990(3) (2009). Subsection (4) of the regulation, consistent with the Clinic Act, provides that a facility becomes a clinic requiring licensure when it does not qualify for the exemption and provides health care services and bills third party payers for those services.

[21] Active Spine Centers, LLC v. State Farm Fire and Cas. Co., 911 So 2d 241 (FL. 3DCA 2005).

[22] In speaking to AHCA on this issue, the staff informally advised that if there is a binding agreement in place requiring the purchase of the deceased's ownership interest as of the date of death, a closing that occurs more than 5 days following death will not trigger the loss of the exemption from AHCA's point of view. However, AHCA's point-of-view may not be determinative since the Clinic Act as

amended in 2007 provides no grace period for licensure. Insurers may refuse to make payments, or demand refunds, following death or other loss of licensure if there is a delay in effectiveness of the redemption of the ownership interest of the deceased.

[23] Street v. Sugerman, 202 So. 2d 749 (Fla. 1967).

[24] As noted earlier, in speaking to the Division of Corporations, the Division has threatened charter forfeiture when a non-licensed person becomes an owner, but has not had to litigate the issue to date

[25] In re Six, Fl. M.D., 190 B.R. 958 (1995). The Court held that "Even if other members of a medical professional association, which was engaged in practice of radiology, did not want to buy back Chapter 7 debtor's stock in the professional association, as was their right under agreement governing transfer of professional association's stock, bankruptcy trustee would be able to sell stock only to radiologist pursuant to Florida law mandating that no corporation organized as professional service corporation may issue stock to anyone other than professional who is licensed or authorized to render same specific professional service as that for which corporation was incorporated."

[26] The In re Six Court held that "If the right to transfer the debtor's property is restricted, restrictions are enforced and recognized in bankruptcy…" The Court also observed "the nature and extent of a trustee's rights in a Debtor's property rise no higher than those of the Debtor unless the restriction under consideration is inconsistent with any provision of the Bankruptcy Code." The decision of the Court is also consistent with Florida law, Fl. Stat. § 607.0627 and §607.0732, recognizing transfer restriction agreements, and also Fl. Stat. §§ 621.09 and 621.11, limiting share ownership in a professional corporation to licensed professionals.

[27] When dealing with a business corporation employing physicians, the bankruptcy court in In re: Urban, Debtors, Johnson v. Walden, Bkrtcy. Fl. M.D., 138 B.R. 632 (1992) held that when debtor physician's corporations were not organized pursuant to Professional Service Corporation Act which prohibited sale or transfer of stock to individuals who are not members of medical profession, but rather pursuant to general statute governing corporations, the transfer of stock in the debtor corporations to non-physicians was not void as matter of law; neither corporation conducted medical practice, but rather employed physicians engaged in practice of medicine. Thus, Florida law did not prohibit the sale of the debtor's stock to non-physicians.

[28] Fl. Stat. § 608.433(4) (2009) provides "On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest."

[29] Fl. Stat. § 608.432(1) (2009) provides that "The assignee of a member's interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in the articles of organization or operating agreement and upon: (a) The approval of all of the members of the limited liability company other than the member assigning the limited liability company interest ...." Fl. Stat. § 608.433(1)(2009) provides "Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent."

[30] 291 B.R. 538 (Bkr. D Colo. 2003).

[31] Federal Trade Commission v. Shaun Olmstead, Julie Connel v. Mark Bernet, Receivor, 21 Fl. Law Weekly Fed. C756a (2009). The right to dissolve a single member LLC was also recognized in Federal Trade Commission v. Peoples Credit First, LLC, No. 8:03-CV-2353-T-TBM, 2006 WL 1169677 (May 2003, from the Federal Court for the Middle District)

[32] See Fl. Stat. § 620.1703 (2009) and Fl. Stat. § 620.8504 (2009).

[33] See Myrick v. Second National Bank of Clearwater, 335 So. 2d 343 (Fla. 2d Dist. Ct. App. 1976), holding that as a judgment creditor only has the rights of an assignee, foreclosure is precluded. Several courts have opined that exclusivity of remedies does not apply in the face of a fraudulent transfer. See for example, Firmani v. Firmani, 332 N.J. Super. 118, 752 A 2d 854 (NJ 2000). The subject of "exclusivity" of remedies is discussed in Probate & Property, Daniel S. Kleinberger, Carter G. Bishop and Thomas Earl Geu, *Orders and the New Uniform Limited Partnership Act: Dispelling Rumors of Disaster*, Prob. & Prop. (Jul. /Aug. 2004).

[34] Under Fl. Stat. § 222.11(2)(b) (2009), compensation paid to the head of a family is exempt from the debtor's creditor claims, whereas membership distributions or dividends are not.

[35] The Clinic Act licensure requirements will not apply during the one-year "delinquent-active" suspension period, but will apply upon final license revocation. See discussion at fn. 20, *supra*.

[36] Fl. Stat § 621.10 (2009).

[37] Atty. General 071-6 (January 25, 1971).

[38] Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 614 So. 2d 1198 (Fla. 5th Dist. Ct. App. 1993).

[39] Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 639 So. 2d 617 (Fla. 1994).

[40] The case in point was ultimately settled in mediation, but on the clinic's motion for partial summary judgment as to the applicability of Fl. Stat. § 818.01, the order denying the motion held in part "Therefore, this Court finds that Section 818.01, which regards 'any personal property subject to a lien' is applicable to the Purchase Agreement with [redacted] and therefore does impede [the clinic and related entities] from exercising their rights to acquire the shares or membership interests of [redacted] without the consent of the lienholder." The order did not address the clinic's position as to its prior rights arising under its bylaws restricting the transfer of shares and providing purchase options to the clinic, which were in effect prior to the lien of the wife of the physician. A motion for rehearing was pending at the time mediation was finalized.

[41] Fl. Stat. § 621.10 (2009), includes the following: "When a corporation's or limited liability company's failure to comply with this provision is brought to the attention of the Department of State, the department forthwith shall certify that fact to the Department of Legal Affairs for appropriate action to dissolve the corporation or limited liability company."

[42] 42 C.F.R. § 1001.952(p).

[43] Gershuny v. Martin McFall Messenger Anesthesia Professional Association, 539 So. 2d 1131 (Fla. 1989)

[44] In re: Petition for Declaratory Statement Jacksonville Heart Center, PA, DOHA 07-2605 (12-19-07). The Florida Patient Self-Referral Act was amended in 2009 to permit sleep laboratory referrals absent direct supervision. See Fl. Stat. § 456.053(3)(o) (2009).

[45] Fl. Stat. § 768.81 (2009) is Florida's statutory minimization of joint and several liability. The statute requires the apportionment of damages for negligence on a percentage basis and not on the basis of joint and several liability. Comparative negligence includes professional liability, whether brought on the basis of contract or

tort or breach of warranty or similar theories. However, the statute does not limit vicarious liability or liability of partners. If the corporate practice of medicine doctrine is violated by use of an entity not authorized under Fl. Stat. §621, an argument can be made that the practicing physicians, as to the practice of medicine, are partners. The implications of In re: Urban, Bkrtcy. M.D., 138 B.R. 632 (1992), discussed supra, are to that effect. The plaintiff-debtor challenged the right of the creditor to foreclose on the debtor's corporate shares, claiming that the issuance of shares in a business corporation under Fl. Stat. §607 was illegal and void, since the corporate organization and the share issuance was not compliant with Fl. Stat. Chapter 621 (the Professional Services Corporation and Limited Liability Company Act). The motion to dismiss from the creditor stated " that neither corporation conducts a medical practice, but rather they employ physicians engaged in the practice of medicine...." The practice of medicine resided with the physicians separate from the business corporation. The Court authorized the foreclosure since Chapter 621 was not utilized in the corporate organization.

[46] Fl. Stat. § 621.10 requires a shareholder or employee to immediately severe "all employment with, and financial interests in," the professional corporation or limited liability company upon the professional's loss of license. "Financial interests" is not defined in Chapter 621, and at the time Chapter 621 was adopted the Florida Courts had not defined the term (See the discussion of the term in Nitzberg v. Zalesky, 370 So. 2d 389 (Fl. 3d Dist. Ct. App. 1979)). Although § 456.053(3) (k) of Florida's Patient Self-Referral Act of 1992 specifically includes owning a note or debt instrument as a "financial interest," as used in Chapter 621, the term "financial interests" should be limited to an ongoing equity or proprietary interest and the term should not prohibit payment for the unlicensed ownership interest being terminated, or as compensation for services provided prior to the loss of licensure. See R. Regulating Fla. Bar 4-8.6(e), which indicates that the statute and the applicable bar rule do not preclude payment to an unlicensed attorney for prior services rendered during the period of licensure.

[47] Fl.Stat. § 608.439 (2009), which also applies to professional limited liability companies.

[48] Internal Revenue Service Regs. § 301.7701-3; former Regs. §301.7701-2. See also Form 8832, the Internal Revenue Service's Entity Classification Election form.

[49] See In re Six, supra note 25. There is, however, no case dealing with § 818.01 that is directly on point. Fl. Stat. § 55.205(4) (2009)

provides: "4) A buyer of stock in a corporation takes free of a judgment lien hereunder if the buyer pays value in good faith without notice as defined in s. 678.1051," which indicates that transfers of assets subject to lien without § 818.01 applying are permitted. No mention is made of limited liability company or partnership interests.

[50] See discussion about the "legislative intent" as to creditor's rights underlying the charging order provisions in the Uniform Limited Partnership Act, § 701 discussion.

[51] In re Six, 190 B.R. 958 (1995).

[52] See Myrick v. Second National Bank of Clearwater, 335 So. 2d 343 (Fla. 2d Dist. Ct. App. 1976), holding that as a judgment creditor only has the rights of an assignee, foreclosure is precluded. Several courts have opined that exclusivity of remedies does not apply in the face of a fraudulent transfer.

[53] Fl. Stat. § 608.432(c) (2009) provides that the member ceases to be a member *only* upon assignment of "all" of the member's rights.

[54] Although the income tax consequence related to limited liability company charging liens is not free from doubt, more than likely the income that would otherwise be taxable to the debtor-member, whether or not distributed to the creditor with the lien, remains taxable to the debtor member and not to the creditor. A 1997 Revenue Ruling, 77-137 (1977-1 C. B. 178) suggests that where a creditor has a charging lien when the general partner/manager does not distribute partnership income, the creditor, not the limited partner/member, is responsible for paying the tax on allocated income. Such a conclusion may be true following a levy and foreclosure, which occurs under §620.8504 as to the encumbered interest of a general partner, since the statute permits foreclosure as to the economic interests (but not full membership or voting rights). However, Chapter 608, the Limited Liability Company Act, does not permit levy and foreclosure, so the same conclusion does not appear applicable to liens on limited liability company or professional limited liability company membership interests.

[55] In re Ehmann (Movitz v. Fiesta Investments, LLC), 310 B.R. 200 (Bank D. Ariz 2005).

[56] In re Garrison-Ashburn, LC, 253 B.R. 700 (Bankr. ED, Va. 2000). See also Sampson v. Prokopf (In re Smith), 185 B.R. 285 (Bankr. S.D. Ill. 1995). See also, Thomas O. Wells and Jordi Guso, *Asset Protection Proofing Your Limited Partnership or LLC for*

Bankruptcy of a Partner or Member, 34 Fl. Bar Journal 34 (January 2007).

[57] In re Six, 190 B.R. 958 (1995).

[58] Street v. Sugerman, 202 So. 2d 749 (1967).

[59] 11 U.S.C. § 365 (2009).

[60] The election is made on Internal Revenue Service Regs. §301.7701-3; former Regs. §301.7701-2. See also Form 8832, the Internal Revenue Service's Entity Classification Election form

[61] I.R.C. §1402(a)(2009); Treas. Reg. § 1.1402(a)-1 (2009); Prop. Treas. Reg. §1.1402-2(h)(1997). The FICA tax-related definition of "limited partner" contained in the Proposed Regulation has been controversial, and has never been finalized, but do serve as a guide.

[62] I.R.C. §1402(a)(1) (2009).

[63] I.R.C. §1402(a)(2) (2009).

[64] I.R.C. §1402(a)(3) (2009).

[65] I.R.C. §1402(a)(13) (2009).

[66] Rev. Rule 59-221, 1959-1 CB 225 (1959) and I.R.C. §1402(a)(2) (2009).

[67] Radke v. U.S., 895 F. 2d 1196(7th Cir. 1990); Fred R. Esser, P.C. v. U.S., 750 F. Supp. 421 (D. Ariz. 1990).

[68] Pediatric Surgical Associates, P.C. v. Commissioner, T. C. Memo 2001-81 (April 2, 2001).

[69] Fl. Stat. § 222.11(2)(b) (2009)

[70] Fl. Stat. § 222.21 (2009); 11 U.S.C. §§ 522(b)(3) and (d)(12) (2009).

[71] See Crow v. Agency for Health Care Administration, 669 So. 2d 1160 (Fla. 5th Dist. Ct. App. 1996); see also Richard O. Jacobs and Elizabeth Goodman, *Splitting Hairs or Splitting Fees: Fee-Splitting and Health Care – the Florida Experience,* 8 Annals Health Care 239 (1999).

[72] 42 U.S.C. § 1395nn (2009).

Professional Regulation and Declaratory Statement Process

Bruce D. Lamb*

Introduction

Regulating the provision of health care services in the State of Florida is divided among several agencies including the Department of Health and the Agency for Health Care Administration. The Department of Health is responsible for licensure, investigations and prosecutions of health care practitioners. Within the Department of Health there are multiple regulatory boards such as the Board of Medicine. The Department of Health provides investigative and prosecutorial services. The boards serve in a quasi-judicial role in disciplinary cases. The Agency for Health Care Administration is responsible for licensure, investigations and prosecutions of licensed facilities. This article addresses the regulatory authority of the Department of Health and the boards regulating professional licensees.

The Investigation

Investigative Procedures. Chapter 456, Florida Statutes, controls investigations of licensed health care professionals.

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This chapter includes provisions that govern the circumstances under which investigations can be initiated as well as procedural requirements for investigations, and some substantive provisions. Grounds for investigation can be mandatory or permissive. Section 456.073(1), Florida Statutes, provides that the Department "shall cause to be investigated":

> ... any complaint that is filed before it if the complaint is in writing, signed by the complainant and legally sufficient . . . . A complaint is legally sufficient if it contains ultimate facts that show that a violation of this chapter, of any of the practice acts relating to the professions regulated by the department, or of any rule adopted by the department or a regulatory board in the department has occurred.

The foregoing subsection also permits investigations of complaints from other sources including anonymous complaints and complaints by confidential informants if the complaint is legally sufficient, the alleged violation of law or rule is substantial and if the department has reason to believe after preliminary inquiry that the allegations of the complaint are true. The department also has general statutory authority to investigate if the department has reasonable cause to believe that a licensee or group of licensees violated a Florida statute or rule.

The legislature has enacted numerous additional specific authorizations to conduct investigations to include Section 766.106, Florida Statutes, relating to notices of the initiation of civil lawsuits; Section 395.0197, Florida Statutes, which requires hospitals and other health care facilities to file adverse incident reports (commonly referred to as "Code 15" reports) and annual reports summarizing adverse incidents with the State of Florida; Section 395.0193, Florida Statutes, which establishes peer review guidelines and requires reports of final peer actions; and Sections 766.305(2) and (5), Florida Statutes, which require that claimants under the birth related

neurological injury compensation fund (NICA) file a copy of the petition for compensation with the Division of Medical Quality Assurance of the Department of Health, and require the Division to evaluate the petition for disciplinary purposes.

Investigative Process. Generally, the subject of the investigation (i.e. the licensee) must be given notice of the initiation of the investigation. Notification to the licensee can be withheld if the matter under investigation is a criminal offense, or if the State Surgeon General (the head of DOH) or designee, and the chair of the respective board or its probable cause panel agree in writing that such notification would be detrimental to the investigation. Licensees are entitled to receive a copy of the complaint or document that resulted in the initiation of the investigation.[1] It is very important for counsel to review the notice letter to assure that the investigator has provided a copy of the complaint or document that resulted in the initiation of the investigation. On occasion, the investigator will attach an internally generated summary instead of the actual complaint or document. In addition, on occasion, the investigator will not include copies of documentary evidence that were supplied with the complaint or document that resulted in the initiation of the investigation. Under such circumstances, correspondence should be sent to the investigator demanding all parts of the complaint, including all attachments.

Section 456.073(1), Florida Statutes, permits the subject of the investigation to submit a written response to the complaint. This section provides that all licensees be given a minimum of 20 days from notification to provide a written response to the complaint. Physicians and osteopathic physicians are provided a minimum of 45 days within which they may submit a response.[2] Any response submitted is to be considered by the Probable Cause Panel of the relevant board when the panel reviews the matter. A licensee is not required

to provide any response, nor is the licensee required to submit to an interview. In addition, licensees may have an additional opportunity to respond to the investigation if the licensee requests a copy of the Investigative Report, in writing.[3] The Department is only obligated to provide a copy of the report if it intends to recommend that probable cause of a violation exists. As a practical matter, the attorney and licensee must determine whether to respond to the investigation during its initial phase, await a copy of the Investigative Report and respond, or provide no response. A written request for the Investigative Report provides protection to the licensee so that a response can be prepared, if desired. Licensees should be discouraged from providing information directly to the Department. A carefully drafted written response by the attorney may be persuasive, assisting the Department and its expert witnesses to understand the licensee's version of the events and position. However, in some instances, the licensee may not have adequate information in his or her possession to formulate such a response during the initial phase of the investigation. Under such circumstances, awaiting a copy of the Investigative Report may be prudent. The Investigative Report may contain records and information that was otherwise not available to the licensee and reports of Department experts. A careful analysis of this issue is appropriate. Generally, the investigator compiles documents that are obtained, and summaries of interviews conducted, in an Investigative Report.

Investigative Authority. General Subpoena Authority. The Department enjoys significant investigative authority including several statutory provisions authorizing the issuance of subpoenas for documents. General subpoena authority is found in Section 456.071, Florida Statutes. General subpoena authority is utilized to obtain general documentary evidence and to obtain patient records from physicians when the Department has a patient release or authorization. Patient records obtained are not subject to public records law provi-

sions. If a subpoena is supported by a release, counsel must carefully review the same to assure that it is an adequate authorization for release of medical records. Patient record releases that are signed by individuals other than the patient are problematic. If the patient is deceased or incapacitated, records can be released upon the authorization of the patient's legal representative.[4] The Board of Medicine has defined the term "legal representative" as a patient's attorney who has been designated by the patient to receive copies of the patient's medical records; any legally recognized guardian of the patient; any court appointed representative of the patient; or any other person either designated by the patient or by a court of competent jurisdiction to receive copies of the patient's medical record.[5] No other health care board has defined the term "legal representative," and the Board of Medicine rule would not control issues related to medical records created by other health care practitioners. Therefore, one may need to analyze other statutory provisions that define a legal representative.

Sections 409.901 and 710.102, Florida Statutes, relating to minors, provide definitions of "legal representative" as an individual's guardian, personal representative or conservator. Section 744.102, Florida Statutes, defines "guardian" as one to whom the law has entrusted the custody and control of the person. Under Section 744.301, Florida Statutes (guardianships), a mother and father jointly are natural guardians of their own and adopted children during minority. When a release is executed by one parent, it is especially important to evaluate whether that parent has some custodial right relating to the health care of the child. If a parent's parental rights have been extinguished by the court, that parent can no longer authorize the release of medical records for the child. Section 61.13(2)(b)3, Florida Statutes provides that a parent may not be denied access to information pertaining to a minor child because the parent is not the child's primary residential par-

ent. However, when one parent has sole parental responsibility, as ordered by the court, the other may be refused access to the minor's medical records.[6]

Section 381.028, Florida Statutes, relating to adverse medical incidents, provides a definition of the term "representative of the patient" and states, in pertinent part:

> (3)(k) "Representative of the patient" means a parent of a minor patient, a court-appointed guardian for the patient, a health care surrogate, or a person holding a power of attorney or notarized consent appropriately executed by the patient granting permission to a health care facility or health care provider to disclose the patient's health care information to that person. In the case of a deceased patient, the term also means the personal representative of the estate of the deceased patient; the deceased patient's surviving spouse, surviving parent, or surviving adult child; the parent or guardian of a surviving minor child of the deceased patient; or the attorney for any such person.

Reasonable Cause Subpoena Authority. In addition to obtaining physician office records with a release, the Department may obtain physician patient records without a release under certain circumstances. Section 456.057(9), Florida Statutes, permits the Department to obtain patient records from physicians when the Department has not obtained a release, if the Department has made a determination that there is reasonable cause to believe that the practitioner has prescribed inappropriately; deviated from the standard of care; provided inadequate care based upon a termination of insurance; engaged in solicitation, fraud or a scheme or when the Department is investigating a matter that gave rise to a professional liability claim. However, the Department must make appropriate reasonable attempts to obtain a patient release. This statutory authorization to obtain records without a release

does not limit the assertion of the psychotherapist-patient privilege. In addition, counsel should consider the impact of federal HIPAA regulations when evaluating Department subpoenas.

Hospital Records. The Department of Health, through the Agency for Health Care Administration, can obtain copies of hospital patient records without a release. Section 395.3025(4)(e), Florida Statutes, authorizes the Agency for Health Care Administration to obtain such records to be used by "the appropriate regulatory board" for investigation and disciplinary proceedings. In addition, the Department of Health may obtain through the Agency for Health Care Administration "all facility records necessary" to investigate adverse incident reports filed under Section 395.0197, Florida Statutes (incident reports). The Department of Health may attempt to obtain records that are privileged or confidential utilizing the broad language of Section 395.0197, Florida Statutes. Such records requests must be carefully reviewed and appropriate assertions of privilege and confidentiality made.[7] Such reports do not become public record and are not discoverable or admissible in evidence. The licensee may obtain the report if the report forms the basis of a finding of probable cause.

Peer Review Materials. The Department of Health may attempt to obtain peer review records utilizing the authority of Sections 395.0193(4), 395.0197(13), 458.337(3), or 459.016(3), Florida Statutes. When an action is taken against the privileges of a physician it is reported to the State of Florida. The Department is required to review the report and determine whether it potentially identifies conduct by a licensee that is subject to disciplinary action. When the Department conducts an investigation based upon a hospital or other facility report, the Department may attempt to obtain documents that may be considered privileged as constituting "peer

review" materials. In determining how to respond to such a subpoena, the facility should initially analyze what documents are being sought and what might constitute protected and privileged "peer review records". In John Doe, M.D. v. Department of Health,[8] the court addressed a subpoena from the Department of Health for information from a peer review action that a hospital had reported to the Department of Health. The Department sought only limited information. The Department sought a summary of the issues discussed by the peer review committee that concern issues that could constitute a violation of the Medical Practice Act, and the identity of any patient record reviewed. The court considered the apparent conflict between the investigative authority of the Department (Sections 458.331(9) and 458.337(3), Florida Statutes) and peer review protection provisions (Sections 395.0193(8) and 766.101(5), Florida Statutes). The court found that granting the limited access requested by the Department fulfilled the legislative intent.

Amendment No. 7, 2004 was passed by the electorate on November 2, 2004. The amendment became Article X, Section 25 of the Florida Constitution and gave patients the right to access to any records made or received in the course of business by a health care facility or provider regarding medical incidents. Subsequently, the legislature enacted Section 381.028, Florida Statutes as "enabling legislation" for the amendment. This legislation included language to preserve the privileged status of peer review materials. However, Section 381.028, Florida Statutes, was found to be largely invalid as it restricted constitutional rights. Florida Hospital Waterman, Inc. v Buster, 984 So. 2d 478 (Fla. 2008). Therefore, the peer review privilege has been largely abrogated as it relates to a patient's access to such materials. However, it appears that the privilege may still be asserted in response to a subpoena from the Department of Health, if the Department seeks materials beyond the scope of materials sought by the Department in John

Doe. The amendment provides access to materials by patients. The amendment included a broad definition of a patient, "... an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider." Although broad, it does not appear that the Department of Health meets the definition. Therefore, it appears that the peer review privilege could still be asserted in response to a subpoena from the Department of Health, depending on the materials sought. The opinion of the court in Bayfront, may also be of use. The court addressed the issue of a subpoena issued to Bayfront Medical Center for "peer review" records. The Agency argued that Section 395.0197(11), Florida Statutes (now Section 395.0197(13), Florida Statutes) operated to override the privilege established under Section 395.0193(7), Florida Statutes, so as to give the Agency access to the deliberations and opinions of peer review committees. The court determined that access provided by that paragraph is limited to records pertaining to the "risk management" program and peer review documents cannot be obtained under that authority. If the materials sought by the Department exceed the scope sought in John Doe other opinions may be useful. In Cruger v. Love[9] the Florida Supreme Court adopted a broad definition of records that are privileged as "peer review" records. The court carefully reviewed previous court decisions before adopting a broad definition as to the scope of documents that could be considered privileged. The Florida Supreme Court stated:

> We hold that the privilege provided by sections 766.101(5) and 395.011(9), Florida Statutes, *protects any document considered by the Committee or Board as part of its decision-making process*. The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the Committee or Board *during the peer review or credentialing process* are protected.

> The Committee members and those providing information to the Committee must be able to operate without fear of reprisal. Similarly, it is essential that doctor's seeking hospital privileges disclose all pertinent information to the Committee. Physicians who fear that information provided in an application might some day be used against them by a third party, will be reluctant to fully detail matters that the Committee should consider. Accordingly, we find that a physician's application for staff privileges is a record of the Committee or Board for purposes of the statutory privilege.

Cruger, 599 So.2d at 114. (emphasis supplied). Section 395.011(9), Florida Statutes, has been renumbered as Section 395.0193(8), Florida Statutes. This broad definition of privileged materials indicated that facilities could assert a "peer review privilege" over not only those documents considered in a disciplinary action against staff privileges and the transcript or minutes of such proceedings, but also applications that a physician filed to obtain hospital privileges.

Subpoena Challenges. Procedural challenges to investigatory subpoenas are governed by Section 120.569 of the Florida Administrative Procedure Act (APA). Section 120.569(2)(k)1, Florida Statutes, provides that a person subject to an agency subpoena may request the agency to invalidate the subpoena on the grounds that it was not lawfully issued, is unreasonably broad in scope, or requires a production of irrelevant material. In addition, to these grounds, other privileges or confidentiality may be asserted. A Petition to Quash or Motion to Invalidate may be filed with the clerk of the Department of Health requesting agency review of the Subpoena. If the agency denies the petition or motion, it will direct the licensee to produce the requested documents. If the licensee still maintains that the documents should not be produced, the licensee can await a circuit court enforcement action by the State of

Florida. Agency subpoenas must be enforced through circuit court action pursuant to Section 120.569(2)(k)2, Florida Statutes. Therefore, if the subject of a subpoena refuses to honor it, regardless of whether an administrative review has occurred, the agency may seek enforcement by filing a petition in the circuit court. The court may award costs and fees to the prevailing party. Therefore, the decision to decline to honor a subpoena must be made carefully. A licensee may not be disciplined for failure to honor a subpoena until such time as an enforcement action has been undertaken and an order of the circuit court obtained.[10] A careful review needs to be undertaken to determine whether to file an administrative challenge to a subpoena or merely decline to produce documents and await the initiation of an enforcement action. If the subpoena is clearly overbroad, an administrative challenge may provide a vehicle to negotiate a more limited scope. If, however, it is perceived that the Department will not limit or restrict the records sought, a licensee may merely choose to respectfully decline to honor the subpoena and allow the enforcement proceeding to go forward, thereby reserving legal argument until an independent circuit court proceeding is conducted. Section 120.569(2)(a), Florida Statutes, provides that once a matter has been referred to the Division of Administrative Hearings (DOAH), it will take no further action except as a party litigant. Thus, the agency's investigative authority ceases at that time.

Completion of the Investigative Process. When the legal staff of the Department of Health deems that adequate information has been gathered to evaluate the issues, the Department deems the investigation to be complete. The legal staff then formulates a recommendation for consideration by the Probable Cause Panel of the regulatory board. If the Department of Health formulates a recommendation that probable cause exists, Section 456.073(10), Florida Statutes, provides a second opportunity to respond to the investigation. The sub-

ject of the investigation must have requested a copy of the investigative report. If a request has been made, a copy of the report is provided upon completion of the investigation and upon the formulation by the Department of a recommendation that probable cause exists to believe that a violation has occurred. The subject may also receive a copy of any expert witness report or patient record connected with the investigation. The subject of the investigation must agree in writing to maintain the confidentiality of any information received until ten (10) days after probable cause is found, and to maintain confidentiality of patient records at all times. The subject may submit a written response to the information within twenty (20) days of the date the Department mails a copy of the Investigative Report. An extension may be requested. A rapid and comprehensive review of the materials received is then necessary. The Investigative Report may contain copies of medical records obtained from other practitioners and facilities that were not previously available to the subject of the investigation. The Investigative Report may contain interviews of other health care practitioners or witnesses. If the investigation addresses subjective issues, such as an alleged deviation from the standard of care, the Department will typically have obtained an expert report. Evaluation should be undertaken to determine if any expert retained by the Department of Health has misapprehended the facts or circumstances. If so, the same should be rebutted in most instances. In addition, documentation may be submitted, including an expert review on behalf of the licensee. Counsel may suggest to counsel for the Department of Health that the matter requires additional expert review of the materials supplied.

Probable Cause Determination. Section 456.073(4), Florida Statutes, requires a review to determine if probable cause exists to believe that a violation of the provisions of Chapter 456, the relevant practice act, or applicable rules has occurred. The determination as to whether probable cause exists is gen-

erally made by a majority vote of the probable cause panel of the relevant board. If there is no board or panel for a particular profession, the Department makes the probable cause determination. Probable cause panels must be composed of at least two members of the regulatory board. Multiple probable cause panels may be appointed. Individual regulatory boards are permitted to create rules in regard to these procedures. A board may, by rule, delegate probable cause determinations to the Department. Each board may, by rule, establish that one member may be a former board member. Proceedings of the probable cause panel are exempt from the Sunshine Law and its findings are exempt from public records status until 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality. However, the Department may provide information gathered in an investigation to a law enforcement agency or another regulatory agency at any time.[11] Upon reviewing the investigative report and materials submitted by the subject of the investigation, the panel must determine if probable cause exists. The panel can request further information or investigation. If probable cause is found, a formal disciplinary action is initiated. The panel may determine that probable cause does not exist and order the case closed, or order that a letter of guidance be sent to the licensee.

If no probable cause is found, the matter remains confidential and does not constitute a public record. If the investigation was initiated by the filing of a complaint, the complainant is notified of the determination of the panel. If the determination is to close the case, the complainant is provided a 60 day window of time to provide further information to the department for consideration by the panel.[12] In practice, most regulatory boards do not permit the licensee or counsel to directly participate in the probable cause panel proceeding. Therefore, any information that the licensee wishes the panel to consider must be submitted in writing. If probable cause

is found, the Department is directed by the panel to file a formal disciplinary action, an Administrative Complaint, against the licensee. The Department may decide not to prosecute a complaint. If so, the matter is referred back to the Board for consideration of direct Board prosecution.[13]

Probable Cause Panel proceedings must be electronically recorded or otherwise recorded. Members of regulatory boards who participate in the Probable Cause Panel proceeding cannot further participate in board proceedings on the same case.[14] The probable cause consideration process must be a meaningful review.[15] Any perceived defect in the probable cause proceeding must be raised by filing a motion in opposition to the petition (i.e., the Administrative Complaint). Such motions must be filed within 20 days of service of the complaint.[16] A denial of such a motion is not typically subject to interlocutory appeal.[17]

Formal Disciplinary Actions – the Administrative Complaint

Administrative Complaints may be served by personal service, certified mail, or constructive service.[18] Professional licensees have an obligation to maintain a current address on file with the Department of Health.[19] When representing a professional licensee during an investigation, it is very important that counsel confirm that the licensee's current address is recorded with the Department of Health so as to assure that the licensee is notified of the initiation of any Administrative Complaint. The complaint must give reasonable notice to the licensee of the facts or conduct which warrant disciplinary action.[20] Because statutory provisions are subject to change by the legislature, careful review of pleadings to ascertain whether the conduct charged in the complaint was prohibited at the time of the act is appropriate. Professional disciplinary statutes are penal in nature and must be strictly construed against the State.[21]

If the Administrative Complaint charges a violation of a rule, the rule should be scrutinized carefully. On occasion, rules are adopted by agencies without adequate legislative authority. In addition, other validity issues could be raised. A rule challenge can be initiated and considered contemporaneously with the disciplinary case.[22] In addition, agencies may initiate professional disciplinary actions based upon "non-rule policy." If the agency attempts to enforce a policy of general applicability without enacting a rule, a challenge can be raised asserting that the agency had an obligation to proceed through the rulemaking process, thereby providing licensees with notice of its policies. Section 120.54(1), Florida Statutes, provides that rulemaking is not a matter of agency discretion.[23]

Hearing Procedures

A licensee must select a type of hearing within twenty-one days of service of the complaint.[24] Section 120.569, Florida Statutes, provides that when the substantial interests of a party are to be determined by an agency, the party may have an administrative hearing. Sections 120.569 and 120.57, Florida Statutes, specify two different hearing procedures depending on whether there are material facts in dispute. The two types of hearings are referred to as informal and formal hearings. In addition, Section 120.57(4), Florida Statutes, provides for an opportunity to dispose of disputes with agencies by means of a stipulation, agreed settlement, or consent order. Informal hearings are conducted when there are no disputed issues of material fact. Informal hearings are conducted by the appropriate licensing board (e.g. Board of Medicine). During an informal hearing, a licensee can provide legal argument as to whether the factual allegations establish a violation of law, and evidence in mitigation. Informal hearings are the administrative equivalent of a criminal court hearing when a no contest plea has been entered. Informal hearings are very risky

for licensees.

When material facts are in dispute, a formal hearing is conducted by an Administrative Law Judge (ALJ) assigned by the Division of Administrative Hearings (DOAH).[25] Generally, an individual or entity must prepare and file a petition for the hearing to obtain a formal hearing.[26] The requirements of the petition are found in the Florida Administrative Code. There is significant debate as to whether an individual professional licensee must meet the requirements of such a petition, especially in regard to the requirement that the disputed issues of fact be specified because specifying disputed issues of material fact may violate the licensee's Fifth Amendment privilege. Many practitioners file a general denial of the factual allegations. The Department may attempt to force the licensee to specify specific factual allegations that are in dispute. Respondents who are not individuals (i.e., business entities) have no Fifth Amendment privilege and must meet the petition requirements.[27] In addition, if the Department disagrees that factual allegations are truly subject to dispute, it may attempt to force the licensee to proceed through an informal hearing.[28]

Traditionally, the determination of whether a health care licensee has deviated from the acceptable standard of care has been determined to be a finding of fact within the authority of the Administrative Law Judge as the trier of fact.[29] A change to Section § 456.073(5), Florida Statutes, in 2003 may reduce the availability of formal hearings in professional licensure cases involving health care practitioners. In 2003, the Florida Legislature enacted a special provision relating to disciplinary actions against health care licensees. Additional authority was provided to health care regulatory boards by this amendment. Section 456.073, Florida Statutes, was amended to add:

> (5) The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable

> standard of care, is a conclusion of law to be determined by the board, or department when there is no board, and is not a finding of fact to be determined by an administrative law judge.

With this enactment, significant new authority was given to the health care boards under the Department of Health by characterizing the ultimate finding of fact in many administrative disciplinary actions as a conclusion of law to be determined by the board. The Department of Health recommended to the health care boards that this statutory change only be applied to cases that were initiated after the effective date of the legislation.

Formal Administrative Hearings. Formal administrative hearings (Section 120.57(1), Florida Statutes) are the administrative equivalent of a bench trial. The ALJ controls the proceedings including resolving any disputed discovery issues. The ALJ generally has the responsibility to consider all evidence and testimony and prepare a Recommended Order that contains specific findings of fact, conclusions of law, and in the event that a violation is deemed to be established by the Department of Health, make a recommendation as to penalty. Many attorneys choose to waive either opening or closing argument, or both. Litigants should strongly consider providing an opening argument to the ALJ for purposes of persuasion. Parties are permitted to file proposed orders, and closing argument can be filed in writing. The rules of the Division of Administrative Hearings are found in Chapter 28 of the Florida Administrative Code.

Discovery. Section 120.569(2)(f) provides that the presiding officer has the authority to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. Discovery methods available include those available

under the Florida Rules of Civil Procedure including depositions upon oral examination pursuant to Rule 1.310; depositions upon written questions pursuant to Rule 1.320; interrogatories pursuant to Rule 1.340; production of documents and other items pursuant to Rule 1.350; production of documents and other items without deposition, pursuant to Rule 1.351 and request for admissions under Rule 1.370. The work product and trial preparation privileges are available pursuant to Rule 1.280(b)(3) and (4), and a protective order may be obtained pursuant to Rule 1.280(c). Sanctions may be imposed by the ALJ for discovery violations as provided under Rule 1.380, and include an award of expenses for costs associated with enforcing discovery rights. In addition, if the party fails to then comply with discovery requirements, other sanctions can be imposed, including an order prohibiting a party from introducing designated matters in evidence, striking a pleading or portions thereof, and expenses for failure to admit the genuineness of documents or truth of matters asserted in requests for admissions.

Attorneys should not overlook the use of Chapter 119 Florida Statutes, the "Public Records Law," as a form of discovery in administrative proceedings. In some instances, information is received pursuant to a public records request quicker than through discovery under the Florida Rules of Civil Procedure, as the time periods provided to parties to respond to traditional discovery requests are not applicable to public records requests. A state agency must generally respond to a public records request within a "reasonable" time. Another distinction relates to the scope of materials available. The scope of what is available under a public records request is controlled by Florida law regarding the same. Thus, the Department cannot object to a public records request on the grounds that it is not likely to lead to the discovery of relevant material. Of course, some materials are not subject to public records requests such as patient medical records. In addition, the ALJ

cannot impose sanctions relating to compliance with public records request. Enforcement of a public records request is by filing a petition with the circuit court as opposed to the administrative law judge. It is most effective to use a combination of public records requests and discovery.

Subpoenas. The procedure for the utilization of subpoenas differs from that utilized in circuit court proceedings. Subpoenas are issued by the ALJ of the Division of Administrative Hearings on forms. One can obtain subpoenas *ad testificandum* and subpoenas *duces tecum*. These forms are issued in blank with the exception of the inclusion of the style of the case, case number, the name, address and telephone number of the attorney or party requesting the subpoena, and information in regard to how to contact the ALJ of the Division of Administrative Hearings. The party that has requested the subpoena then completes the subpoena and arranges for service of the same. Any party or any person on whom a subpoena is served, or to whom a subpoena is directed, may file a Motion to Quash, objection, or Motion for Protective Order with the presiding officer before whom the case is pending. The resolution of such disputes is controlled by the provisions of Section 120.569(2)(k), Florida Statutes, which provides in pertinent part:

> 1. Any person subject to a subpoena may, before compliance and on a timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.
>
> 2. A party may seek enforcement of a subpoena, order directing discovery, or order imposing sanctions issued under the authority of this chapter by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides. A failure to com-

> ply with an order of the court shall result in a finding of contempt of court. However, no person shall be in contempt while a subpoena is being challenged under subparagraph 1. The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure.

Conduct of Hearings Before Administrative Law Judges. The Administrative Procedure Act controls formal hearings. Section 120.57(1), Florida Statutes, provides, in pertinent part, that during an evidentiary hearing:

> (b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and to submit rebuttal evidence, to submit proposed findings of fact and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel, or other qualified representative....
>
> * * *
>
> (f) The record in a case governed by this subsection shall consist only of:
>
> 1. All notices, pleading, motions and intermediate rulings.
>
> 2. Evidence admitted.
>
> 3. Those matters officially recognized.
>
> 4. Proffers of proof and objections and rulings thereon.
>
> 5. Proposed findings and exceptions.
>
> 6. Any decision, opinion, order, or report by the presiding officer.
>
> 7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its dis-

> position, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public record.
>
> 8. All matters placed on the record after an ex parte communication.
>
> 9. The official transcript.

Evidence. Sections 120.569(2)(g) and 120.57(1)(c), Florida Statutes, provide specific rules for evidence in administrative proceedings, and state respectively:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons as in the conduct of their affairs, shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.
>
> * * *
>
> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

A party should not rely heavily on these "relaxed" rules of evidence because Administrative Law Judges tend admit the same type of evidence as would be admitted in circuit court. Hearsay evidence is more freely admitted but must be corroborated or it will not be considered to support findings of fact. Section 120.57(1)(d), Florida Statutes, specifically allows the admission of "similar fact evidence" of other wrongs, if relevant to prove a material fact in issue such as motive, intent, propensity or absence of mistake. The state must give notice of its intent to use such evidence.

Burden of Proof. Most authorities agree that the burden of proof is clear and convincing evidence in professional

disciplinary actions seeking suspension or revocation of any professional licensee. Fla.Stat. § 458.331(3) (allopathic physicians) and Fla Stat. § 459.015(3) (osteopathic physicians) provide that the burden of proof is the greater weight of the evidence if revocation of license is not sought by the Department. The Florida Supreme Court has held that the burden of proof in professional licensure revocation proceedings is "clear and convincing evidence."[30] Most Administrative Complaints filed by the Department specify that the Department may seek suspension or revocation.[31]

Fifth Amendment Privilege. Many agencies will attempt to obtain admissions (i.e. incriminating statements) from a licensee via an interview, a request for a written statement, or through discovery once a charge has been filed (including the filing of requests for admissions or by deposition). The Fifth Amendment privilege is available to an individual who holds a professional license. The Supreme Court of Florida in State ex rel. Vining v. Florida Real Estate Commission,[32] considered a rule of the Florida Real Estate Commission which required the licensee to file a written answer to an Administrative Complaint. The Florida Supreme Court held that the Florida Real Estate Commission was attempting to shift to the licensee the burden of proving his own guilt, in violation of the Fifth Amendment to the United States Constitution and Article I, Section IX of the Florida Constitution. The Supreme Court held that the right to remain silent applied not only to criminal cases, but also to proceedings which were "penal" in nature. It defined penal cases as those that "...tend to degrade the individual's professional standing, professional reputation or livelihood." The Department of Health may take the position that the assertion of the Fifth Amendment privilege may conflict with the rule requirement for petitions for hearing. In Brookwood, *supra*, the court upheld a decision of the Agency for Health Care Administration (AHCA) to require that a petition in compliance with rule 28-106.201, Fla. Admin. Code, be

filed to obtain an evidentiary hearing. However, Brookwood involved a facility license and not a professional license and thus the complaint may not constitute a "penal" proceeding under Vining.

Exceptions to Fifth Amendment Applicability.

Mental and Physical Examinations. In 1985, the Florida Supreme Court addressed the Fifth Amendment privilege in a different context. In Boedy v. Department of Professional Regulation, 463 So.2d 215 (Fla. 1985), a physician, Frederick Boedy, M.D., sought a protective order that he not be compelled to submit to a series of mental examinations for the purpose of determining his ability to practice medicine with reasonable skill and safety. Dr. Boedy relied upon the Supreme Court's holding in Vining. The Supreme Court determined that although Dr. Boedy had a valuable property right in his license to practice medicine, his right was not absolute, but rather subject to regulation under the police power of the State of Florida. The Court adopted a balancing approach in determining that the Fifth Amendment privilege "...did not extend to the exclusion of evidence of his physical or mental condition when such evidence is otherwise admissible, even when the evidence is obtained by compulsion." The Supreme Court identified a limited exception to the privilege against compelled self incrimination, when the information sought was information as to the physician's ability to practice medicine with reasonable skill and safety, finding that proceedings related to the ability to practice safely were remedial in nature.

Required Records Exception. An exception to the Fifth Amendment privilege has also been recognized where records are required to be made and maintained by statute.[33]

Dealing with Fifth Amendment Issues. The Department may attempt to compel responses to requests for admissions

by asserting that the Fifth Amendment privilege has been eroded, or eliminated, by decisions of various cases involving Florida Bar proceedings. There is a series of cases in Florida Bar disciplinary proceedings which hold that the Fifth Amendment privilege is not available in such proceedings, as Bar disciplinary proceedings are considered remedial (designed for the protection of the public) and not penal in nature.[34] In addition, the District Court of Appeal, First District in Borrego v. Agency for Health Care Administration,[35] in addressing an assertion of double jeopardy, held that licensure disciplinary sanctions imposed against Dr. Borrego were "remedial rather than punitive." Nevertheless, most ALJ's recognize the Fifth Amendment privilege. As a practical matter, a licensee may have to eventually choose between an opportunity to provide testimony in a disciplinary case and maintaining the Fifth Amendment privilege. The case of Securities and Exchange Commission v. Cymaticolor Corporation[36] recognized the Fifth Amendment privilege in an administrative action. However, the Court indicated that the individual asserting the Fifth Amendment privilege must choose between maintaining the privilege or offering the agency the opportunity to obtain discovery prior to litigation of the issues. If the individual continued to maintain the Fifth Amendment privilege, the individual would then be barred from offering into evidence any matter relating to the factual bases for his denials and defenses on issues where the Fifth Amendment right continued to be asserted. However, in Securities and Exchange Commission v. Graystone Nash, Inc.,[37] the court found that a party may assert the Fifth Amendment privilege and still present testimony unless the other party establishes prejudice by the denial of discovery.

This issue has been addressed at least twice by Administrative Law Judges of the Division of Administrative Hearings who determined that if a licensee chooses to testify on the licensee's behalf at the hearing, and has previously refused to

give a deposition, the State may request a recess to take the licensee's deposition.[38] The Fifth Amendment privilege does not necessarily prohibit the State from taking a deposition. In Patchett v. Commission on Ethics, the court held that the right to remain silent did not bar the calling of a witness who may invoke the privilege.[39] In addition, in Hargis vs. Florida Real Estate Commission, 174 So.2d 419 (Fla. 2d DCA 1965), the court held that a licensee must raise objections to specific questions posed, and allow the court to determine whether the question tends to incriminate the witness.

Post Hearing Procedures

Proposed Recommended Orders. Section 120.57(1)(b), Florida Statutes, gives parties the right to submit proposed findings of fact and orders. Proposed recommended orders should be separated into findings of fact (which should be supported by citation to the record), and conclusions of law. Some ALJ's find that argument contained within proposed findings of fact is not desirable. Argument can be segregated in a separate area or a separate legal brief. A carefully crafted, proposed recommended order, can induce the Administrative Law Judge to consider the evidence presented by a party in a careful and reasoned fashion. After submission of proposed orders by the parties, the ALJ will enter a Recommended Order. Such orders are detailed and contain specific findings of fact, conclusions of law, and, in the event that the Judge concludes that a violation was established by the Department, a recommendation as to penalty. Under such circumstances, the ALJ must consider the penalty guidelines adopted by regulatory board involved. The ALJ transmits a copy of the Order to counsel representing the parties, and to the agency head.

A party is entitled to file exceptions to the Recommended Order. Generally, exceptions should be filed to Findings of Fact, if such findings are not perceived to be based upon competent substantial evidence.[40] Although not specifically autho-

rized, many litigants also provide legal argument in conjunction with exceptions. Exceptions must be filed within 15 days of the filing of the Recommended Order, with the agency, not with the DOAH.[41]

Post-Hearing Agency Review. The relevant licensing board will consider the Recommended Order and any exceptions at a regularly scheduled meeting. Section 120.57(l)(1), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which is has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of agency rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or is more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire records, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the records in justifying the action.

Rejection of findings of fact by administrative boards has been amply discussed by appellate courts. In Prysi v. Department of Health,[42] the court reviewed the action of the Board of Medicine in reversing findings of fact of the ALJ. The court found that the Department in its exceptions had basically argued that the ALJ had ignored competent substantial evidence that supported the Department's position. The Board of Medicine agreed and reversed the findings of the ALJ. The court took this opportunity to recite the respective roles of the Board and the ALJ in the administrative process. Citing to Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco,[43] the court found that factual inferences are to be drawn by the ALJ as the trier of fact. An ALJ's findings cannot be rejected unless there is no competent substantial evidence from which the findings could be reasonably inferred.[44] Of course, the amendment to Section 456.073(5), Florida Statutes discussed above may impact on this balance of authority between the boards and the ALJ.

Appearances Before Regulatory Boards. The appearance of the licensee and counsel before a regulatory board is one of the most difficult aspects of assisting professional licensees in the regulatory process. Regulatory boards are collegial bodies. The Board of Medicine currently consists of fifteen members, twelve physicians of various specialties and three laypersons. Arguments that may be found persuasive to one member may be offensive to another. Attorneys who do not routinely appear before a regulatory board should attend a board meeting before attempting to assist a client before that board. Information should be obtained in regard to board members including their profession, medical specialty and other information that may influence their decisions. If an appearance before a regulatory board occurs for review of a recommended order of an Administrative Law Judge, the licensee is not required to attend. No new evidence can be produced before the regulatory board at that stage of the proceedings because the record

has already been created before the Division of Administrative Hearings. The only information that can be supplied to the board subsequent to a hearing before an Administrative Law Judge would be in the form of exceptions to the recommended order and legal argument in support thereof. Attorneys should be aware that they may be limited or precluded from oral argument on exceptions.

Appearances also occur at informal hearings, or at hearings for consideration of settlement agreements. Under such circumstances, the licensee will likely be required to be in attendance. The licensee will be placed under oath and may be interrogated by board members or board counsel. Obviously, careful preparation of the licensee for such an appearance is necessary. The presentation of evidence or argument may be curtailed by the board. Therefore, when appearing for an informal hearing or in support of a settlement agreement, a detailed written summary with attached objective evidence may be the best means to assure that the licensee's position is adequately communicated to the members of the board. As indicated previously, informal hearings are very dangerous to licensees and should generally be avoided.

Costs. Florida Statutes require that costs be imposed against a licensee whenever a final order of discipline is issued. The term "cost" as applicable to administrative proceedings is defined. Fla.Stat. § 456.072 provides, in pertinent part:

> (4) In addition to any other discipline imposed... the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board

> shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto.

Imposition of costs of investigation and prosecution is a very significant consideration for a licensee in determining whether to proceed through the formal hearing process, or consider a settlement of the charges filed. If the event giving rise to the disciplinary action occurred prior to September 15, 2003, costs that can be imposed do not include costs of personnel. Certainly, attorneys representing a licensee should carefully discuss with the client the implications of the costs of investigation and prosecution that could be imposed against them, and the significant increase in such costs if an evidentiary hearing is pursued. Costs imposed against licensees have exceeded $50,000 on matters that have proceeded through the formal hearing process. Of course, the Department of Health also seeks to impose the costs of investigation and prosecution in any settlement agreement. Typically, such costs are significantly less than those imposed in those cases that have proceeded through the entire hearing process. In many instances, the issue of the increase in costs must be balanced with the pursuit of discovery in an attempt to best advise a client as to the chances of prevailing through the formal hearing process, so as to allow the licensee to make an informed decision.

Additional Issues in Formal Disciplinary Actions

Laches and Statute of Limitations. *Section* 456.073(13), Florida Statutes, requires actions be initiated within six years unless the matter involves a criminal act, diversion of controlled substances, sexual misconduct or impairment. The period is extended to twelve years if fraud, concealment, or misrepresentation prevented the discovery of the conduct.

The Department of Health takes the position that this provision is not applicable to events that occurred prior to the effective date of the legislation. Court decisions have indicated that the doctrine of laches may be applied to disciplinary proceedings. In Devine v. Department of Professional Regulation,[45] the court affirmed an order of the Board of Dentistry, holding that the doctrine of laches was applicable barring the dentist from challenging his examination results as such challenge was not pursued in a timely manner and the board had appropriately disposed of the grade sheets for the examination. In Ong v. Department of Professional Regulation,[46] the court recognized the applicability of the doctrine of laches but found that Dr. Ong had not established the requisite elements of the doctrine.

Subject Matter Index. Section 120.53, Florida Statutes, requires that agencies maintain a subject matter index of documents containing legal value that must be permanently preserved and made available to the public. Agencies utilize various devices to comply with the requirements of Section 120.53, Florida Statutes. Some agencies have relied on newsletters or websites to serve as the required index. In Gessler v. Department of Professional Regulation,[47] the court reviewed a case where the Board of Medicine disciplined a physician. The physician moved for a stay based upon the failure of the board and department to comply with the provisions of Section 120.53, Florida Statutes. The court ordered a stay finding that the board's noncompliance was presumptively prejudicial and confirming that prior decisions of the board had precedential value. The district court certified the issue as one of great public importance. On February 18, 1994, the Supreme Court granted a joint motion of the parties to dismiss the appeal (apparently the result of settlement of the issue by the parties). In 1992 the legislature revised Section 120.53, Florida Statutes. In Caserta v. Department of Business and Professional Regulation,[48] the court found that this amendment removed any

obligation on agencies to maintain a subject matter index for time periods prior to March 1, 1992, the effective date of the legislative change.

Penalty. Florida Statutes and decisional law encourage consistent penalties. Section 456.079, Florida Statutes, requires that each board or the department if there is no board adopt by rule and periodically review disciplinary guidelines for each ground for disciplinary action. The language utilized by the legislature is mandatory and strong. It provides, in pertinent part:

> (2) The disciplinary guidelines shall specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses, it being the legislative intent that minor violations be distinguished from those which endanger the public health, safety, or welfare; that such guidelines provide reasonable and meaningful notice to the public of likely penalties which may be imposed for proscribed conduct; and that such penalties be consistently applied by the board.
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> (5) The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

The combination of the requirements of a subject matter index and the aforementioned statutory section, provides a tool to evaluate an appropriate penalty if a violation is established at hearing, or for settlement evaluations. A failure of a professional board to adopt penalty guidelines may result in the board being unable to discipline professional licensees.[49] However, courts have held that penalty ultimately

rests within the board's sound discretion.[50]

Appeals

Appeal of a final order is to a District Court of Appeal and may be filed in the appellate district where the agency maintains its headquarters (i.e., the First DCA), or where the licensee resides. If the licensee is adversely impacted by the order of an administrative agency, a stay is available as a matter of right upon reasonable conditions. The state agency may petition the court and establish that a stay would constitute a probable danger to the health, safety or welfare of the public.[51] If no suspension or revocation has been ordered, a stay is typically not available or authorized by the court.

Ramifications of Disciplinary Actions

Clients should be advised of the ramifications of disciplinary actions. These ramifications include, but are not limited to the following:

- if the disciplinary action was based upon a finding of malpractice by a final administrative agency decision, the same constitutes a "strike" for the purposes of determining loss of license based upon repeated medical malpractice ("three strikes rule").
- reports to the National Practitioners Data Bank or Healthcare Integrity and Protection Data Bank;
- potential loss of affiliations with third party payors including Medicare and Medicaid, managed care organizations, hospitals and other licensed facilities;
- reciprocal disciplinary actions by other states;
- the possibility of an affirmative obligation to report discipline to other states, insurance companies, and facilities;
- exclusion from federal government assistance programs;

- impact on the availability of liability insurance or liability insurance rates;
- the use of a prior disciplinary action to aggravate the penalty imposed in any future disciplinary action;
- impact upon testimony as a defendant, or expert in civil lawsuits and other forums;
- potential action by the Drug Enforcement Administration;
- inability to supervise physician assistants or serve as Medical Director to Ambulatory Surgical Centers if on probation;
- availability of information through internet sites including the Federation of State Medical Boards and State of Florida websites and public information sources. Publication of information in the regulatory agency newsletter; and,
- requirement that the practitioner's profile be updated to reflect the disciplinary action.

Emergency Authority

Section 120.60(6), Florida Statutes, authorizes agencies to issue an emergency suspension, restriction, or limitation of license, if the agency finds an immediate serious danger to the public health, safety, or welfare. The agency may take such action by any procedure that is fair under the circumstances if the procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution; the agency takes only that action necessary to protect the public interest under the emergency procedure; and the agency states in writing at the time of, or prior to its action, the specific facts or reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings

of immediate danger, a necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to subsections 120.569 and 120.57 shall also be promptly instituted and acted upon. Section 456.073(8), Florida Statutes, provides that any proceeding for the purpose of a summary suspension or restriction of license shall be conducted by the State Surgeon General, or his or her designee, as appropriate, who shall issue the final summary order. The secretary exercises discretion in issuing emergency orders. In addition, the secretary must review certain matters. For example, Section 456.074(2), Florida Statutes, provides that the State Surgeon General must review all findings of probable cause of alleged violations of the standard of care concerning physicians and osteopathic physicians, if such physician has previously been found to have committed violations of the standard of care in treatment of three or more patients. In addition, the department may issue an emergency order suspending or restricting the license of any health care practitioner who tests positive for any drug on any pre-employment or employer ordered confirmed drug test, unless the practitioner has a lawful prescription and legitimate medical reason for using such drug. The practitioner is to be given 48 hours from the time of notification of a confirmed drug test to produce a lawful prescription for the drug before an emergency order is issued. Section 456.074(3), Florida Statutes. In addition to this "discretionary" authority to issue an emergency order, the Legislature has mandated the emergency suspension of license of practitioners under certain circumstances. Section 456.074, provides, in part:

> (1) The department shall issue an emergency order suspending the license of any person . . . who pleads guilty to, is convicted or found guilty of, or who enters a plea of *nolo contendere* to, regardless of adjudication, a felony under chapter 409 (social and

> economic assistance act), chapter 817 (fraudulent practices act) or chapter 893 (controlled substances act) or under 21 U.S.C. ss. 801-970 (federal controlled substances act) or under 42 U.S.C. ss 1395-1396 (federal Medicare/Medicaid provisions). Section 456.074(1), Florida Statutes. (descriptions in parenthesis added).
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> (4) Upon receipt of information that a practitioner has defaulted on a student loan issued or guaranteed by the state or the Federal Government, the department shall notify the licensee by certified mail that he or she is subject to immediate suspension of license, unless, within 45 days after the date of mailing, the licensee provides proof that new payment terms have been agreed upon by all parties to the loan. The department shall issue an emergency order suspending the license of any licensee who, after 45 days following the date of mailing from the department has failed to provide such proof.

Appeals of emergency orders may be filed in the First District Court of Appeal, or the district in which the licensee practices. Appeals are in the form of a petition for review of the emergency order. In addition, Florida Rules of Appellate Procedure permit the party to file an application for stay.[52] Generally, petitions for review of emergency orders are limited to certain issues. Obviously, since there has been no hearing, there is no record to review. An appendix may be considered. Licensees can assert that the emergency order was not lawfully issued, that the emergency order departs from the essential requirements of law because the Department did not take only that action which was necessary to protect the public interest, or that the order departs from the essential requirements of law because the order does not set forth adequate reasons on its face to demonstrate an immediate danger to the health, safety and welfare of the public.[53] Emergency or-

ders must be tailored to address the harm to be prevented and must demonstrate an immediate danger to the health, safety and welfare of the public.[54] In addition, the Department must promptly institute a formal disciplinary action.[55] The agency's reasons for acting cannot be general or conclusory, but must be factually explicit and persuasive concerning the existence of a genuine emergency.[56]

Declaratory Statements by Agencies

A declaratory statement is a means for an affected person to obtain an agency's opinion as to the interpretation or applicability of a statutory provision, or of any rule or order of the agency, as it applies to the Petitioner's particular set of circumstances. Declaratory statements are discussed in Section 120.565, Florida Statutes. A petition seeking a declaratory statement must contain a statement with particularity of the Petitioner's set of circumstances and the specific statutory provision, rule, or order that the Petitioner believes may apply to the set of circumstances. The Agency must give notice of the filing of the petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the Administrative Procedures Committee of the Legislature. The Agency must issue a declaratory statement or deny the petition within ninety days of its filing and the declaratory statement issued or the denial of the petition must be noticed in the next available issue of the Florida Administrative Weekly. The petition must clearly indicate the standing of the individual or entity bringing the petition. It should be executed by an individual or representative of an entity with standing, as opposed to counsel. The issue for resolution should be clearly stated at the beginning of the petition. This statement can be followed by a discussion of the issues in a separate section. The petition should close with a prayer for relief. Finally, it may be advisable to provide a separate memorandum of law to assist the agency in reaching the desired conclusion.

Endnotes:

[1] Fla.Stat. § 456.073(1).

[2] See Fla. Stat. § 458.331(9) and 459.015(9).

[3] Fla.Stat. § 456.073(10).

[4] Fla.Stat. § 456.057(7)(a).

[5] 64B8-10.004, Fla. Admin. Code.

[6] Fla.Stat. § 61.13(2)(b)3.

[7] Bayfront Medical Center vs. Agency for Health Care Administration, 741 So.2d 1226 (Fla. 2d DCA 1999).

[8] 948 So.2d 803 (Fla. 2d DCA, 2007).

[9] 599 So.2d 111 (Fla. 1992).

[10] Carrow vs Department of Professional Regulation, 453 So.2d 842 (Fla.. 1st DCA 1984).

[11] Fla.Stat. § 456.073(10).

[12] Fla.Stat. § 456.073(9)(c).

[13] Fla.Stat. § 456.073(4).

[14] Fla.Stat. § 456.073(6).

[15] Kibler vs. Department of Professional Regulation, 418 So.2d 1081 (Fla. 4th DCA 1982).

[16] Rule 28-106.204(2), Fla. Admin. Code.

[17] Nelson vs. State Board of Accountancy, 355 So.2d 216 (Fla. 1st DCA 1978).

[18] Fla.Stat. § 120.60(5).

[19] Fla.Stat. § 456.035.

[20] Fla.Stat. § 120.60(5); Cottrill vs. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996); Ghani vs. Department of Health, 714 So.2d 1113 (Fla. 1st DCA 1998); Lusskin vs. State of Florida, Agency for Health Care Administration, 731 So.2d 67 (Fla. 4th DCA 1999); Trevisani vs. Department of Health, Case No. 1D04-2488, 1st DCA Opinion filed July 20, 2005.

[21] Bach vs. Florida State Board of Dentistry, 378 So.2d 34 (Fla. 1st DCA 1980); Lester vs. Department of Professional and Occupational Regulation, 348 So.2d 923 (Fla. 1st DCA 1977).

[22] Fla.Stat. § 120.56; Department of Business Regulation, Division of Alcoholic Beverages and Tobacco vs. Martin County Liquors, Inc., 574 So.2d 170 (Fla. 1st DCA 1991); State Board of Optometry

vs. Florida Society of Ophthalmology, 538 So.2d 878 (Fla. 1st DCA 1989).

[23] See Food 'N Fun, Inc. vs. Department of Transportation, 493 So.2d 23 (Fla. 1st DCA 1986); Anglickis vs. Department of Professional Regulation, 593 So.2d 298 (Fla. 2d DCA 1992).

[24] See 28-106.111(4), Fla. Admin.Code.

[25] Fla.Stat. § 120.57(1) and 456.073(5).

[26] Fla.Stat. § 120.569(2)(a).

[27] Brookwood Extended Care Center of Homestead, LLP vs. Agency for Health Care Administration, 870 So.2d 834 (Fla. 3d DCA 2003).

[28] United States Service Industries Florida vs. State Department of Health and Rehabilitative Services, 383 So.2d 728 (Fla. 1st DCA 1980).

[29] Gross vs. Department of Health, 819 So.2d 997 (Fla. 5th DCA 2002).

[30] Ferris vs. Turlington, 510 So.2d 292 (Fla. 1997), Reich v. Department of Health, 973 So. 2d 1233 (Fla. 4th DCA 2008).

[31] See also Rupp v. Department of Health, 963 So.2d 790 (Fla. 3d DCA 2007), regarding a defense of impossibility. In Rupp, the court considered the appeal of a physician who had been disciplined based upon her license in another state having been subject to a disciplinary action, and an alleged failure to report such discipline to the Department of Health in a timely fashion. Dr. Rupp had accepted a position that required her to practice in several states. She retained an independent firm to be responsible for assuring that her medical licenses remained active and her addresses on file with the various states. This firm closed their offices in 2004 without notice to Dr. Rupp. Dr. Rupp subsequently learned that the State of Virginia had found her in violation for failure to notify it of a change of address, and ordered her to pay a $1,500 monetary penalty. Dr. Rupp was not notified of the Virginia action until almost two months after its conclusion. The Florida Department of Health charged Dr. Rupp with failing to notify it of a disciplinary action in another state within thirty days of such an occurrence. A formal hearing was conducted and the ALJ found that Dr. Rupp had failed to provide timely notice. There was a specific finding of fact that Dr. Rupp did not receive notice of the Virginia action until almost two months after its entry. The Florida Board of Medicine disciplined Dr. Rupp by imposing a $500 fine and imposed over $10,000 in costs. Dr. Rupp appealed and asserted the defense of impossibility. The district court agreed.

Dr. Rupp also contended that the Board erred in failing to conduct a de novo review of the Judge's Recommended Order. The court found that the Board was required to conduct a de novo review by Fla Stat. § 120.57. The court found that the Board failed to allow Dr. Rupp to present argument regarding the findings of the Administrative Law Judge. Finally, the court found that costs were imposed against Dr. Rupp without allowing Dr. Rupp any opportunity to be heard regarding the same. In Reich v. State of Florida Department of Health, 973 So. 2d 1233 (Fla. 4th DCA 2008), the Fourth District Court of Appeal addressed the burden of proof as it relates to missing medical records. Dr. Reich had been working at a medical clinic. The corporation dissolved. Dr. Reich had attempted to obtain copies of the medical records and had obtained a court order requiring the clinic to provide the original patient records to him. However, no records were ever obtained. The Board of Medicine during its investigation was also unable to obtain the medical records. Dr. Reich testified he had no recollection of his treatment of the four patients involved in this Administrative Complaint. He had some brief handwritten notes but testified that this was only about five percent of the information in the records. The ALJ concluded that no more detailed records ever existed. The court of appeal reversed. It found that the burden of proof was on the Department to establish a violation by clear convincing evidence and that the finding of the ALJ that the physician had fabricated his testimony that additional medical records existed for these patients was not supported by a competent substantial evidence. The court reversed the Final Order. Dr. Reich had also raised a statute of limitations defense. However, the court did not make any determination concerning the same.

[32] 281 So.2d 487 (Fla. 1973).

[33] Sheppard v. Florida State Board of Dentistry, 369 So.2d 629 (Fla. 1st DCA 1979).

[34] See, DeBock v. State of Florida, 512 So.2d 164 (Fla. 1987).

[35] 675 So.2d 666 (Fla. 1st DCA 1996).

[36] 106 F.R.D. 545 (1985).

[37] 25 F.3d 187 (1994).

[38] See the recommended orders in Department of Professional Regulation vs. Fabric, No. 87-2682 (DOAH, Dec. 8, 1987), and Department of Professional Regulation vs. Grimberg, No. 86-3496 (DOAH, March 22, 1988).

[39] 626 So.2d 319 (Fla. 1st DCA 1993).

[40] Fla.Stat. § 120.57(1)(b).

[41] Fla.Stat. § 120.57(1)(k).

[42] 823 So.2d 823 (Fla. 1st DCA 2002).

[43] 475 So.2d 1277 (Fla. 1st DCA 1985).

[44] See also Gross v Department of Health, 819 So.2d 997 (Fla 5th DCA 2002).

[45] 451 So.2d 994 (Fla. 1st DCA 1984).

[46] 565 So.2d 1384 (Fla. 5th DCA 1990).

[47] 627 So.2d 501 (Fla. 4th DCA 1993).

[48] 686 So. 2d 651 (Fla. 5th DCA 1996).

[49] Arias vs. State Department of Business and Professional Regulation, Division of Real Estate, 710 So.2d 655 (Fla. 3d DCA 1998).

[50] Marrero vs. Department of Professional Regulation, 622 So.2d 1109 (Fla. 1st DCA 1993); Lusskin v. Department of Health, 866 So.2d 733 (Fla. 4th DCA 2004).

[51] Fla.Stat. § 120.68(3). See Iturralade vs. Department of Professional Regulation, 482 So.2d 375 (Fla. 1st DCA 1985).

52 Fla. R. App. P. 9.190(e)(2).

[53] Fla.Stat. § 120.60(6).

[54] Witmer vs. Department of Business and Professional Regulation, 631 So.2d 338 (Fla. 4th DCA 1994); Daube v. Department of Health, 897 So.2d 493 (Fla. 1st DCA 2005).

[55] Fla.Stat § 120.60(6)(c); Broyles vs. Department of Health, 776 So.2d 340 (Fla. 1st DCA 2001).

[56] Commercial Consultants Corp. vs. Department of Business Regulation, 363 So.2d 1162 (Fla. 1st DCA 1978) (quoting from Florida Home Builders vs. Division of Labor, 355 So.2d 1245 (Fla. 1st DCA 1978)).

Just Dating or Soul Mates? Patient Safety Meets Fraud and Abuse

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Introduction

A focus on patient safety and a reduction in fraud/abuse have each separately emerged politically, legally and clinically. In this article, we summarize the growing connection between patient safety and fraud and abuse and suggest that these two public policy imperatives can work together to improve health and medical care.

Reducing errors in medical care (e.g., improving patient safety) should be a goal of both plaintiff and defense attorneys, insurers, health care providers, patients, patient rights groups, and government regulators. State/federal reporting systems create bureaucratic processes rather than use-

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ful information about how errors can be mitigated. The path to fraud/abuse reduction has been built upon a plethora of examples, presumptions of physician and hospital bad faith and greed, which led to punishment by hefty financial penalties, jail time and licensure sanctions including probations, suspensions and revocations. Far more regulatory attention and resources have been directed toward fraud than to patient safety. However, patient safety is a more valuable public policy imperative in terms of its net relationship to both the health of people and the cost of care. Ultimately, an emphasis on patient safety improvement as a "carrot" could make the "sticks" of fraud/abuse reduction more effective.

Federal regulations seek to reduce unnecessary and/or fraudulently reported procedures through a series of fraud and abuse laws, including the Medicare Secondary Payer Act (MSPA).[1] The Centers for Medicare and Medicaid have sought to include quality/safety components in the reimbursement process by way of "pay for performance" guidelines. Evolving federal reporting requirements purport to reduce fraud and abuse and to enhance outcome measurement by collecting reliable patient safety information on a confidential and protected basis. Individual states have sought to address fraud and safety through statutory and regulatory initiatives that may include various reporting requirements. The State of Florida has required adverse event reporting under Section 395.0197(7), Florida Statutes, commonly known as the Code 15 reporting system. The Florida law ostensibly seeks reliable information that can be used to improve patient safety.

The Patient Safety Wake Up Call

Following the publication of the Institute of Medicine Report *To Err Is Human* in 1999,[2] what had been a relatively fragmented boutique interest in patient safety was catapulted into a national and visible priority. The IOM's findings rattled state and federal governments, boards of medicine and nurs-

ing, third parties and consumer groups in its estimate that at least 44,000 and as many as 98,000 people die in hospitals each year due to medical errors.[3] This finding was early met with skepticism and criticism by some segments of the physician and hospital communities. But it has since been accepted as being not only valid – but very likely. Responses to these data have been mixed but clear: state and federal governments have sought to learn more and do more to improve patient safety by way of making more data available with which to view and assess clinical quality and outcomes. At the federal level, the Patient Safety Quality Improvement Act (PSQIA) of 2005[4] provides for the creation of a voluntary reporting system to identify and resolve quality and safety issues. There are privilege and confidentiality protections to encourage reporting. But these conditions appear to have been at least partially trumped following the Florida Supreme Court decision in Florida Hospital Waterman v. Buster[5] that ruled in favor of the "Patient Right to Know Act" of 2005, Amendment 7, which affords access to all aspects of health and medical records.

Separate Lives: The Fraud and Abuse Predicate

Fraud and abuse regulation took little or no heed of patient safety in the early years of government regulation. Starting in the 1970s, federal and state government concern about rising health care costs led to a focus on the control of fraud and abuse within the Medicare and Medicaid programs. These efforts built upon the principles of the Civil War era False Claims Act[6] by creating a series of laws designed to monitor, manage and punish behaviors that were deemed to be abusive of the federal and state health benefit reimbursement systems. We will not review the details of these laws here, but they include statutes prohibiting kickbacks,[7] the Medicare-Medicaid Anti-Fraud and Abuse Amendment of 1977, prohibiting "any remuneration… directly or indirectly, overtly or covertly, in cash or in kind,"[8] the "Stark" amendments of 1989 and 1993

regarding self referrals,[9] exceptions to the kickback statutes articulated in the Health Insurance Portability and Accountability Act of 1996[10] and the Balanced Budget Act of 1997, creating new statutory civil penalties previously not available to the government that added treble damage and $50,000 per violation provisions.[11] Add to this the *qui tam* components of the original False Claims Act that have been preserved throughout the Medicare and Medicaid fraud and abuse legislation affording whistleblowers a percentage of recoveries.[12]

The point of these laws has been to target waste and fraud within the federal and state financed systems, prohibit self-dealing and kickback activities, and create costly punishments for clinical and institutional health care providers found to be in violation of these laws. In the process, these laws also created a lucrative fraud and abuse defense and *qui tam* prosecution industry among attorneys and consultants, and a panoply of federal and state jobs within the FBI, Office of the Inspector General in the U.S. Department of Health and Human Services, Department of Justice, and state Medicaid and state attorney offices.

Going Steady: Bringing Together Fraud and Abuse and Patient Safety

While the emphasis of the fraud and abuse laws was to save money, recover fraudulently billed funds and punish deceptive and fraudulent behaviors, there evolved linkages to patient safety and quality factors. These related to clinical services billed that were not performed; and for billed services performed that were deemed to be clinically inappropriate or manifestly unnecessary. These linkages became more explicit following the 2005 Deficit Reduction Act that added changes to the way Medicare pays for hospital services, and includes a very specific set of foci on "serious reportable events," identification of adverse events and conditions that are preventable, and linking expressly quality of care to reimbursement.[13] This

requires new levels of reporting, monitoring and measuring, including the "present on admission" (POA) requirement of the new law.

In addition to the new Medicare guidelines, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) began its campaign for patient safety improvement, including accreditation requirements that have demanded evidence of event reporting and use of data to improve patient safety. In addition to these national accreditation requirements, 24 states including Florida, have implemented adverse events reporting systems in health care. The variations in these state reporting systems is quite broad, as is the quality of the data obtained and the use of the information for any purpose at all.

In Florida, F.S. 395.0197 requires the reporting of certain adverse medical incidents to the Florida Agency for Health Care Administration (AHCA) within fifteen days of the occurrence of such an event. This is known as the "Code 15" requirement. For purposes of reporting, an "adverse incident" is defined as an event over which a health care professional could exercise control and which is associated in whole or in part with medical intervention, rather than the condition for which such intervention occurred, and which results in certain specified injuries.[14] Code 15 events are similarly but more specifically defined at Section 395.0197 (7), Florida Statutes.[15]

Linking Adverse Event Data and Fraud

Data produced in Code 15 reports are not routinely reported externally by AHCA and are generally not available for academic analysis and publication. These data have historically been used by the State of Florida to augment internal regulatory efforts, and to follow up on reports of adverse events. While data from the Code 15 reports remained locked away in boxes and filing cabinets within the walls of AHCA for years, there were other aggressive efforts to understand,

report and use data about adverse events to improve patient safety – and to link patient safety to costs and quality. The federal Agency for Healthcare Research and Quality (AHRQ) conducts and funds research into patient safety, quality and costs. Following the IOM report, AHRQ published findings from a National Patient Safety Council survey that included 42% of respondents had been affected by a medical error, either personally or through a friend or relative and that 32% of respondents indicated that the error had a permanent negative effect on the patient's health. Overall, respondents to this survey thought the health care system was "moderately safe" (rated a 4.9 on a 1 to 7 scale, where 1 is not safe at all and 7 is very safe).[16]

AHRQ also reported survey findings from the American Society of Health-System Pharmacists, indicating that that 61% of Americans are very concerned about being given the wrong medication; 58% believe that they are at risk of being prescribed two or more medications that can negatively interact and 56% fear complications from a medical procedure.[17]

As a key element of its national research and policy mission, AHRQ funded and developed a set of indicators of health care quality and patient safety that make ready use of routinely collected hospital discharge data. These indicators, called Patient Safety Indicators (PSIs) are well-validated tools that can be used to identify adverse events that occur during inpatient hospitalizations. These indicators have been validated with detailed studies of medical records and other data sources. They provide exceptionally useful information about potential complications and adverse events following surgeries, various procedures and childbirth. Health services researchers have successfully used the PSI indicators along with software templates (available free from AHRQ) to help hospitals monitor and develop risk management responses to adverse events. In addition, the PSI tool has been used by state and federal regulators to establish benchmarks of relative performance as a

basis for policy development and interventions. The PSI software has been designed to be applicable to any hospital inpatient database. AHRQ's PSIs include 27 measures of adverse events that have been correlated with likely patient safety issues.[18]

The Florida Data

In 2004, the Florida Patient Safety Network, an AHCA funded coalition of academic patient safety researchers from the University of South Florida, The Florida State University, the University of Florida, the University of Miami and Nova Southeastern University, produced a set of recommendations intended to pave the way for the creation of what is now the Florida Patient Safety Corporation. These recommendations were based on mandates included in Section 36 of Senate Bill 2-D calling for studies, of among other things, the utility of the Code 15 reporting system, and suggestions as to how patient safety in Florida could be improved through reporting, changes in statutory and regulatory provisions, or in other public/private systems and programs (such as incentives to electronic health records).

Among the studies conducted and reported by the academic patient safety network was the Assessment of Progress Made by the Florida Patient Safety Corporation Toward Achieving Select Statutory Requirements.[19] Included in this study was a comparative assessment of data obtained directly from the Code 15 database, compared against AHRQ PSI that measured data obtained from the Florida Uniform Hospital Database,

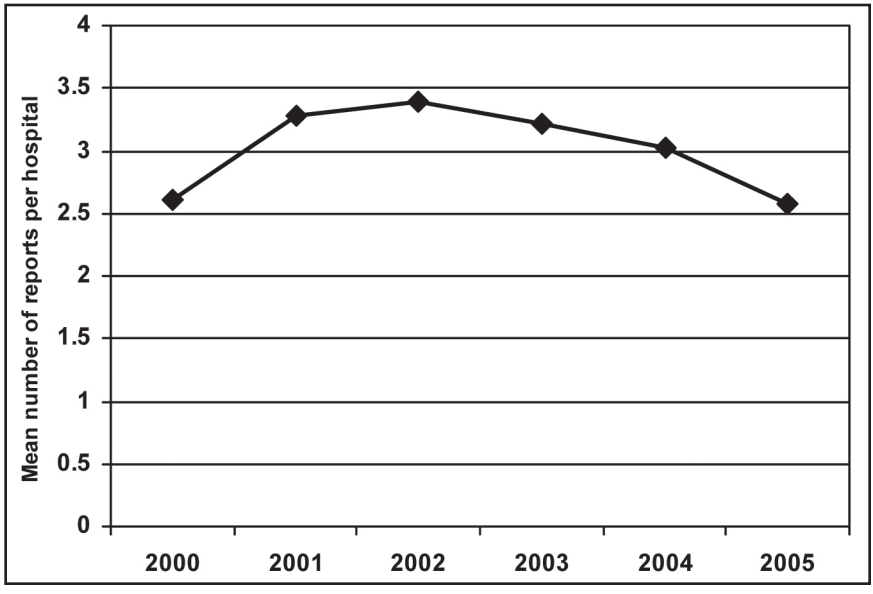
Mean number of reports per hospital considered one of the most reliable and complete hospital databases in the nation. These data did not provide information about payor source, but the comparative analysis revealed evidence of reporting gaps and data quality questions. And the adverse events that were reported could, if Medicare claims were involved, attract

the attention of those enforcing some of the fraud provisions of the Medicare Secondary Payor Act.

Briefly stated, we obtained data from the AHCA Code 15 reports for the 2000-2005 periods. Included in our analysis was a simple trend of average number of Code 15 reports per year for all Florida hospitals. As Figure 1 below indicates, the average ranged between 2.5 and just under 3.5 adverse event reports per hospital per year.

FIGURE 1: ANNUAL TREND IN AVERAGE NUMBER OF REPORTS PER HOSPITAL FLORIDA, 2000- 2005

Our more detailed analyses included reviews of the reported adverse incidents across the major reporting categories used by AHCA. There were often large variations across hospitals of similar size and case mix in the annual number of Code 15 reports on record for the five years that were studied. Some hospitals had no reported Code 15 events. But we deployed a cross checking method based on the application of



the above referenced, well validated AHRQ Patient Safety Indicator (PSI) measures using the Florida Hospital Discharge Database for the same categories of adverse events reported in the Code 15 standards, and for the same hospitals.

Two examples of the findings are presented in the Tables that follow, and are consistent with the general findings throughout our analysis. The AHRQ PSI measures were applied to the Florida Uniform Hospital Discharge data for each of the same hospitals for which Code 15 data were obtained, and for each of the categories of adverse event. In Table I, the adverse, mandatory reportable event of 'foreign body left inside during procedure" compared the AHRQ discharge data analysis as against the Code 15 reports. The variation is stunning, suggesting that, given the known reliability of the AHRQ measures and the validity of the AHCA discharge database as a source – the Code 15 process grossly under reports events.

Table I: Occurrence of foreign body left during procedure among the top most frequent hospitals for this event, for a given year in Florida

	Number of Foreign Body Left during Procedure (PSI #5)	Number of Code 15 reports for Foreign body left during procedure
Hospital A	7	2
Hospital B	6	0
Hospital C	5	0
Hospital D	4	0
Hospital E	4	1
Total	**26**	**3**

•Total number (all hospitals) of Code 15 reports for a foreign body left during procedure: **15**
•Total number of foreign body left during procedure per PSI #5: **85**
Note: None of the hospitals in this table had the highest rate of foreign body left during procedure.

Table II emphasizes this variance, using the adverse event category of 'postoperative hip fractures' (due in many instances to falls or dropping of the patient). Examining a second event produced a similar effect of profound under-reporting.

These data raise policy and legal issues. The policy matter pertains to the utility and relevance of Florida's Code 15 reporting system and process, and whether the State of Florida should continue to fund and operate the system. In our report to the State, we concluded that the system was unreliable, not used for its potential purpose, and could and should be transformed to a substantively different system that relied upon voluntary, deidentified reporting of errors and near misses. That recommendation, while enthusiastically embraced by the hospital, physician and insurance interests, and by many legislators, was not accepted by the State.

The relevance of these data extends beyond their value for

Table II: Occurrence of postoperative hip fractures among the top most frequent hospitals for this event, for a given year in Florida

	Number of postoperative hip fractures (PSI #8)	Number of Code 15 reports for postoperative hip fractures
Hospital A	4	2
Hospital B	3	0
Hospital C	3	0
Hospital D	3	0
Hospital E	3	0
Total	**16**	**2**

•Total number (all hospitals) of Code 15 reports for a foreign body left during procedure: **N/A**
•Total number of foreign body left during procedure per PSI #8: **107**
Note: None of the hospitals in this table had the highest rate of postoperative hip fractures.

monitoring or improving patient safety. The findings suggest that adverse events resulting in billable services may be occurring with some frequency – creating the possibility that health care providers may be billing Medicare and other third parties to repair errors caused during the course of the patient's care. To the extent this is occurring, it raises legal issues associated with the Medicare Secondary Payer Act (MSPA) and the expanding quality of care terms of the False Claims Act.

The legal and policy theory here is that if, in the course of treatment, an adverse event occurs, and if Medicare is billed for that episode of care, and if the patient should return to have the error fixed – then Medicare is entitled to recover the initial payment. Further, if there is a reasonable basis for determining that the provider knew, could have known or should have known about the adverse event, failed to report and/or charged again to repair it. This scenario could be interpreted under the auspices of both the MSPA and the False Claims Act as fraud, and subject to per incident fines and multiplier damage awards. Further, there is a provision within the MSPA that is a partial emulation of the *qui tam* opportunity for a relator. Except that the plaintiff need not be a relator meeting the bona fides of the False Claims Act – in that there is no requirement that they have been a patient or an employee blowing a whistle from the inside. Anybody can serve as the plaintiff.

Testimony to this distinctive plaintiff role is the effort by the now famous paralegal, Erin Brockovich, to sue an array of hospitals and hospital corporations in California courts in the mid 2000s.[20] Ms. Brockovich used certain published AHRQ and other patient safety data to make the point that each of the hospital and hospital corporation defendants named had a history of adverse events that had occurred within their entities. Further, Ms. Brockovich claimed that some reasonable percentage of those adverse events resulted not only in billing to Medicare for the services provided, but that the cases had returned to the same institution where they received re-

mediation and subsequent rebilling for the fix. Ms. Brockovich alleged that the defendants inappropriately received reimbursement from Medicare for treatment given to patients whose injuries were caused by the defendant as a result of medical error or neglect. Her complaint sought damages of twice the amount that the defendant was allegedly obligated to pay or reimburse Medicare in connection with the treatment in question, plus interest, together with plaintiff's costs and fees, including attorneys fees.

In her separate causes of action, she sought discovery of all of the cases treated in each of the hospitals. Her goal was to elicit from the hospitals, through discovery, those cases, without naming patients in advance, that met certain clinical criteria that might make them fit into the scheme she had defined, thereby making these cases potentially subject to the fine and damage provisions of the Medicare Secondary Payor and False Claims Acts.

In November 2006, the motion to dismiss the suit filed by principal defendant, Tenet Hospital Corporation was granted. After Tenet's motion to dismiss was granted, Brockovich filed an appeal of the dismissal to the U.S. Court of Appeals for the Ninth Circuit, but later voluntarily dismissed the appeal in March 2008. The remainder of the cases has been dismissed.

This was a first, aggressive, shot across the bow of the hospital industry that had attracted quite of bit of attention. These cases did not gain sufficient legal traction. But their premise remains well grounded in the language of the MSPA and the False Claims Act – not just as a legal exercise seeking to address fraud and abuse – but as a means by which to formally raise issues of patient safety and quality of care that are inextricably linked to ostensibly fraudulent billings.

And there is an audience of interest beyond Medicare, including private third parties who may craft actions in fraud and breach of contract for the same kinds of alleged behaviors.

Conclusions

Patient safety has joined fraud and abuse in statutory, regulatory and litigation applications. As a consequence, patient safety has acquired a powerful stick of fraud, with which to make its quality of care and public health points; and fraud and abuse has access to empirical, evidence based measures of safety and quality that can serve as a carrot to encourage less wasteful, and presumably, fewer fraudulent behaviors.

Patient safety and quality indices are becoming an increasing part of the Medicare reimbursement lexicon. These measurable, reportable clinical outcomes and processes are becoming more and more a part of the formal basis for reimbursing hospitals and physicians. This is a combined public policy push to get some control over health cost inflation; to affect in a rational manner the documented variability in costs and care and outcomes across health care providers; and to recognize that that there remains an element of fraud and abuse that affects both costs and quality.

As a matter of public policy, federal and state governments are encouraging the adoption of both electronic health information system capacity within providers (e.g. electronic medical records) and the ability to exchange health information between and among clinical providers, third parties and patients to create greater continuity of care and quality control. The availability of more valid, reliable and accessible data from clinical providers through electronic health information enhancements will permit regulators and attorneys (both plaintiff and defense) to glean insight into evidence-based clinical and administrative performance benchmarks of safety, quality and outcome – as well as fraud and abuse.

Endnotes:

[1] 42 U.S.C. 1395y(b).

[2] National Academy Press, Washington, D.C., 1999.

[3] Id.

[4] 119 Stat. 424, Public Law 109 – 41, amending 42 U.S.C. 299 by adding, among other things, "Part C – Patient Safety Improvement".

[5] 984 So.2d 478 (Fla. 2008).

[6] 31 U.S.C. 3729.

[7] Section 242(b) of the Social Security Amendment of 1972, 92 Stat. 1329 (1972).

[8] 91 Stat. 1175 (1977).

[9] 42 U.S.C. 1395.

[10] 110 Stat. 1936.

[11] 42 U.S.C. 1320a-7a(7).

[12] 31 U.S.C. 3730(b).

[13] Sect. 5001(c) 120 Stat. 4.

[14] (a) Results in one of the following injuries:

1. Death;
2. Brain or spinal damage;
3. Permanent disfigurement;
4. Fracture or dislocation of bones or joints;
5. A resulting limitation of neurological, physical, or sensory function which continues after discharge from the facility;
6. Any condition that required specialized medical attention or surgical intervention resulting from nonemergency medical intervention, other than an emergency medical condition, to which the patient has not given his or her informed consent; or
7. Any condition that required the transfer of the patient, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the patient's condition prior to the adverse incident;

(b) Was the performance of a surgical procedure on the wrong patient, a wrong surgical procedure, a wrong-site surgical procedure, or a surgical procedure otherwise unrelated to the patient's diagnosis or medical condition;

(c) Required the surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage was not a recognized specific risk, as disclosed to the patient and documented through the informed-consent process; or

(d) Was a procedure to remove unplanned foreign objects remaining from a surgical procedure.

Section 395.0197 (5), Florida Statutes.

[15] Any of the following adverse incidents shall be reported by the facility to the agency within 15 calendar days after its occurrence:

(a) The death of a patient;

(b) Brain or spinal damage to a patient;

(c) The performance of a surgical procedure on the wrong patient;

(d) The performance of a wrong-site surgical procedure;

(e) The performance of a wrong surgical procedure;

(f) The performance of a surgical procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or medical condition;

(g) The surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage is not a recognized specific risk, as disclosed to the patient and documented through the informed-consent process; or

(h) The performance of procedures to remove unplanned foreign objects remaining from a surgical procedure.

[16] http://www.ahrq.gov/qual/errback.htm

[17] Id.

[18] Hospital-level Patient Safety Indicators (20 Indicators)

Complications of anesthesia (PSI 1)

Death in low mortality DRGs (PSI 2)

Decubitus ulcer (PSI 3)

Failure to rescue (PSI 4)

Foreign body left in during procedure (PSI 5)

Iatrogenic pneumothorax (PSI 6)

Selected infections due to medical care (PSI 7)

Postoperative hip fracture (PSI 8)

Postoperative hemorrhage or hematoma (PSI 9)

Postoperative physiologic and metabolic derangements (PSI 10)

Postoperative respiratory failure (PSI 11)

Postoperative pulmonary embolism or deep vein thrombosis (PSI 12)

Postoperative sepsis (PSI 13)

Postoperative wound dehiscence in abdominopelvic surgical patients (PSI 14)

Accidental puncture and laceration (PSI 15)

Transfusion reaction (PSI 16)

Birth trauma -- injury to neonate (PSI 17)
Obstetric trauma -- vaginal delivery with instrument (PSI 18)
Obstetric trauma -- vaginal delivery without instrument (PSI 19)
Obstetric trauma -- cesarean delivery (PSI 20)
Area-level Patient Safety Indicators (7 Indicators)
Foreign body left in during procedure (PSI 21)
Iatrogenic pneumothorax (PSI 22)
Selected infections due to medical care (PSI 23)
Postoperative wound dehiscence in abdominopelvic surgical patients (PSI 24)
Accidental puncture and laceration (PSI 25)
Transfusion reaction (PSI 26)
Post-operative hemorrhage or hematoma (PSI 27)
Patient Safety Indicators Overview. AHRQ Quality Indicators. February 2006. Agency for Healthcare Research and Quality, Rockville, MD.
http://www.qualityindicators.ahrq.gov/psi_overview.htm

[19] June 2006, Florida Patient Safety Corporation.

[20] Brockovich v. Community Medical Centers, 2007 WL 738691 (E.D. Cal. March 7, 2007); Brockovich v. Tenet Healthcare Corp, et al, No. BC353406, Calif. Super., Los Angeles Co., Central Dist.; Brockovich v. Loma Linda University Medical Center, No. 06-0834, C.D. Cal., November 15, 2006.

NOTES

Health Law Section Membership Information

Health Law Section Membership Application

Health Law Section Affiliate Membership Information

Health Law Section Application for Affiliate Membership

Article Submission Guidelines

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Any member of the Bar in good standing (MIG) eligible for section membership.

Membership Dues $30.

Non-Member Affiliates - students, health law professionals are eligible for non-member affiliates.

Affiliate members $50

Affiliate students $25

Article III
MEMBERSHIP

Section 3.1. Eligibility. Any member of the bar, in good standing and interested in the purposes of this section, is eligible for section membership upon application and payment of the section's annual dues. Any member who ceases to be a member in good standing of the bar may no longer be a member of the section, unless they qualify as an affiliate member as set forth in Section 3.4.

Section 3.2. Administrative Year. The section's administrative year will run concurrently with the fiscal year of the bar (currently July 1st through June 30th).

Section 3.3. Annual Dues. The annual dues of the section shall be determined by the executive council and approved by the Board of Governors of The Florida Bar. After an applicant has become a member, dues shall be payable in advance of each membership year and shall be billed by the bar at the time that regular dues of the bar are billed. Any member whose dues are in arrears for a period of 3 calendar months after the first calendar month of any membership year will not be afforded member rights or privileges for such time that the member's dues remain in arrears.

Section 3.4. Affiliate Membership. The executive council may enroll, upon request and upon payment of the prescribed dues, as affiliate members of the section, other persons who can show a dual capacity of interest in and contribution to the section's activities as defined hereinbelow. The purpose of affiliate membership is to foster the development and communication of multi-disciplinary information utilized in health law, but not to encourage the unli-

censed practice of law. The number of affiliate members shall not exceed one-third of the section membership. An affiliate member is a member of this section only.

3.4.1. "Affiliate" or " Affiliate Member" means any person who practices a profession dealing with health care including but not limited to physicians, nurses, administrators, allied health practitioners, risk managers, students of any of the foregoing professions, accountants, students currently enrolled in an accredited school of law, law school graduates, in-house corporate counsel not admitted to The Florida Bar, paralegals, legal administrators or other persons who hold positions directly related to the health care industry and its involvement in health law.

3.4.2. Affiliates shall have all the privileges accorded to members of the section except that affiliates shall not be entitled to vote, to hold office, or to participate in the election of officers or members of the executive council or to advertise affiliate membership in any way. Affiliates may serve in an advisory, nonvoting capacity, which the executive council may from time to time establish in its discretion.

3.4.3. Affiliate members shall pay dues determined as set forth in these bylaws.

3.4.4. The section shall reimburse the bar for expenses incurred by the bar in administering this section's affiliate membership.

Application for Affiliate Membership Follows

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"Affiliate" or "affiliate member" means any person who practices a profession dealing with health care; including but not limited to physicians, nurses, administrators, allied health practitioners, risk managers, students of any of the foregoing professions, accountants, students currently enrolled in an accredited school of law, law school graduates, in-house corporate counsel not admitted to The Florida Bar, paralegals, legal administrators or other persons who hold positions directly related to health law."

"Affiliates shall have the privileges accorded to members of the Section except that affiliates shall not vote, hold office, or participate in the selection of officers or members serve in an advisory nonvoting capacity which the Executive Council may from time to time establish in its discretion."

The dues for affiliate membership are $50 per individual per fiscal year and student affiliate memberships are $25 per individual per year. The fiscal year starts July and ends the following June 30.

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Health Law Section, The Florida Bar
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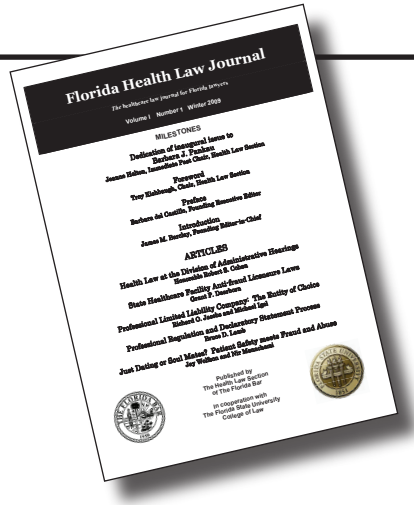

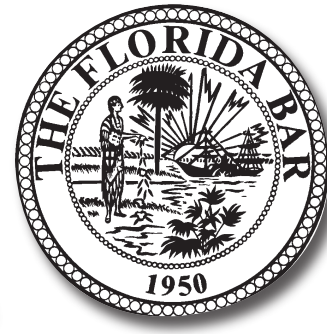

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