



# BUSINESS COUNSELING UPDATE

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## MEDICAL OFFICE SPECIAL EDITION

- November 2003 -

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### NEBRASKA SUPREME COURT UPHOLDS CAP ON MEDICAL LIABILITY

A major development in the area of medical liability occurred recently when the Nebraska Supreme Court upheld the statutory cap on the amount of damages a plaintiff is entitled to recover in a malpractice action. This cap had been declared unconstitutional by a lower court in 2000 before heading to the Nebraska Supreme Court on appeal. In *Gourley v. Nebraska Methodist Health Systems*, decided in May 2003, the Supreme Court reexamined the statutory ceiling on the amount of malpractice recovery. Lamson, Dugan & Murray, LLP represented the appellant health care provider, and successfully fought to maintain the cap and to reduce the jury's verdict from \$5,625,000 to \$1,250,000.

In a 5-2 decision, the court rejected arguments that the cap was an unconstitutional violation of equal protection, that it constituted a taking without just compensation, and that it violated separation of powers. In addition, the court found no merit in the patient's challenge that the liability cap was a type of unconstitutional "special legislation" that unfairly gave doctors a privilege not extended to other professionals. While the decision left open the possibility of a constitutional attack on other grounds, the court went on to recognize that the cap was firmly grounded in public policy, and ultimately held that the Legislature's concern of providing quality health care at affordable costs was deemed to be a valid justification for the cap.

The cap on medical expenses was enacted in 1976 as part of the Nebraska Hospital-Medical Liability Act. The Act, a response to the perceived crisis

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LAMSON, DUGAN & MURRAY, LLP

caused by Nebraska's rapidly-rising medical costs, created a fund to ensure that malpractice claimants would be compensated, organized a medical review panel, and placed a limit on the amount of recovery in medical malpractice cases. Legislators viewed the cap as a way to serve the public interest by reducing the cost of malpractice insurance coverage, thus improving the quality and availability of medical care.

Many are convinced that the medical liability cap has been responsible for helping keep down insurance costs. The Nebraska Medical Association has pointed out that without the cap, the public's health costs would likely increase because physicians would need to pay higher premiums for malpractice insurance to maintain coverage and would then be forced to pass these higher costs on to the patient. While the cap has recently been increased from \$1.25 to \$1.75 million for each occurrence of medical professional malpractice, the existence of a ceiling on recovery ensures that malpractice insurance costs will not become prohibitive. Lamson, Dugan & Murray, LLP remains firmly committed to these ideals and will continue to protect the rights of those affected by the Nebraska Hospital-Medical Liability Act.

Stacy L. Morris

## CHARGING PATIENTS FOR COPIES OF THEIR RECORDS UNDER HIPAA

Although questions on HIPAA abound, one area of particular concern seems to center around the amount providers may charge for copying patient records. Most providers charge the amount allowed under Nebraska law regardless of the person requesting the records: a \$20 handling fee

plus 50¢ per page. However, if a patient requests his or her own records, HIPAA mandates some changes in this copying fee.

As most of you are probably aware by now, HIPAA preempts less stringent State law provisions, and in this instance,

HIPAA partially preempts Nebraska law. In Nebraska, a provider may charge a handling fee, up to \$20, and no more than 50¢ per page as a copying fee when a patient requests his or her records or when the provider receives a subpoena for those records. However, HIPAA does not provide for a handling or retrieval or any similar fee, but does allow the provider to charge the patient a "reasonable, cost-based fee." This fee would include the actual costs of copying (including supplies and labor for copying) and postage. Since HIPAA does not limit the amount a provider can charge per page, in theory the provider could charge his or her actual costs for

making the copies, with no limit. The provider may also charge a fee for providing a summary of the records, if the patient requests such a summary and agrees to the fee in advance. Although a consistent interpretation seems to be up in the air, most agree that the fee limitation applies only when the individual requests his or her records, not when anyone else does so.

Therefore, because HIPAA does not provide for a handling fee and Nebraska law does allow such a fee, HIPAA preempts the Nebraska law on this issue because HIPAA is more stringent. Further, because Nebraska law sets a limit on the amount a provider may charge per page for copying and HIPAA does not, Nebraska law is more stringent and consequently governs. In summary, when a patient requests his or her medical records you may charge them a "reasonable cost-based" fee for copying the records, although your fee may not exceed 50¢ per page. When anyone else requests a patient's records, HIPAA does not apply and you can charge the fees allowed in Nebraska, *i.e.* a \$20 handling fee and 50¢ per page.

Michele E. Young



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## OCCUPATIONAL SAFETY AND THE MEDICAL OFFICE

Between October 2001 and September 2002, the Occupational Safety and Health Administration (“OSHA”) cited 223 medical offices across the country for violations of OSHA. Of the citations, 116 (or 52%) involved blood-borne pathogen issues, 36 (or 16%) involved hazard communication matters and 14 (or 6%) involved electrical safeguards and wiring issues. The remaining 26% of citations involved a myriad of other citations. The penalties for the three main citations for the year amounted to less than \$65,000.

OSHA’s current enforcement policy is to focus on employers who have received “high gravity” citations. In February 2003, OSHA notified 14,200 employers that their rates were higher than average. Few, if any, medical offices are on this list. In addition to enforcement, OSHA’s current strategy focuses on outreach, education and compliance assistance.

We advise our medical clients to have proper blood-borne pathogen, needlestick safety and hazard communication policies in place. We also strongly suggest the establishment of a general safety program. The following are steps we believe medical offices should take to comply with the basic OSHA requirements:

- 1) Champion a safety program.
- 2) Appoint a safety coordinator.

OSHA says your practice must devise programs to implement the agency’s standards on blood-borne pathogens/needlestick safety and prevention and hazard communication (for workers who are exposed to dangerous chemicals), and each initiative needs a leader. The safety coordinator can fill those roles.

- 3) Assemble a safety committee.
- 4) Draft a safety manual. OSHA demands that you put your mandatory programs on blood-borne pathogens and chemical hazard communication in writing. Your safety manual could also discuss indoor air quality, tuberculosis precautions, general safety (such as electrical wiring and places where people may trip) and emergency planning (who does what when a fire breaks out, for example).
- 5) Train staffers and doctors. Institute annual safety classes based on your manual. OSHA mandates this specifically for blood-borne pathogens and chemical hazard communication.
- 6) Collect and analyze safety data. Encourage the doctor and employees to file incident reports on any accident, near-accident, or safety violation they encounter. Then, review these at safety committee meetings. OSHA, though much maligned, tries to be helpful. Its Website <http://www.osha.gov> features helpful information.

Also, medical offices should be aware that, while the Nebraska Department of Labor is not an

OSHA enforcement authority, state law requires that it enforce the federal standards. The Nebraska DOL will dispatch a safety inspector to a place of business free of charge to identify problems. Violations found during this consultation will not result in a citation or penalty, but you will be expected to correct any problems. Information on this program can be found at the Nebraska DOL’s website - <http://www.dol.state.ne.us/>.

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Medical offices that take these steps toward a safer office can reap economic rewards. Insurers may discount premiums if an organization addresses accident prevention as part of a broader risk management program. In addition, courts respect good-faith efforts. If someone gets hurt and sues you, and you have a safety program, the settlement tends to be lower. OSHA feels the same way - it’s likely to ease up on fines.

Brian J. McGrath



## IRS APPROVES REIMBURSEMENT OF OVER-THE COUNTER DRUGS FROM CAFETERIA PLANS

The IRS recently announced in a Revenue Ruling (2003-102) that the cost of over-the-counter drugs and medicines may be reimbursed by medical flexible spending account plans. In a departure from its prior position, the IRS now allows "reimbursements by an employer of amounts paid by an employee for medicines and drugs purchased by the employee without a physician's prescription are excludable from gross income" under Code Section 105(b). The Revenue Ruling does not, however, permit the reimbursement of dietary supplements (e.g., vitamins) that are "merely beneficial to the general health" of an employee or the employee's spouse or dependents.

The Revenue Ruling provides an example in which an employee pays for an antacid, an allergy medicine, a pain reliever and a cold medicine from a pharmacy. The items are purchased to alleviate or treat personal injuries or sickness

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*The IRS found that amounts expended by an employee without a physician's prescription may be expenditures for medical care.*

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of the employee or the employee's spouse or dependents. None of the items are purchased with a prescription. The employee submits substantiated claims for all of these expenses, which have been incurred during the plan year, to the employer's health FSA for reimbursement. Under the new Revenue Ruling, the IRS found that the amount expended by the employee to purchase the antacid, allergy medicine, pain reliever and cold medicine without a physician's prescription is an expenditure for medical care and thus could be reimbursed by health FSAs, HRAs and other employer-provided health plans.

The IRS also ruled that dietary supplements (e.g., vitamins) purchased by the employee without a physician's prescription to maintain general health of the employee or the employee's spouse and dependents are not expenses for medical care and are not reimbursable. The reason given for the denial of tax-free status, however, was not related to over-the-counter status - it was because the dietary supplements were "merely beneficial" to general good health.

Even though this is significant news, there are still a number of questions left to be answered. For example, the Revenue Ruling does not specify an effective date, and therefore whether a plan may rely on it immediately depends on how the plan documents are currently drafted. If the plan is drafted broadly enough, it may permit reimbursement of such expenses

since the beginning of the plan year. If the plan must be amended to allow reimbursement of the cost of over-the-counter drugs, the amendment(s) may only be effective prospectively. Regardless of whether your plan must be amended, summary plan descriptions (SPDs), reimbursement request forms, and communication materials will most likely need to be revised to reflect any changes.

Craig F. Martin

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