HEALTH LAWYERS NEWS

VOLUME 7 • NUMBER 6 • JUNE 2003

Your law firm signed that HIPAA business associate agreement

But is the firm complying with it?

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A PUBLICATION OF THE AMERICAN HEALTH LAWYERS ASSOCIATION

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On the Cover

As a healthcare lawyer, you or your law firm has signed HIPAA business associate agreements. But is the firm complying with those agreements? The article, written by Kristen B. Rosati, Coppersmith Gordon Schermer Owens & Nelson PLC, and Edward F. Shay, Post & Schell PC explains the provisions required in those agreements

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Mission Statement

The mission of the American Health Lawyers Association is to provide a forum for interaction and information exchange to enable its members to serve their clients more effectively; to produce the highest quality non-partisan educational programs, products and services concerning health law issues; and to serve as a public resource on selected healthcare legal issues.

American Health Lawyers Association Diversity Statement

In principle and in practice, the American Health Lawyers Association values and seeks diverse and inclusive participation within the Association regardless of gender, race, creed, age, sexual orientation, national origin, or disability. The Association welcomes all members as it leads health law to excellence through education, information and dialogue.

Expert Decision Makers: Premature or Panacea for the Medical Malpractice Insurance Crisis

Jason Oliver Houser
Venable Baetjer and Howard LLP, Baltimore, MD

For some time now, a major public policy debate has focused on the looming medical malpractice insurance crisis affecting healthcare providers across the United States. Medical liability reform has become the number one legislative priority for the American Medical Association (AMA). In March of 2003, the AMA increased its list of "crisis states" to eighteen including: Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington, and West Virginia.

A great deal of recent media attention has focused on physicians in states such as West Virginia and New Jersey who have gone on strike in protest of the unusually high insurance premiums that they are incurring. Additionally, there have been anecdotal reports of physicians responding to the medical malpractice insurance crisis by choosing to retire early, completely uprooting an established practice and moving to another state with lower premium rates, or refraining from high risk medical specialties such as obstetrics or neurosurgery.

Interestingly, opinions about the cause of the malpractice insurance crisis vary depending on philosophical and professional perspectives. Trial attorneys point to under-performing insurance company investment portfolios and systemic operational quality of care impediments as major contributing factors to the recent hike in premiums. On the other hand, healthcare providers and insurance companies point to the unwieldy litigation climate in the United States, which they claim is headed by trial attorneys seeking high contingency fees, as well as a juries that are susceptible to sympathy inspiring plaintiffs and muddled by sophisticated medical issues.

Both sides of the policy debate argue that their position protects the patient's best interests. Trial attorneys assert that the current premium crisis is merely part of a cyclical economic trend and that the current medical malpractice structure plays an important role in protecting a patient's right to seek just compensation for an injury. Alternatively, healthcare providers claim that reform is necessary to protect patient access to high-level quality healthcare at affordable rates.

Using similar legislation passed in the State of California as a model, the U.S. House of Representatives took the nation a step closer to malpractice liability reform in March, 2003 when it passed the Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003 (H.R. 5). The Association of Trial Lawyers of America opposes the enactment of the HEALTH Act but both the AMA and the American Hospital Association support the legislation which includes such reform measures as: placing a three-year time limit from the date of a malpractice incident or one year from the date of discovery for filing a malpractice lawsuit; establishing a national cap of $250,000 on non-economic damages; allocating the level of financial liability to be commensurate with the defendant's culpability; placing limits on the contingency fee paid to a claimants attorney; allowing punitive damages in certain cases; and permitting periodic payments to successful plaintiffs rather than lump sum awards. However, the U.S. Senate's version of the HEALTH Act (S. 6) will likely face difficult opposition in the Senate and skeptics doubt that the reform legislation will come to fruition during this year's legislative session.

The advocacy group "Common Good" is calling on Congress to enact even greater medical liability reform measures than are provided for in the HEALTH Act. This

group is supported by approximately seventy prominent healthcare industry leaders who represent an array of healthcare industry sectors including academic medical centers and professional societies. One of the more radical reform ideas is the concept of replacing civil jurors with expert medical malpractice decision makers. Supporters of this concept largely claim that experts are needed to fully comprehend the extremely complex issues associated with medical malpractice cases, such as determining the proper standard of care that should be applied in a particular case, deciphering dueling expert witness testimony, and comprehending increasingly perplexing medical terminology and procedures.

While I support certain medical malpractice reform measures contained in the HEALTH Act, the more radical proposal of eliminating the current citizen civil juror system in medical malpractice cases is troubling. I do not dispute that the concepts that a jury, composed of ordinary citizens, must interpret during a medical malpractice case are complex and sometimes technical. If our society were to make the determination that the American jury system is ill suited to properly address medical malpractice disputes due to the complex and emotional issues involved, we would have to re-examine our entire jury system in both civil and criminal cases. Arguably, over the past decade criminal trials have grown increasingly complex due to advances such as technical DNA evidence. I do not subscribe to the argument that the complexities of a medical malpractice case are distinctively greater than the complexities of a murder trial or even a white-collar crime case involving an intricate accounting scandal.

The solution to the adjudication of complex medical malpractice cases does not reside with the removal of civil jurors. To the contrary, the American legal system must respond to such criticism by ensuring that the jurors are able to comprehend medical concepts without "dumbing-down" the underlying issues. The burden falls upon trial attorneys to ensure that evidence is presented in a clear and succinct manner and that expert witnesses communicate their knowledge in an understandable format. Finally, we must have faith in our fellow citizens that they will be able to distinguish between the factual case before them and the humanistic desire to sympathetically identify with an injured patient.

There are too many alternative options that have less drastic ramifications that may be pursued prior to our society's premature abandonment of the current civil jury system in medical malpractice disputes. While even the HEALTH Act is not likely to be the panacea that some proponents claim, the legislation's passage would be a reasonable step forward toward alleviating the current medical malpractice predicament.

Jason O. Houser, Esq., a 2002 graduate of the University of Richmond in Virginia, is an associate with Venable Baetjer and Howard LLP, in Baltimore, MD. He advises clients on federal and state regulatory compliance issues, impacting healthcare providers and organizations. Houser can be contacted at (410) 244-7698 or johouser@venable.com.

At the request of the Association's Membership Committee, this additional feature in the magazine will be included on a regular basis. It is written by AHLA members who are health law associates, attorneys new to health law, or law students. The purpose of the new column is to provide additional avenues for participation from a diverse cross-section of the membership; enable members to communicate and network with one another; and offer a new and different perspective on health law issues of interest to many of the Association's members. If you are interested in writing for this column, contact Emily Gaumer at (202) 833-0781.