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# THE BENCHMARK

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## SPSK Wins Big For Hospital Client

**By Brian M. Foley, Esq.**

On behalf of one of its New Jersey hospital clients* Schenck, Price Smith & King, LLP, prevailed in a significant arbitration against two national managed care companies, resulting in the hospital's recovery of over one million dollars in additional reimbursement for chemotherapy drugs.

Approximately one year into its new contracts with the two related managed care companies, the hospital realized that its revenues from outpatient services were declining. Upon further investigation, it appeared that the hospital was receiving significantly less reimbursement for chemotherapy than it received under prior contracts with the two companies. Under the prior contracts, dating back many years, the hospital received reimbursement for outpatient chemotherapy services, consisting of two components: 1) the fee for the administration of the chemotherapy, and 2) the fee for the chemotherapy drug. This two-part payment arrangement has been, and continues to be, the accepted practice among hospitals and third-party payers, including managed care companies and government payers such as Medicare.

Chemotherapy drugs are among the highest cost items that hospitals provide to their patients. As such, the reimbursements for these drugs are usually much greater than the reimbursements for the administration of them. Commonly, the reimbursement for the drugs may be thousands of dollars, while the reimbursement for the administration may be a few hundred dollars.

When the hospital questioned the two managed care companies about the declining revenues that it was receiving related to the outpatient chemotherapy services, the companies replied that they were paying a combined fee to cover both the drug and the administration. The combined fee, however, was little more than the amount the hospital had been paid previously, for just the administration. It did not appear to include the fee for the drug. As an example, under the prior contracts, the hospital may have received reimbursement for chemotherapy services rendered to a particular patient in the amount of $300 for the administration of the drug, and $2,000 for the drug, for a total payment of $2,300. Under the new contracts, for the same patient, receiving the same

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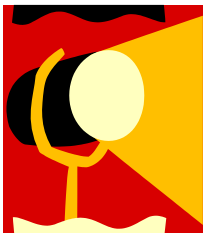
* In the interest of maintaining confidentiality, the name of the hospital and the two managed care companies are not identified.



# CLIENT SPOTLIGHT

## Jeff Veenhuis: Team Spine and Insight Neural Monitoring

**By Susan J. Flynn-Hollander, Esq.**

Waukesha, WI – located on both sides of the Fox River, which starts near Menomonee Falls and flows into the Illinois River in the Upper Midwest section of the United States; incorporated as a city in 1896; total population of nearly 66,000; once known as "Saratoga of the West," for its local mineral water that had "miraculous benefits" for persons suffering from all manner of urinary tract and bladder problems, diabetes, kidney disease, torpid liver, indigestion, chronic diarrhea, dropsy, and 'female weakness', according to reports made in 1873 (the natural springs have since been spoiled by pollution or gone dry); site of the first legal forward pass thrown in football in1906; and home to rock star Steve Miller, Team Spine Inc. and Insight Neuralmonitoring Inc.

Team Spine, a Medical, Dental and Hospital Supply company, originally partnered with Medtronic Spinal to successfully operate a large distributorship for spinal implants. About five years ago, Team Spine executives Jeff Veenhuis and Tim Healy identified a regional opportunity in the fast-growing field of intraoperative monitoring, and started a new, full-scale IOM company, Insight Neural Monitoring. According to Jeff Veenhuis, in the years ahead, "Insight will be doing hundreds of cases, and involved in many more things than spine surgery. I hope to have technologies that allow us to increase our impact on making surgeries safer."

Intraoperative monitoring involves the use of mechanical devices to record and display physiologic parameters such as heart rate, blood pressure, oxygen saturation, and temperature. It can also involve the use of electrophysiological methods including EEG, EMG and evoked potentials to monitor the functional integrity of neural structures (brain, nerves, spinal cord) during surgery.

IOM is most frequently used in neurosurgery such as spinal surgery; certain brain surgeries; carotid endarterectomy; ENT procedures including acoustic neuroma resection; thoracic-abdominal aortic aneurysms; and peripheral nerve surgery. Intraoperative monitoring localizes neural structures, tests the function of these neural structures and can provide early detection of intraoperative injury thus allowing for immediate corrective measures to be taken by the surgical team.

*"We see great opportunity for a company such as ours with established clinical standards and the scale to do huge caseloads without compromising on the quality of care."*

The basic science behind the various IOM techniques (EEG – electroencephalography; EMG – electromyography; ABR - auditory brainstem response, aka BSEP, BSER, BAEP; SSEP – somatosensory evoked potentials; TCeMP – transcranial electrical motor evoked potentials; TCD – transcranial Doppler; DBS – deep brainstem stimulation; PST – pedicle screw testing; and ECOG – electrocortocography) lies within the body's electrical activity and how it is conducted from structure to structure. This electrical activity is measured via needle electrodes based on strength and a time scale, and this digitalized information is gathered 'real time' during a surgery and interpreted by the clinician to aid in decisions regarding the integrity of the central and peripheral nervous system structures. Monitoring occurs in the operating room while surgery is being performed.

At Insight, Jeff and his team of IOM professionals strive to be the premier service provider in the industry. The Insight Medical Director is a Board Certified Neurologist (M.D.) and Insight clinicians are Board Certified Neurophysiologic Intraoperative Monitoring (CNIM) clinicians and American Board of Registration of Electroencephalographic and Evoked Potential Technologists (ABRET). In addition to classroom and OR training, each clinician is required to participate in a rigorous apprenticeship that includes hands on case studies at many institutions, including Abbott Northwestern with Dr. Stanley Skinner of the Minneapolis Neuroscience Institute, Minneapolis, MN.

While Insight was not officially incorporated until 2008, Jeff Veenhuis and Tim Healy were testing the market and garnering advice and counsel from various

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# DID YOU KNOW?

Vermont ranks as the nation's healthiest state, Louisiana as the least healthy state. Key factors contributing to these results included unprecedented levels of obesity, an increasing number of uninsured people, and the persistence of risky health behaviors, particularly tobacco use.


Hospitals across the country have laid off more than 1,200 employees over the past month, contributing to the country's highest unemployment rate since 1994.

Gulf War syndrome is a real illness. A major federal study concluded that exposure to toxic chemicals sickened one in four Gulf War veterans. Symptoms include memory and concentration problems, persistent headaches, unexplained fatigue, and widespread pain.

The Justice Department secured $1.12 billion in fiscal 2008 from settlements and judgments from healthcare organizations alleged to have defrauded the government. The figure is down from $1.53 billion reported for 2007.

The USA's largest pharmaceutical lobbying group is preparing a multimillion dollar public relations campaign to push the importance of free market healthcare and undercut an expected push by the Obama administration for price controls of prescription drugs.

Healthcare stocks are usually seen as a haven when the economy slows because the demand for many healthcare products and services continues unabated at any rate. Although they have struggled lately, they still have managed to outperform the broader market.

An increasing number of countries now consider the spread of HIV a crime according to an International Planned Parenthood Federation report. So far, 58 countries have laws that criminalize HIV or use existing laws to prosecute people for transmitting the virus and another 33 are considering similar legislation. Health officials contend that these laws undermine advances made in the fight against the AIDS epidemic.

Personal health records ("PHR") could save payers and providers $21 billion annually according to new research from the Center for Information Technology Leadership. The report said that interoperable PHR systems that collect and share information such as patient test results and medication lists improve efficiency in healthcare delivery by reducing waste and errors, and decreasing costs.

**Continued on Next Page**

The nation's mayors and governors are urging Congress to jump start the economy by extending unemployment insurance and boosting funding for Medicaid. They are promoting a federal spending plan that could total $126 billion in additional spending on such initiatives.

The global recession is having a negative impact on medical tourism. Business Week reports that hospitals in foreign countries that had been counting on a big influx of overseas patients are scaling back expectations. Dental tourism remains popular because of high costs and a lack of adequate dental coverage in the U.S.

## Whither Healthcare Reform?

**By M. Sheilah O'Halloran, Esq.**

**ARTICLES OF INTEREST**

On December 3, 2008, Morris County based Atlantic Health, a long standing SPSK healthcare client, convened a panel of healthcare policy experts to discuss the prospects for healthcare reform in the new administration and the pressure on healthcare providers in the current economic environment. There was some good news and some bad news for all. While expressing guarded optimism that the chances for healthcare reform are better than they have been in years with the change of administration, all five panelists agreed that the complexity and cost of healthcare reform, coupled with dwindling federal and state resources, make the prospect of sweeping reform unlikely in the short term.

At the federal level, the focus is expected to be on the expansion of health insurance coverage. In the view of Dr. Eliot Fishman, Director of the Office of Policy in the New Jersey Department of Health and Senior Services, the number of uninsured is the most scandalous aspect of the United States healthcare system. Carolyn Forcina, Regional Executive of the American Hospital Association (AHA), agreed that although coverage is a key aspect of healthcare reform, reform involves more than just expansion of coverage. For that reason, AHA is focusing efforts on what Forcina described as five pillars of reform: wellness, efficiency and affordability, enhanced quality, expansion of information sharing, including the development of a national electronic health record, and coverage for all with payment by all. Ryan Haaker, Vice President of the Washington, DC-based MWW Group, concurred that healthcare reform in the upcoming years will focus on enhancing effectiveness, reducing costs, and incentivizing efficiency and effectiveness in the delivery of care. To achieve these goals, Haaker said, echoing Forcina's view, the insured must be willing to make sacrifices to help the uninsured.

At the state level, the challenges hospitals face in the near term are daunting. According to Dr. Fishman, in recent years the focus in New Jersey has been on the fragility of urban hospitals. Hospitals throughout New Jersey are struggling. Sean Hopkins, Senior Vice President of the New Jersey Hospital Association, noted that more than half of New Jersey's hospitals are operating in the red. Even hospitals that are not operating at a loss have operating margins that are substantially below what is required to permit reinvestment in facilities. Chronic underfunding by the government for charity care is a key factor contributing to the precarious financial condition of New Jersey's hospitals. The current economic turmoil has directly affected New Jersey hospitals, explained Hopkins, by hampering hospitals' access to capital and financing for facility improvements and increasing borrowing costs at a time when patient volume, investment income and fundraising are all down. Developing a strategy to keep New Jersey's hospitals viable must be a priority.

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Beyond the need to shore up New Jersey's hospitals, Dr. Fishman suggested that there is a compelling need to develop a comprehensive plan to reform the primary care system. The focus needs to change from simply healthcare financing to preventive services. Forcina agreed that any healthcare reform must include guaranteed access to primary care, which will require that primary care providers be paid more to attract more practitioners. Dr. Fishman believes that while there will likely be no national system changes in the short run, the incoming administration will be open to local initiatives, particularly in the area of primary care. Kim Champi Krenik, Director of Federal Relations for NJHA, agreed. Krenik said NJHA is hoping a new economic stimulus package at the federal level will channel aid to the states for healthcare initiatives.

All agreed that the key to meaningful healthcare reform will be advocacy by all stakeholders. As Ryan Haaker put it, "healthcare fatigue" tends to set in quickly because of the cost and complexity of the solution. To effect change, the public will need to keep the issue on the front burner for policy makers.

## Apologies Emerging as a Medical Malpractice Strategy

**By Judy Pak Chung, Esq.**


Imagine you get back surgery. A short time later, you are deathly ill from a surgical device accidentally left in your abdomen that caused an infection. If the doctor treating you tells you "I'm sorry," would you forgive and forget?

Everyone makes mistakes and many healthcare providers who have the heartfelt desire to explain and apologize for their mistake are caught in an awful dilemma. In medical malpractice situations, attorneys usually advise doctors and hospitals to deny that any medical error has been made or even express any form of regret that a patient is suffering.

In legal language, an admission is a statement against one's own interest, and the general rule is that an admission may be considered by the court. An apology constitutes an admission and in the event of litigation, may be considered by the court. Accordingly, there was a decided shift away from moral concerns to strategic maneuvers and legal consequences.

However, there's some evidence that this approach may be changing. More medical institutions are promoting open communication, full disclosure of medical errors, and apologies to patients and their families when something goes wrong.

By promptly disclosing medical errors and offering earnest apologies and fair compensation, hospitals and physicians are hoping to restore integrity to dealings with patients, make it easier to learn from mistakes and dilute anger that often fuels lawsuits. Studies reveal that patients sue not simply because of the injury to their bodies but rather because of the insult to their dignity. When patients are not treated with respect, when they are not told the truth, when a healthcare provider does not take responsibility for his or her actions, patients often feel they have no alternative.

*More medical institutions are promoting open communication, full disclosure of medical errors, and apologies to patients and their families when something goes wrong.*

The VA Hospital in Lexington, Kentucky developed a disclosure program which essentially consists of: 1) identification of an instance of accident, possible negligence or malpractice by risk management; 2) notification to a patient that there was a problem with the care received and an invitation to come to the hospital; 3) a face to face meeting; and 4) an offer of continuing assistance to the patient in obtaining compensation. This approach reaped significant economic rewards for the hospital. It went from being among the nation's VA hospitals that paid the most in claims to among those that pay the least.

Various organizations, such as the University of Michigan Health System, have replicated the VA Hospital's disclosure program. At the University of Michigan Health System, existing claims and lawsuits dropped from 262 in August 2001 to 83 in August 2007, and legal costs fell by two-thirds. Moreover, at the University of Illinois, of 37 cases where the hospital acknowledged a preventable error and apologized, only one patient filed suit.

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# Environmental Alert

## By Richard J. Conway, Jr. Esq.

Having faced years of environmental focus on their operations, hospitals and health care providers should currently have good control over their handling of regulated and hazardous substances and disposal of regulated medical wastes, universal wastes and hazardous wastes (such as waste epinephrine) and other matters such as air, water and underground tank permits. Some continue to take the opportunity to conduct voluntary compliance audits of their operations to identify and correct regulatory problems that otherwise could pose substantial threats of enforcement, fines and increased operating costs. Some, of course, deal only with what they must address immediately.

Any proposed purchase or lease of real estate, and/or expansion of facilities by new construction, should trigger current review and consideration of the environmental conditions of the target site. Dealing with such issues now may avoid significant future issues and liability. Transactions can be restructured or reconsidered, and designs can be changed, to address real and imagined issues before major investments occur (for example, protections against vapor intrusion from groundwater contamination is relatively inexpensive in new construction; (www.nj.gov/dep/srp/guidance/vaporintrusion/). There is far less flexibility after the fact.

Also, any existing or proposed child care facility regulated by the state already should be considering and addressing environmental issues to obtain and maintain its license. (www.nj.gov/dep/dccrequest/)

Rarely will environmental conditions prevent successful pursuit of plans. Instead they may affect timing, and increase costs, neither of which is desirable as economic pressures on health care costs require greater efficiency and focus. In some circumstances, discussions with counsel can occur in a privileged and confidential manner, assisting preliminary thinking: obviously actual threats need to be addressed to protect patients, visitors and staff, and potentially others (neighbors). Facing the reality of such issues early, identifying them and managing them forthrightly, can reduce both long term and short term risks. Good consultants and good lawyers can work with you to help achieve your goals.

STUDENT CORNER


# Gardasil: Medical Miracle or Merck's Myth?

## Should Schools Mandate the Vaccination of School Girls?

## By Nicole McErlean

In June 2006, the Food and Drug Administration (FDA) approved Gardasil®, the first vaccine against human papillomavirus (HPV). Gardasil is intended to prevent four strains of HPV associated with cervical cancer and genital warts. Currently, state legislatures around the country are engaged in a concentrated effort to pass laws mandating vaccination of young girls against HPV. Questions remain whether this decision has a basis in science or politics.

**HPV & Cervical Cancer**

An estimated fifteen percent of the United States population is currently infected with some form of HPV. HPV encompasses more than one hundred different viral strains, of which more than thirty infect the genital area. The majority of HPV infections are asymptomatic. However, two particular strains, sixteen and eighteen, have been classified as carcinogenic, accounting for 70 percent of cervical cancer cases. Despite the carcinogenic nature of these two particular strains, the combined prevalence in the United States population has been found to be between 1.3% and 7.8%. While more than 200,000 women die of cervical cancer each year, less than 3.4% of these deaths occur in the United States.

**FDA Approval & National Recommendations**

Merck conducted a five-year clinical trial of Gardasil. The double blind,

**See "Gardasil" on Page 12**

# Obama Targets Ambitious Healthcare Plan

## By Jordan Hollander

During the 2008 presidential election, healthcare reform was a hot-button issue on many voters', and candidates', minds. Each candidate had his or her own vision for reform, and proposed plans ranged from universal healthcare coverage to letting the free market determine prices, with several variations on the theme.

President-Elect Barack Obama has proposed a plan for healthcare reform that attempts to take a middle road between what he calls "two extremes: government-run healthcare with higher taxes or letting the insurance companies operate without rules." According to Obama, "I'll end the outrage of one in five African Americans going without the healthcare they deserve. We'll guarantee healthcare for anyone who needs it, make it affordable for anyone who wants it, and ensure that the quality of your healthcare does not depend on the color of your skin. And we're not going to do it 20 years from now or 10 years from now, we're going to do it by the end of my first term as President."

The main points of Obama's plan include:

◇**Make Health Insurance Work for People and Businesses - Not Just Insurance and Drug Companies**

- Require insurance companies to cover pre-existing conditions so all Americans regardless of their health status or history can get comprehensive benefits at fair and stable premiums.
- Create a new Small Business Health Tax Credit to help small businesses provide affordable health insurance to their employees.
- Lower costs for businesses by covering a portion of the catastrophic health costs they pay in return for lower premiums for employees.
- Prevent insurers from overcharging doctors for their malpractice insurance and invest in proven strategies to reduce preventable medical errors.

*"We'll guarantee healthcare for anyone who needs it..."*

**See "Obama" on Page 14**

# Healthcare Advocacy

## By Jacob R. Peltzman, MBA, MPH

The healthcare system in the United States is fragmented and broken. It is well documented that patients have an increasingly difficult time finding healthcare providers and hospitals that provide quality care. The general consensus amongst the healthcare community is that patients will need to play an increasing role in determining the course and quality of their care.

This problem has gained increasing awareness in the media and through current events. The problem is not only relevant, but it is increasingly significant as well. As the baby boom generation ages and an increasing shortage of physicians and nurses grows, making decisions on who provides care and where to go for care have become extremely important.

In a recent convenience sample of 40 patients in various support groups, there is evidence that obstacles to quality care are inherent within the healthcare system. The study sought to seek answers to the following questions:

1. Where do patients get their health care information?

2. How helpful/confusing is the information they obtain in their decision making?

3. Do they have insurance and has it been confusing to them to navigate this system?

According to the survey, patients are getting much of their information from the internet, their physician(s), and informal networks of family and friends. It appears

from our survey many patients are researching treatment options and disease state information on the internet and are reaching out to physicians for referrals. This seems logical as there is a tremendous amount of information available online for disease states and treatment options. The growing popularity of certain sites such as www.webmd.com, www.revolutionhealth.com, as well as hospital sites that also offer information, make the internet a logical choice for information. Unfortunately, due to the overwhelming volume of

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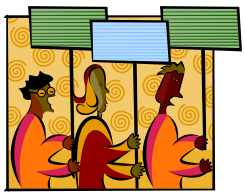
# NEWS ALERTS

Labor unions across all industries and business sectors are pushing for passage of the Employee Free Choice Act (EFCA). The Democratic Congress clearly supports passage of EFCA and President-Elect Barack Obama has vowed to sign EFCA in its current form. If passed, EFCA would essentially change the union organizing process. EFCA would substantially reduce the barriers to unionization by: a) using union authorization cards, instead of secret-ballot elections, to determine whether employees want to be represented by a union; b) eliminating the pre-election campaign period during which employers typically communicate their position on unionization; and c) enabling unions to guarantee that they will get a contract for employees, even without the employer's agreement. As a result of these proposed changes, the frequency and success of union organizing activity is expected to increase dramatically. Healthcare employers who wish to remain union-free will have to find new and effective ways to combat this growing union threat.

A new federal rule gives states sweeping authority to charge premiums and higher co-payments for doctors' services, hospital care and prescription drugs provided to low-income people under Medicaid. The new rule is expected to save money for the federal government and the states. But public health experts and even some federal officials predict that many low-income people will delay or forgo care because of the higher charges. Centers for Medicare and Medicaid Services spokesman Jeff Nelligan said that "states are in the best position to determine the appropriate levels of cost sharing; this rule gives states more tools to help slow spending growth, while maintaining needed coverage, which was the intent of Congress." But the rule has drawn criticism from the American Academy of Pediatrics, the National Association for Home Care and AARP, among other groups.



NJ Senate voted 37-1 to approve Bill S. 787 which requires single operating-room facilities to register with DHSS and permits practitioners to refer patients to existing ambulatory surgery facilities in which practitioners have a financial interest under certain conditions (including written disclosure to patients). On the same day, the Assembly passed floor amendments to mirror the language in the Senate bill, and the Assembly bill remained on second reading status. It is expected that the bill will be posted for a vote on February 5, 2009, the next scheduled Assembly voting session.

Three of the country's top-10-selling drugmakers have pledged to publicly disclose their financial relationships with physicians. In September, Eli Lilly said that "by the second half of 2009 it would report payments to its physician speakers and advisers." Merck also announced that "next year it too would report payments made to doctors serving the...company as promotional speakers." In October, GlaxoSmithKline then announced its intent to publicly disclose payments to U.S. doctors. The drugmakers' move comes ahead of bipartisan congressional legislation, the Physician Payments Sunshine Act, which would mandate such reporting.

The Boston Globe (12/1, Wangsness) reported that "some Congressional Democrats in charge of health reform are talking about" taxing healthcare benefits. While Sen. John McCain (R-AZ) "wanted to end the tax exclusion entirely for employer-sponsored insurance," these Democratic lawmakers would limit employee exclusions "so that those with higher incomes or more generous health benefits might pay taxes on some portion of the income they use to pay for their health premiums." In doing so, they would also limit government expenditures on "more than $300 billion a year in potential tax revenues...one of the few large pools of cash available to help fund a major health reform package." In fact, Sen. Max Baucus' (D-MT) "health policy paper that many see as an important Democratic blueprint for health reform...raises the possibility of capping tax breaks for health insurance premiums." Still, some unions "are wary of any changes since employers provide insurance to the vast majority of their members," and "business groups are...extremely cautious."

**Continued on Next Page**

The final Medicare physician fee schedule for 2009 includes a 1.1 percent pay increase. The Centers for Medicare and Medicaid Services stated that legislation enacted in July reversed a 10.6 percent cut to physician payments and beginning in January 2009, a 1.1 percent across the board increase will replace an additional roughly 5 percent cut that would have gone into effect.

Although stem cell technology is primarily within the small biotechnology companies' sphere, Pfizer, one of the world's largest drugmakers, plans to invest in stem cell research in hopes that it will reveal how to reverse the aging process. The company will spend $100 million to harness stem cells to treat heart disease, diabetes and vision loss among the elderly.

In the Wall Street Journal (12/1) Health Blog, Scott Hensley recaps previous Chicago Tribune and LATimes articles on the prospects of cheaper prescription drugs and universal health coverag e under an Obama Administration. Hensley says that some of Big Pharma's "worst fears could become reality under the Obama administration." Among the changes to look for: "Legalization of the importation of cheaper prescription medicines, legislation clearing the way for generic versions of biotech drugs and direct price negotiations between Medicare and drugmakers."


On the front page of its Science Times section, the New York Times (12/2, D1, Tarkan) reports that several surveys indicate that "hospital staff members...blame badly behaved doctors for low morale, stress, and high turnover." In addition, "recent studies suggest that such behavior contributes to medical mistakes, preventable complications, and even death." For instance, a poll "of healthcare workers at 102 nonprofit hospitals from 2004 to 2007 found that 67 percent of respondents said they thought there was a link between disruptive behavior and medical mistakes, and 18 percent said they knew of a mistake that occurred because of an obnoxious doctor." Still, "physicians and nurses say they have seen less of it in the past five or 10 years, though it is still a major problem, and the Joint Commission is requiring hospitals to have a written code of conduct, and a process for enforcing it."

Beginning January 1, 2009, the pharmaceutical industry has agreed to a voluntary moratorium on the branded goodies such as pens, flash drives, calculators, calendars, pens, mugs, etc. long used to foster good will with doctors. While intended to foster good will, critics contend that such gifts to doctors actually unduly influence medicine. These guidelines from the Pharmaceutical Research and Manufacturers of America still permit the companies to provide "free" lunches for doctors and their staffs or to sponsor them at restaurant dinners, provided the meals are accompanied by educational presentations. The pharmaceutical companies are also allowed to hire doctors as consultants for fair market compensation – drawing harsh words from the same critics who don't like the use of the branded bling – complaining that the companies will continue to pass tens of thousands of dollars each year to individual doctors.


AMNews (12/8, Berry) reports that "opponents of the for-profit conversion" [of Horizon] want New Jersey regulators "to ask for a new application from the plan that takes into account the failing economy since the plan's application in August." Specifically, the "Medical Society of New Jersey, the Alliance for Advancing Nonprofit Health Care, and QualCare, a New Jersey-based hospital and physician-owned nonprofit health plan, wrote a letter to the director of the New Jersey Dept. of Banking and Insurance and the state attorney general calling for Horizon to withdraw its application or for the state to require a new one." The groups argue that Horizon's for-profit "application should be amended to reflect the changes to the economy that have sent stocks plummeting and frozen the credit market." Horizon spokesperson Tom Rubino said he hadn't seen the letter, but "the economic crisis has done nothing to change Horizon's reasons for wanting to convert and has heightened the need for the economic benefit to the state that Horizon expects."

**"SPSK Wins Big" from Page 1**

chemotherapy, including the same drug, the companies paid a total of approximately $400. They said that the payment included the fees for both the administration and the drug.

The hospital asserted that the administration fee and the drug fee are two separate items and are reimbursed separately. The companies attempted to justify their actions through an interpretation of the language in their new contracts with the hospital. The companies relied upon contract provisions that said the payment for "Chemotherapy" was $400 "per visit". The contract definition of the term "per visit" provided, in part, that it was the payment method applicable to covered services rendered to a customer (patient) on one calendar day for designated outpatient services, and "shall be considered payment in full for all covered services rendered to the customer on that day…including nursing care, diagnostic and therapeutic services, durable medical equipment, supplies…and medications…."

The companies took the position that the "per visit" payment for chemotherapy was all-inclusive and covered "medications rendered to the customer on that day". They said that chemotherapy drugs were "medications" and were therefore, "bundled" into the payment for chemotherapy, at $400 per visit. As a result of the companies' interpretation of their contracts, the hospital was receiving reimbursement amounts that did not even cover the hospital's cost of purchasing the drugs. The hospital was losing thousands of dollars each time it rendered chemotherapy to patients who were members of these two managed care companies.

On behalf of the hospital, Schenck, Price, Smith & King, LLP filed a request for arbitration with the American Arbitration Association (as required by the contracts). We asserted various legal theories against the managed care companies, including: breach of contract; breach of the implied covenants of good faith and fair dealing; quantum meruit; unjust enrichment; and violations of numerous state laws, including the Unfair Claims Settlement Practices Act. We also requested interest on all claims under the Prompt Payment Laws.

During the arbitration, we were able to demonstrate that the "per visit" payment for chemotherapy was not intended to cover the drugs. The references to "chemotherapy" in the contracts were limited by references to "Revenue Codes 331, 332 and 335". These three Revenue Codes, as defined by the American Medical Association, apply only to the administration of chemotherapy and do not apply to the drugs. The chemotherapy drugs are customarily identified by Revenue Code 636, defined as "drugs requiring detailed coding". We were able to prove to the Arbitration Panel that the drugs, coded in the hospital's bills under Revenue Code 636, were not intended to be "bundled" into the fee for the administration of chemotherapy, coded under Revenue Codes 331, 332 or 335.

The contracts identified hundreds of covered goods and services, the applicable Revenue Codes or CPT Codes, and the fees for each, but they did not identify specifically, drugs under Revenue Code 636. The contracts provided separately that goods and services not identified in the contract by Revenue Code or on the list of exclusions came under the service category identified as "All Other Outpatient Services". For All Other Outpatient Services, the contracts provided a payment rate based on a certain percentage of the hospital's charges. We argued successfully that the hospital was entitled to payment for the chemotherapy drugs identified under Revenue Code 636, under the category of All Other Outpatient Services, at a percentage of the hospital's charges.

The Arbitration Panel rendered an award in favor of the hospital, and ordered the managed care companies to pay the hospital for all of the chemotherapy drugs, based on a fixed percentage of the hospital's charges, along with interest under the Prompt Payment Laws.

"We are very happy that the Arbitration Panel recognized the logic of the hospital's position and was not persuaded by the managed care companies' tortured interpretation of their contracts to achieve a clearly unjust result," said Brian M. Foley, Partner in Schenck, Price, Smith & King's Health Law Practice Group and lead counsel for the hospital in this matter. "With many hospitals struggling financially, it is imperative that they are willing to challenge the managed care companies, when necessary, to assure appropriate reimbursement for services. I give this hospital a lot of credit for standing up to these companies, and recovering monies to which it is rightfully entitled. We are thrilled to have been able to provide the resources of our Healthcare Law Practice Group, supported by the strength of our Litigation Department to help this hospital achieve this result."

**"Insight" from Page 2**

experts in the field, including Colin Wagner and Derek Mai for more than three years. Once Insight launched, Mike Tierney joined the team to oversee operations as demand for Insight's services grew exponentially to include being the IOM provider of choice at more than 75 hospitals. Jeff notes that in the time he has been involved in IOM, the team has seen tremendous national interest in the services from patients, physicians and payers – although the payers continue to scrutinize the coding, charges and billing for financial compliance. "We have seen a shift of more of the health care cost to the patient, and decline in reimbursements. We see great opportunity for a company such as ours with established clinical standards and the scale to do huge caseloads without compromising on the quality of care."

Jeff and his team expect Insight and IOM generally to continue its successful pattern of growth and reputation over the next 5 - 10 years. "I hope we are still the dominant player in the industry and while 15 years would more than double our tenure, it is difficult to predict. I do know that Insight will be doing hundreds of cases, and involved in many more things than spine surgery. I hope to have technologies that allow us to increase our impact on making surgeries safer."

A focus on ethical business practices, patient safety and highly credentialed staff is key to the way Team Spine, under the direction and control of Jeff Veenhuis and his partner Tim Healy, has grown a company from 10 employees and $12 Million in revenues to one with 60 employees and $110 Million in revenues in just 5 years. Jeff is passionate about the company's professionalism, honesty, integrity and commitment to those values. Still, Jeff is humble in his success and credits "luck, mentors, role models, hard work, persistence and optimism" for his business success. When asked what his greatest successes in life have been, the response is quick – "Having two great kids, (9 year old Jacob and 6 year old Emily) and a wonderful wife Betsy, who works for Team Spine." Travel all around the world has made Jeff and his family appreciative of the good fortune they have and sensitive to different cultures. A Calvin College graduate, Jeff makes time for family, friends, travel, spending time outdoors to enjoy golf, boating, skiing, hunting, and fishing; and balancing these activities with service to his church, charities and community. Jeff's Uncle George gets credit for some of these passions – Jeff learned from him that it is important to help others, "in ways besides writing a check."

The passion to improve healthcare and commitment to "give back" were intensified by the loss 10 years ago of the Veenhuis' first child, a daughter who succumbed after only 8 days to a Hypoplastic Left Ventricle. But even after a tragedy, life continues to offer lessons and from a business perspective Jeff learned that "it takes a lot of other people who aspire to similar goals - and you cannot be successful on your own. You have to treat people fairly, and it can be hard to get them to always see the big picture and bright future."

On the family side of things, an uncle presented Betsy and Jeff with the opportunity to acquire his island home in Northern Wisconsin and it has since provided a haven for this busy family. Nothing presents challenge quite like having to bring building and other supplies across a frozen body of water. It makes growing a successful company look easy!

Looking forward, Jeff believes that "as IOM proves its efficacy, the scarcity of Neurophysiologists and Neurologists will drive more people to a remote model with a CNIM in the operating room and the Neurologist connected by technology. I am hoping technology helps us make the 'remote' seem less distant, and allows them a greater level of participation in the cases." Keep your eyes on this forward thinking company as it moves from its current position as the preeminent regional player in the Midwest to being a factor to contend with in the Northeast market as well. You'll know Insight is coming when you see Shilo, "the world's best 13 year old Yellow Lab" dressed in a Green Bay Packer's jersey, and doing the "Lambeau Leap," leading Jeff Veenhuis and company eastward.

**"Apologies" from Page 5**

There is also evidence that insurers are receptive to their providers participating in open discussions and apologies when properly conducted. For example, the COPIC Insurance Company developed a program that encourages teaching doctors to discuss medical errors, apologize and sufficiently compensate the injured patient.

A majority of states have adopted or are considering apology laws that exempt expressions of regret, sympathy or compassion from being considered as admissions of liability in medical malpractice lawsuits. 36 states have actually enacted apology laws, which protect physician expressions of sympathy, regret and condolence from being used against them in subsequent litigation. Eight of these states also have laws that protect admission of fault as well as expressions of sympathy. Because of the differences among the states, it is imperative that physicians know what type of apologies their state laws protect.

Notwithstanding the recognized values of apologies, both morally and as an effective tool in dispute resolution, apologies are not fully embraced in our culture. Opponents of apology laws argue that public confidence in courts could be adversely affected if a person admitted liability in an apology and is later found not liable. Another negative consequence may be insincere and strategic apologies. Moreover, critics contend that such legislation might create an emotional vulnerability in some plaintiffs who might accept settlements that are inappropriately low.

On a local note, New Jersey introduced apology legislation in May 2008 to establish disclosure pilot programs in particular hospitals, however, the proposed legislation was withdrawn from consideration in September 2008.

**"Gardasil" from Page 6**

placebo-controlled studies involved almost 12,000 participants. Participating women ranged in age from sixteen to twenty-six, but girls as young as nine were included in the safety and immunogenicity studies and not the efficacy study. Following FDA approval, the national Advisory Committee on Immunization Practices (ACIP) recommended routine vaccination for girls ages eleven and twelve with Gardasil, the only FDA-approved HPV vaccine. While the data supporting the efficacy and safety of the vaccine is positive, the clinical study length is also unreasonably short for a proposed mandatory vaccination.

**Long-Term Safety and Effectiveness of Gardasil is Unknown**

Although the aim of clinical trials is to generate safety and efficacy data that can be extrapolated to the general population, it is widely understood that such trials cannot reveal all possible adverse events related to a product. For this reason, post-market adverse event reporting is required for all manufacturers of FDA-approved products, and post-market surveillance may also be required. Unfortunately, there have been numerous examples in recent years in which unforeseen adverse reactions following product approval led manufacturers to withdraw their product from the market: Rotashield, the first vaccine for the prevention of rotavirus gastroenteritis in infants; Fen-phen, a popular weight-loss drug; Bextra, a widely used pain-killer; and Vioxx, an osteoarthritis drug. In the case of Gardasil, no serious adverse effects were revealed in the five-year clinical trials. However, there have been 9,749 reports of adverse events and twenty-one deaths subsequent to vaccination since the vaccine's approval.

**There is no Public Health Necessity for Mandating Gardasil**

Along with Gardasil's unknown long-term efficacy and safety, there is no imminent health necessity for Gardasil in the United States. The current list of ACIP-recommended vaccinations are all for diseases that are highly contagious and associated with considerable mortality occurring shortly after exposure. Gardasil is unlike the other ACIP-recommended vaccinations in many respects. HPV is not immediately life threatening. Even if cervical cancer subsequently developed from exposure to the cancer-causing strains of HPV, this would not occur shortly after exposure. Furthermore, most women will never be exposed to the cancer-causing strains of HPV and those who

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*"…The American College of Pediatricians (ACPeds) has openly declared itself 'opposed to any legislation which would require HPV vaccination for school attendance…'"*

are exposed are not overwhelmingly likely to go on to develop cervical cancer.

In addition to not being highly contagious, HPV can be managed through behavioral changes and is not communicable through ordinary daily interactions. HPV does not pose a risk of rapid transmission in schools since it is not a highly infectious airborne disease and, thus, is not directly related to school attendance. Furthermore, not all children who attend school are at equal risk of exposure to or transmission of HPV. Gardasil is aimed at protecting the recipient from the long-term risks of HPV. Thus, HPV does not constitute a public health emergency warranting a mandatory vaccination.

*"Immunization should be 'for doctors and parents to determine.'"*

**The Medical Community is not Convinced of the Necessity of Mandatory Gardasil Vaccinations**

While numerous organizations support vaccinating young women for HPV, the American College of Pediatricians (ACPeds) has openly declared itself "opposed to any legislation which would require HPV vaccination for school attendance," because the degree of protection and spectrum of side effects remain to be determined.

In addition to the ACPeds, other doctors argue that the HPV vaccine should not be mandatory because the "virus is not an infection, like measles, that can be spread by casual contact." Immunization should be "for doctors and parents to determine." Attempts at mandatory vaccination, given the overall low prevalence of carcinogenic HPV types 16 and 18 and the unknown efficacy and safety of Gardasil, may prove to be more harmful than beneficial in the absence of a public health necessity.

Proponents of mandating the Gardasil vaccine seek to reduce the incidence of cervical cancer. These proponents feel that the only way to do this is to institute Gardasil as a compulsory vaccination. They argue that this is the only way to guarantee that economically disadvantaged children will have access to vaccinations that they would not otherwise be able to afford.

Gardasil is ACIP-recommended. Therefore, children may be vaccinated through Medicaid or the federally funded Vaccines for Children Program. While proponents have legitimate public policy concerns for making vaccines available, Gardasil should not be made mandatory when medical experts are conflicted as to the vaccination's necessity. Since Gardasil is required to be available under ACIP standards whether or not the vaccine is mandatory, a government mandate is not necessary.

**Conclusion**

Unlike other diseases for which state legislatures have mandated vaccination for children, HPV is neither transmissible through casual contact nor potentially fatal during childhood. Until there is more information on the safety and efficacy of Gardasil and greater support from doctors and physician


organizations, state legislatures should not mandate the HPV vaccine. Despite the politics underlying Gardasil, cervical cancer and HPV are not imminent threats to the population of the United States. Therefore, waiting a few years to effectively analyze Gardasil and its long-term efficacy and safety will not adversely affect the female population of the United States. In the interim, Gardasil should not be a mandatory vaccination.

**"Obama" from Page 7**

- Make employer contributions fairer by requiring large employers that do not offer coverage or make a meaningful contribution to the cost of quality health coverage for their employees to contribute a percentage of payroll toward the costs of their employees' healthcare.
- Establish a National Health Insurance Exchange with a range of private insurance options as well as a new public plan based on benefits available to members of Congress that will allow individuals and small businesses to buy affordable health coverage.
- Ensure all who need it will receive a tax credit for their premiums.*

◇**Reduce Costs and Save a Typical American Family up to $2,500 as reforms phase in**

- Lower drug costs by allowing the importation of safe medicines from other developed countries, increasing the use of generic drugs in public programs and taking on drug companies that block cheaper generic medicines from the market.
- Require hospitals to collect and report healthcare costs and quality data.
- Reduce the costs of catastrophic illnesses for employers and their employees.
- Reform the insurance market to increase competition by taking on anticompetitive activity that drives up prices without improving quality of care. *

◇**Encourage grassroots movements for local communities to hold discussions and forums on healthcare reform and submit their thoughts to the government**

Obama expects his healthcare plan to cost approximately $50-$65 billion, and plans to pay for it by cutting back the "Bush tax cuts" for Americans earning more than $250,000 per year and by retaining the estate tax at its 2009 level.* In the incoming administration, Obama has nominated former Senate Majority Leader Tom Daschle (D-South Dakota) to be the Health and Human Services Secretary. President-Elect Obama and Secretary-Designate Daschle have made it clear that healthcare is a top priority for the Obama Administration. To ensure that all Americans have the opportunity to provide input on the subject of healthcare reform, a Community Outreach program has been developed to provide open forums through January 15, 2009, to receive comments from citizens prior to the new Administration taking office. Seeking "political intelligence it could use to sway lawmakers and special interest groups in the upcoming healthcare reform debate," Obama's transition team is collecting "insights" on public healthcare concerns through this effort.^

Critics of the failed efforts at healthcare reform during former President Clinton's first term claimed that "the process then was too secretive and was mishandled," according to a report in the St. Petersburg Times.+ But, "Obama has long touted his background as a community organizer…and structured his presidential campaign to rely on grass-roots efforts."+ These country-wide meetings represent his first attempt at utilizing his community network roots as part of his governance strategy since winning the election in November.

**"Advocacy" from Page 7**

information and the inconsistency of symptoms in different people, it may be challenging for patients to obtain accurate information.

Most patients surveyed in the sample said they had some challenges and experienced some confusion when selecting a physician, hospital, or medicine for their situation. In addition, many experienced a level of confusion when working with the insurance companies. The obstacles, we believe, are a result of the disjointed healthcare system in the United States. Legal results such as malpractice suits, defamation of character, costly legal battles, etc. keep much of the information away from consumers. For example, due to the cost of legal proceedings, many malpractice suits do not make it to court and get settled out of court. These results do not get reported to the individual consumer, so when a patient selects a physician it may be impossible for patients to fully understand the

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quality of the physician they have chosen. Additionally, because of the large volume of "frivolous" lawsuits, legal proceedings may not be a good measure to begin with. This can be confusing for patients and families.

When asked about insurance, all respondents in our sample said they had health insurance. We feel that this is a reflection of our convenience sample. The patients in our sample have successfully found a physician and have completed (or are in completion) of treatment. Despite having health insurance, the patients still experienced a level of confusion when it came to the obstacles they encountered from the insurance companies. A majority of the patients had also been denied claims and have appealed insurance denials. We feel this is an unnecessary step that patients get burdened with while trying to get well.

We feel that consumers do have challenges in determining a course of care for themselves, but this may be an inherent problem in healthcare. In general, patients know less about the disease and treatment options than their physicians and are typically forced to make quick decisions under a lot of stress. Patients make treatment decisions while facing unknown or uncertain outcomes with limited knowledge. This can be mitigated by encouraging second opinions, providing useful information, and encouraging healthcare advocacy, but that is not all happening today, at this point in time.

Consumers clearly need help navigating the system. This means selecting an insurance company, choosing physicians, learning about disease states, learning about treatment options, and eventually making wise healthcare decisions. In the past, physicians have filled this void in the system, but with pressure to see more patients and provide more services; this is becoming challenging. The new field of "Healthcare Advocacy" which employs "Healthcare Advocates" can fill this void by helping patients navigate the pitfalls associated with obtaining quality care. Healthcare advocates' duties and responsibilities vary greatly depending on the services they provide, but they typically provide services such as: providing disease state information, providing information on hospitals, fostering open and honest communication between patients and their physicians and families, and much more. In addition, they can work with the insurance companies to manage denials, make payments, and handle administrative decisions.

All of these functions are currently thrust upon patients and family members at a time where there is much emotion, fear, and confusion. Healthcare advocates relieve the burden of bureaucratic processes for the patient and the patient's family so they can concentrate on getting well and getting back to a productive life.

## HEALTHCARE DECISIONS/OPINIONS

**Poliner v. Texas Health Systems, 537 F. 3rd 368 (5th Cir. 2008)**

Avoid Litigation and Liability When Dealing With Peer Review

The Fifth Circuit Court of Appeals has reversed the $33 million dollar judgment awarded the plaintiff and reaffirmed hospitals' and physician peer reviewers' broad immunities from damages claims under the Health Care Quality Improvement Act ("HCQIA") in Poliner v. Texas Health Systems.

Following a patient incident at the defendant hospital, Dr. Poliner, a cardiologist, had his privileges summarily suspended and was prevented from performing procedures in the hospital's catherization laboratory while an

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investigation was pending. His case went to a jury solely on defamation grounds. The jury originally granted a damages award of $360 million dollars but the trial court reduced the award to $33 million dollars prior to the appeal.

The Fifth Circuit's decision was based on an analysis of HCQIA. Congress passed the HCQIA to "improve the quality of medical care" by granting limited immunity from lawsuits for money damages to participants in professional peer review actions. In order for that immunity to apply, a "professional review action" must be taken:

(1) in the reasonable belief that the action was in furtherance of quality health care;

(2) after a reasonable effort to obtain the facts of the matter;

(3) after adequate notice and hearing procedures are afforded; and

(4) in the reasonable belief that the action was warranted by the facts known after a reasonable effort to obtain those facts.

The Act includes a presumption that a peer review action meets those standards, unless that presumption is rebutted "by a preponderance of the evidence."

The Court then analyzed the temporary restrictions imposed on Poliner under those criteria, and found that the defendant was protected against monetary damages.

First, the Court found that the hospital sanctioned Poliner in the reasonable belief that the action was in furtherance of quality health care. At the time of that decision, the hospital was aware of a number of recent patient issues involving Poliner and that Poliner had given substandard care in numerous cases. Based on those facts, the Court concluded that the defendant's belief that restricting Poliner's privileges during the investigation would further quality health care was objectively reasonable.

Next, the Court reviewed the totality of the circumstances, and found a reasonable effort on the part of defendant to "obtain the facts of the matter." Poliner argued to the Fifth Circuit that at the time of the abeyance, there was insufficient evidence to label him as a "present danger" under the hospital's bylaws. Interestingly, the Court responded that immunity under the HCQIA is "not coextensive with compliance with an individual hospital's bylaws." Provided that a peer review process complies with the standards set out in the HCQIA, a failure to comply with a hospital's bylaws does not automatically defeat a peer reviewer's right to immunity from damages.

Third, the Court reviewed the procedural requirements imposed by the HCQIA to determine whether Poliner received the required adequate notice and hearing procedures. It cited an exception within the Act that allows an "immediate suspension or restriction of clinical privileges, subject to subsequent notice," where the failure to impose such restriction may result in imminent danger to patients. The Court went on to find that the defendant was warranted in concluding that failing to impose temporary restrictions on Poliner may have led to that "imminent danger," and that, therefore, the notice provided to Poliner regarding the abeyances was adequate to satisfy the HCQIA.

Lastly, the Court found that the abeyances were "tailored to address the health care concerns" that were being raised. The fact that the abeyances related only to the catherization laboratory made the restrictions reasonable.

According to the Court, Poliner failed to rebut the statutory presumption that the peer review actions taken were compliant with HCQIA. Because the defendant was therefore immune from money damages under that Act, the

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district court's judgment was reversed and judgment was rendered for the defendant.

**Estate of Cordero v. Christ Hospital, 403 N.J. Super. 306 (App. Div. 2008)**

Hospital may be Liable for the Actions of its Independent Contractors if by the Hospital's Action and Inaction, the Patient Reasonably Believes that the Doctor's Care is Rendered on Behalf of the Hospital

The Superior Court of New Jersey, Appellate Division, issued a published opinion on October 29, 2008 in which it held that when a hospital provides a doctor for its patients and the totality of the circumstances created by the hospital's action and inaction would lead a patient to reasonably believe that the doctor's care is rendered on behalf of the hospital, the hospital has held out that doctor as its agent.

Plaintiffs were the family of a deceased woman, who lost consciousness, entered a vegetative state and died three years later. The anesthesiologist who attended to the patient was an independent contractor of the hospital.

Plaintiffs relied on Arthur v. St. Peters Hosp. and argued that the hospital was liable for the anesthesiologist's negligence under a theory of "apparent authority." 169 N.J. Super. 575, 581 (Law Div. 1979). In the Arthur case, the court held that apparent authority applied to a hospital when, "by its actions, a hospital has held out a particular physician as its agent and/or employee and…a patient has accepted treatment from that physician in the reasonable belief that it is being rendered on behalf of the hospital." Following the Arthur court's reasoning, the trial court dismissed the case based on the lack of evidence that the hospital actively held out the anesthesiologist as its agent.

On appeal, the Appellate Division reversed and remanded for further proceedings on the liability issue. The Appellate Division stated that the lower court interpreted the conditions for liability in Arthur too strictly. In view of that, the Appellate Division cited numerous cases in which courts have relied on the hospital's inactions as conduct manifesting the hospital's assent to having the specialist care for the patient on its behalf. Accordingly, the Court held that active or explicit misrepresentations of agency were not required for a hospital's conduct to constitute "holding out" a doctor as its agent. Rather, the totality of the circumstances created by the hospital's action and inaction should be considered in determining whether the hospital's conduct amounted to "holding out" the doctor.

Furthermore, the Court held that when a hospital patient accepted a doctor's care under such circumstances, the patient's acceptance in the reasonable belief that the doctor was rendering treatment on behalf of the hospital may be presumed unless rebutted.

The Court concluded that the following were among relevant circumstances that should be considered in their totality when determining whether the hospital's conduct would lead a patient in the same situation to reasonably believe that the doctor acted on the hospital's behalf:

1. whether the hospital supplied the doctor;
2. the nature of the medical care and whether the specialty is typically provided in and an integral part of medical treatment received in a hospital;
3. any notice of the doctor's independence from the hospital or disclaimers of responsibility;

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4. the patient's opportunity to reject the care or select a different doctor;

5. the patient's contacts with the doctor prior to the incident at issue; and

6. any special knowledge about the doctor's contractual arrangement with the hospital.

On the issue of fraudulent concealment, the Appellant Division upheld summary judgment for the hospital. The hospital's procedure required a "code blue review sheet" for dangerous incidents. However, the hospital could not locate the sheet after litigation commenced. Nevertheless, the Appellate Division concluded that the plaintiffs did not demonstrate that they could not have obtained the same information from other sources, such as deposing a member of the code team who was available.

**In re Kim, 403 N.J. Super, 378 (App, Div. 2008)**

New Jersey State Board of Medical Examiners Can Issue Reprimand

With Grant of State Medical License

The Superior Court of New Jersey, Appellate Division, issued a published opinion on October 28, 2008 in which it held that the New Jersey State Board of Medical Examiners (the "Board") has the authority to issue a reprimand contemporaneously with the grant of a state medical license.

Plaintiff, who was a licensed physician in California, moved to New Jersey and submitted a license application to the Board. In his application, Plaintiff disclosed that he had settled a malpractice action filed by a former patient. The matter was ultimately settled with no admission of wrongdoing.

Plaintiff was required to appear before the Board's Credentials Committee (the "Committee") to discuss his prior interaction with his patient. Pursuant to the Committee's inquiries, the Medical Board of California advised the Committee that the case was closed because an accusation would not be filed against Plaintiff.

Nevertheless, the Committee recommended that Plaintiff be granted a medical license with the condition that he enter into a public order of reprimand for engaging in conduct which constitutes a violation of the sexual misconduct regulations. The Board subsequently approved the Committee's recommendation and executed a consent order that included a public reprimand.

On appeal, the Appellate Division affirmed the Board's decision and concluded that the Board's actions were within its statutory authority. The Appellate Division opined that the remedial nature of the Uniform Enforcement Act (UEA) suggested its liberal interpretation. Because the Board's authority under the UEA includes incidental powers which are reasonably necessary or appropriate to effectuate the powers expressly granted, the Court asserted that it was within the Board's implicit statutory authority to condition its grant of license with a reprimand. The Court further declared that to separate the power to grant licensure from the imposition of a lesser action is irrational and thwarts the Board's fundamental dual purpose of permitting qualified physicians licensures while protecting the State citizenry.

## MEET MEMBERS OF THE SPSK HEALTHCARE GROUP

**Front Row**: Sandra Calvert Nathans, Susan Flynn-Hollander, Sheilah O'Halloran

**Back Row**: Sidney Sayovitz, Brian Foley, Peter Marra

**Brian M. Foley** is a partner with SPSK's Business Law Department and the Health Care Law Group. An honors graduate of Villanova University and Seton Hall Law School, Mr. Foley clerked for the Honorable Thomas S. O'Brien of the Superior Court of New Jersey, Appellate Division and is admitted to practice in both New Jersey and Pennsylvania. Brian is a former associate editor of "HealthSpan, the Report of Health Business and Law" and has extensive experience representing providers in state and federal regulatory matters. Mr. Foley is the former VP and General Counsel of Cathedral Healthcare System in Newark, NJ and boasts a number of reported cases in which he successfully represented his health care clients that encompass systems, hospitals, medical staffs, physicians and suppliers.

**M. Sheilah O'Halloran**, a partner with SPSK's Business Law Department also serves as Chair of the Health Law Practice Group, is a member of the firm's Management Committee, heads its Associate Evaluation Committee, and serves as outside Assistant General Counsel for Atlantic Health, Morristown, NJ. Ms. O'Halloran graduated from Seton Hall Law School with honors, and was a member and Survey Editor of the Law Review and member of the National Appellate Moot Court Team. A French major in college at Montclair State University, and published translator, Sheilah holds a master's degree from the School of Translation at the University of Montreal where she also taught as an adjunct professor. Sheilah holds leadership positions in a number of professional associations, serves on the Board of Trustees of the Westfield Area Y and the UCPC Behavioral Healthcare in Plainfield, and is an active volunteer with the Interfaith Council for the Homeless.

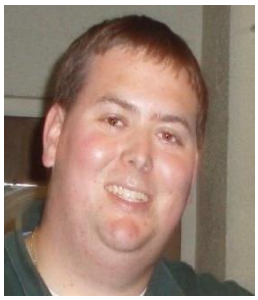
**Susan J. Flynn-Hollander** is Of Counsel to SPSK and is a member of the Business Law Department and Health Care Law Practice Group focusing exclusively on health care related matters. Ms. Flynn-Hollander has a diverse business, insurance and consulting background and has held executive management positions including, Legal Counsel, Senior VP and Chief Operating Office for Terence Cardinal Cooke Health Care Center in NYC, NY and VP Administration and General Counsel of Bayonne Medical Center, Bayonne, NJ. A graduate of Douglass College and New York Law School, Susan was Book Editor for the NYLS Journal of International and Comparative Law. Ms. Flynn-Hollander chairs a number of student mentoring and community service events and serves as Treasurer and member of the Executive Committee for the Foundation of UMDNJ, the Healthcare Foundation of New Jersey, the Foundation Venture Capital Group, and is a Member/Trustee for the Women's Health Institute and the New York Law School Alumni Board.

Richard J. Conway Jr. is a partner with SPSK's Business Law and Environmental Departments. A recognized expert in all areas of state and federal environmental compliance regulations, statutes and processes, Mr. Conway regularly counsels clients and supervises consultants regarding environmental issues and laws. Rich writes and lectures frequently on a wide range of topics and is frequently honored for his work. An honors graduate of Rutgers Law School, former law clerk, and member of numerous boards, associations and task forces, Rich is one of *the* "go-to" lawyers for national and state business and environmental matters.

Judy Pak Chung, an associate at SPSK, served as assistant editor for "The Bruin," the college newspaper of her alma mater, the University of California, Los Angeles. A graduate of Seton Hall Law School, Ms. Chung was a member of the Legislative Journal and an intern with the Immigration Department. In addition to working full time in SPSK's Business Law Department, and maintaining personal and professional ties on both coasts, Judy volunteers with the Asian American Legal Defense and Education Fund. No stranger to healthcare issues, Judy and dentist-husband Christian are proud parents of their son, 11 month old Ethan.

## MEET OUR STUDENT CONTRIBUTORS

Nicole McErlean is a 2L at Seton Hall University School of Law. Her article "Gardasil: Medical Miracle or Merck's Myth?" has been reprinted with permission from the Fall 2008 Seton Hall University School of Law Health Law Outlook. Nicole has worked at the law office of Michael R. Scolnick, focusing on personal injury & police misconduct. She is also involved in the Urban Education Law & Policy Initiative and NJ Law and Education Empowerment Project. Nicole has a special interest in healthcare issues.



Jordan Hollander, from Branchburg, NJ, is a junior French, Political Science, and International Studies major at Lycoming College located in Williamsport, PA. Jordan intends to pursue a joint JD/Ph.D. degree program with emphasis on International Law and Political Science.

Jacob Peltzman received his MPH from UMDNJ School of Public Health in January of 2009, his MBA from Rutgers University (Camden '06), and serves as Ventures Associate for Robert Wood Johnson University Hospital in New Brunswick, NJ. Jake's future plans include attending law school with a focus on healthcare law and continuing to advocate on behalf of patients and their families to effectively navigate the intricacies of the U.S. healthcare system.

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- *-Taken from www.barackobama.com/issues/healthcare/
- ^- Quoted from The Politico (12/30, Frates)
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