

# Health Law ADVISORY

*Current legal insights for health care executives*

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Julie A. Knutson, Editor

## *Workers' Compensation Case Managers – Where Do You Draw the Line?*

There appears to be a recent trend for workers' compensation case managers, hired by workers' compensation insurers or employers, to request and in some cases insist, on being present in the examination/treatment room with the workers' compensation patient.

While both State law and HIPAA provide for the flow of protected health information between health care providers providing health care to injured workers and the employers of such workers, there is clearly a line to be drawn when it comes to case managers being present in the exam room where treatment is rendered. Access to *information* does not equal the right to be physically present to observe examination and treatment. There is no provision in State or federal law that would permit a case manager hired by the employer/insurer to be in the exam room with a patient without the patient's consent. His or her presence could compromise the care received by the individual due to the individual's hesitation to provide full and complete information to the physician.

An opinion from the AMA Board of Medical Ethics states as follows:

### **E-5.0591 Patient Privacy and Outside Observers to the Clinical Encounter**

Outside observers are individuals who are present during patient-physician encounters and are neither members of a health care team nor enrolled in an educational program for health professionals such as medical students.

Physicians are ethically and legally responsible for safeguarding patient privacy and, therefore, must inform outside observers about medical standards of confidentiality and require them to agree to these standards.

### **Outside observers may be present during the medical encounter only with the patient's explicit agreement.**

Physicians should avoid situations in which an outside observer's presence may negatively influence the medical interaction and compromise care. The

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presence of outside observers during encounters between physicians and patients who lack decision-making capacity should not be permitted, except under rare circumstances and with consent of the parent or legal guardian.

Employers have a right to require the employee to have an examination by a physician of their choosing, to assure unbiased assessment of the patient's condition and to prevent abuse of workers' compensation benefits. However, the employee has the right to have medical examinations conducted in private.

Patients may be unaware of their right to privacy under these circumstances and may acquiesce to the case manager's presence during examinations. Acquiescence is not the same as explicit agreement. Patients appearing to acquiesce to pressure of the case manager should be asked for their express agreement to have the case manager present and have the opportunity to deny the case manager's request. It may be necessary to explain the patient's rights in this regard.

**Vickie Brady Ahlers**

providers and health care professionals. Because the OIG has noted that compliance with the PhRMA Code will substantially reduce the risk of fraud and abuse and will help demonstrate a provider's good faith effort to comply with applicable Medicare and Medicaid requirements, providers should take into account the recent changes to the PhRMA Code in their compliance efforts in the coming year. Below is a summary of the most significant changes in the PhRMA Code as they apply to health care providers and professionals.

- The revised PhRMA Code now expressly prohibits the provision of entertainment, recreational items or vacations to any health care professional who is not a salaried employee of the pharmaceutical manufacturer.
- The revised PhRMA Code expressly prohibits the provision of items of minimal value to health care professionals if those items are related to the practice of medicine. For example, the provision of free pens, clipboards and note pads to health care professionals is no longer acceptable.
- The revised PhRMA Code limits gifts to health care professionals to those of modest value that further the education of the health care professional or his or her patients. These would include, for example, textbooks, journal subscriptions and clinical treatment guidelines. These gifts are capped at a \$100 per gift.
- Modest occasional meals may be offered in connection with informational presentations if they are not part of an entertainment or recreational event and are conducive to informational communication. These meals must be in-office or in-hospital and may not be hosted at a restaurant.

*Patients may be unaware of their right to privacy under these circumstances and may acquiesce to the case manager's presence during examinations. Acquiescence is not the same as explicit agreement.*

## *The Revised PhRMA Code – Impacts on Providers*

Effective January 1, 2009, a new PhRMA Code becomes effective, changing the ways which pharmaceutical sales representatives will be able to interact with health care

Likewise, it is inappropriate to offer take home or take out meals or meals for the health care professional and his or her spouse.

- In addition to the prohibition on providing financial support for travel, lodging and personal expenses of health care professionals who attend CME, pharmaceutical companies may no longer provide meals directly at CME programs. This includes directly hosting the meal or being identified as the sponsor of the meal. Pharmaceutical companies may continue to provide funding to the CME provider, but the CME provider must have the discretion to use such funding in any way it deems appropriate.
- The revised PhRMA Code now requires that any speaking or consulting engagements must be based upon the expertise, reputation and knowledge of the individual in a certain area and any reimbursement or compensation provided for such services must be reasonable and based on fair market value. This is in an effort to bar what have been viewed as sham consulting and speaking arrangements.
- Health care professionals who serve as speakers or consultants for pharmaceutical companies and serve on formulary or guideline committees must disclose that affiliation. Such disclosure should continue for two years after the relationship has terminated.

Each of these revisions to the PhRMA Code potentially impact the policies and procedures of health care providers. Many of the above revisions restrict what previously were acceptable relationships

between pharmaceutical manufacturers and health care professionals. As such, providers should review their policies and procedures to ensure that they remain aligned with the revised PhRMA Code.

**Andrew D. Kloeckner**

## *Obtaining Patient Consent for Cell Phone Collection Calls*

As a new year “rings” in, the topic of collection calls to patients has arisen. A recent opinion by a California federal judge has made newsworthy the topic of patient consent for cell phone collection calls. This article raises an important consideration for health care providers on this topic.

The California judge’s ruling involves the Telephone Consumer Protection Act of 1991 (“TCPA”). The TCPA, at least typically, prohibits callers from using automated dialers and prerecorded messages in contacting consumer cell phones. The Federal Communications Commission (“FCC”), however, declared in January 2008 that creditors and debt collectors were exempt from the TCPA restrictions. The FCC thus opened the door for health service providers and other organizations to employ such collection methods to increase recovery rates.

The California judge considered a purported class action suit involving consumer debtors who had provided a creditor with cell phone numbers but did not expressly state the creditor or any debt collector could call those cell phones. The California judge held, among other

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things, that using automated dialers and prerecorded messages directed to the cell phones violated the TCPA, notwithstanding the FCC's declaration. One of the judge's major concerns was that any supposed consent by the debtors to collection calls was not expressly given.

On November 21, 2008, the California court vacated its previous opinion for a technical, procedural reason. Still, the California court's previous opinion is the only known substantive interpretation by a judge of the FCC declaratory ruling. Thus, the previous opinion deserves cautious attention.

This has caused astute health care providers to amend patient admission or intake forms to include language that comports with the previous California opinion. Doing so will make it easier for debt collectors to collect patient accounts and to reduce a health care provider's overall collection costs. Any health care provider interested in improved language for its forms should contact a lawyer. This improvement can allow the provider's debt collectors to "ring" in the New Year with improved efficiency.

**Thomas O. (Tom) Ashby**  
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*Best wishes for  
a successful and  
rewarding 2009!*

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