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The Quarterly

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AFTER ACT 142: PROTECTING YOUR MEDICAL ASSISTANCE APPEALS

By: *Daniel K. Natirboff, Esquire*

New procedures implemented by the Department of Public Welfare's Bureau of Hearings & Appeals ("BHA"), as a result of Act 142 of 2002 and the Supreme Court's decision in Department of Public Welfare v. Presbyterian Medical Center of Oakmont and Presbyterian Medical Center of Oakmont, Pennsylvania, Inc., 583 Pa. 336 (2005), require all kinds of healthcare providers, with Medicaid appeals pending before BHA, to vigilantly guard their procedural rights to these matters. As a result of Act 142 and the Oakmont decision, the Commonwealth's Board of Claims no longer has jurisdiction prospectively for disputes relating to services provided under a Medical Assistance Provider Agreement, and retrospectively for older appeals filed prior to the promulgation of Act 142.

The consequences of the loss of the Board of Claims' jurisdiction with respect to these matters are twofold: (1) As a practical matter, the Bureau of Hearings & Appeals has taken the position that matters filed in the Board of Claims, but not dually filed in the Bureau of Hearings & Appeals, are subject to dismissal; and (2) The transfer of literally hundreds of matters filed before the Board of Claims to the Bureau of Hearings & Appeals gives exclusive jurisdiction to BHA over Medicaid disputes in Pennsylvania, which has resulted in BHA being focused on moving and clearing their docket by any means necessary. As a result, all healthcare provider appeals pending before the Bureau of Hearings & Appeals may be subject to Rules to Show Cause issued by the Bureau and subsequent dismissal if a timely response is not filed. In some instances, these Rules to Show

Cause have not been addressed appropriately and/or include outdated information regarding the appropriate contact person from the facility. Some providers may not even be aware that they have appeals pending before the Bureau involving significant Medicaid reimbursement. These appeals may be 10, and in some cases, 20 years old.

As a practical matter, providers must preserve their right to pursue relief before the Bureau of Hearings & Appeals by being vigilant in monitoring all correspondence for any BHA Rules or Orders. Healthcare providers must also be proactive in pursuing any appeals before the Bureau. In some instances, the Bureau has ordered dismissal of cases for failure to prosecute, even when the Provider had not failed to timely respond to any BHA Rule or Order. Healthcare providers should contact their attorneys to assist them in preserving and prosecuting any pending Medicaid Appeals before BHA. Moreover, Providers should also proactively investigate any matters that have been filed previously before the Bureau of Hearings & Appeals by prior owners or prior staff of the facility, to determine if there are matters going under the radar that are well worth pursuing.

Should you have any questions regarding preserving Medicaid Appeal rights and practice and procedure before the Department of Public Welfare's Bureau of Hearings & Appeals, please feel free to contact Louis J. Capozzi, Jr., Esquire, Daniel K. Natirboff, Esquire and Don Reavey, Esquire at Capozzi & Associates, P.C.

MODERN ELECTRONICS: WHAT TO DO ABOUT SECRET TAPE RECORDINGS

By: *Doreena Craig Sloan, Esquire*

We have all been amazed at how modern technology has reduced cumbersome recording and transmitting devices to such tiny devices that can be hidden in pockets, purses, briefcases and backpacks. Many of these devices can and do record conversations on demand. Throughout the country, employees have used them to secretly record conversations with supervisors and managers. At times, these tapes even show up in litigation brought by the employee and may even get played in court. While statistics on secret recording by employees are not available, we are likely to see an increase in the use of these recordings simply because they are more available now than at any other time in our history.

As an employer, what can you do about this growing problem? First, you should know that the recording of any conversation, in person or on the phone, without the consent of all the participants, or the existence of a current valid court order, is illegal in Pennsylvania. 18 Pa.C.S.A. 5701 et al. Anyone who secretly

records a conversation is guilty of a felony of the third degree for which the criminal penalty is up to seven (7) years imprisonment and a \$15,000.00 fine. Any secret recording should not be admitted into evidence in court in Pennsylvania.

It is important that you know that an employee's violation of this law does not automatically mean that he or she must be discharged. It is appropriate and advisable to add a policy prohibiting secret recording of any work-related conversation. We recommend that the policy include a statement that discharge is the consequence of secretly recording a work-related conversation.

In other states, the laws on electronic recordings range from having no law on the subject to having a complete prohibition. If you have any questions on developing your policy or this area of the law, please feel free to contact your attorneys at Capozzi and Associates, P.C., for assistance.

WELCOME TO KIRK S. SOHONAGE, ESQ.



Kirk S. Sohonage, Esquire, is a graduate of the University of Denver and Washington & Lee University. Prior to joining Capozzi & Associates, P.C., Mr. Sohonage practiced law in the midstate and western Pennsylvania, focusing on business and employment litigation. Mr. Sohonage has also served as a Domestic Violence Prosecutor, where he oversaw a

federally funded unit that endeavored to eliminate domestic violence in southwestern Pennsylvania. He has tried over one hundred jury cases, civil and criminal, including successfully prosecuting homicides and other major felonies. He is currently the solicitor for the Cumberland County Register of Wills.

Mr. Sohonage has lectured on issues of Estate Planning, Employment Law and Domestic Violence, presenting seminars to Pennsylvania law enforcement, school districts and non-profit and for-profit entities. He has acted as solicitor for various governmental and quasi-governmental agencies over his career, including zoning boards, planning commissions, health authorities and workforce investment boards. Mr. Sohonage is a member of the Pennsylvania and Cumberland County Bar Associations and is admitted to practice before all Pennsylvania state courts and the Federal District Courts for the Middle and Western Districts of Pennsylvania. He currently serves on boards for Camp Hill Zoning and the Cumberland County Crimestoppers. Mr. Sohonage focuses his work on employment and labor law, and business litigation, primarily serving institutions providing nursing care to the elderly.

Mr. Sohonage resides in Camp Hill, Pennsylvania, with his wife and three daughters.

NEW PARTNER

We are pleased to announce that Donald R. Reavey, Esquire, has been elevated to Partner! Please join us in congratulating him and celebrating his professional achievement.

PARTIAL MCARE PREMIUM ABATEMENT

Governor Rendell signed into law an act amending the Medical Care Availability and Reduction of Error (MCARE) Act on December 23, 2005. The MCARE Act amendments extend the Health Care Provider Retention Account and Health Care Retention Program through the end of calendar year 2007.

As you know, one component of this program is made up of a state fund used to pay claims filed against participating health care providers for losses or damages awarded in medical professional liability actions that exceed the basic insurance coverage required. The fund's liability coverage is equal to \$500,000.00 per occurrence or \$1.5 million per year. Assessments of all participating providers subsidizes the fund by using the prevailing primary premium for each participant. Eligible providers may apply to the Department of Insurance for an abatement of that Provider Assessment. Nursing Homes could not previously apply for an abatement as they were not included in the definition of an 'eligible provider.'

Governor Rendell's action now expands the definition of an "eligible provider" to include Nursing Homes and, for the first time, authorizes them to apply to the Pennsylvania Department of Insurance for an abatement of that Assessment. Therefore, Nursing Homes are now eligible to apply for a fifty percent (50%) abatement of their 2006 Retention Fund Assessment by timely filing with the Department of Insurance. All applications for the 2006 Retention Fund Abatement must be filed by Monday, February 12, 2007

ASSISTANT U.S. ATTORNEY JAMES G. SHEEHAN (PHILADELPHIA) DISCUSSES IMPACT OF NEW MEDICARE PART D PROGRAM ON NURSING HOMES

During a compliance program held January 24, 2006, AUSA Sheehan, responding to a question concerning the impact of Medicare Part D on nursing home compliance programs, advised that:

1. Nursing Homes will be major victims of Medicare Part D Fraud and Abuse and are at risk of getting stuck with bills for assuring the timely availability of prescription drug services for their residents that should be paid by Medicare Part D Plans, including employer-based plans subsidized under Medicare Part D.
2. Nursing Home compliance programs must resist incentives offered to switch patients into specific plans. These 'incentives,' 'prizes,' 'gifts,' or 'rewards' as they may be termed by the prescription plan or their representatives are actually interpreted by the federal government as illegal kickbacks. Medicare Part D substantially increases the risk of kickback problems in nursing facilities and requires increased vigilance by

your staff to guard against the risk of accepting a kickback which subjects you to a host of potential criminal and civil problems.

3. Nursing Home compliance programs must include oversight of Pharmacy Consultants, Assistants and Technicians to assure that they are not engaged in unlawful referral practices.
4. Nursing Homes need to keep detailed records of any and all problems their residents or they have with accessing Medicare Part D benefits and work with enforcement agencies to detect and investigate Medicare Part D fraud and abuse. This is particularly true if you discover counterfeit drugs or short fills which can result in problems for residents.

If you have questions about incorporating Medicare Part D compliance concerns into your facility's compliance program, you may contact Louis J. Capozzi, Jr., Esquire.

"CURRENT ISSUES FOR NURSING FACILITIES IN PENNSYLVANIA"

CAPOZZI & ASSOCIATES, P.C. Continuing Education Seminar

THURSDAY, MARCH 16, 2006

9:00 a.m. – 4:30 p.m.

HOLIDAY INN-GRANTVILLE (*Interstate-81 at NEW EXIT 80*)

This educational offering has been approved by the National Continuing Education Review Service (NCERS) of the National Association of Boards of Examiners for Nursing Home Administrators (NAB) for approval for 6 clock hours and 6 participant hours.

Program Approval Number: 1032006-21801-6

9:00 a.m. – 10:00 a.m. – *Louis J. Capozzi, Jr., Esquire*

MEDICARE AND MEDICAID UPDATE

STATUS OF PROVIDER TAX ASSESSMENTS AND NEW PAYMENT SYSTEM
CURRENT YEAR RATE AND PAYMENT ISSUES
PROPOSED CHANGES TO ELIGIBILITY AND BENEFITS
REVIEW OF PENDING/RECENT COURT/ADMINISTRATIVE DECISIONS
MEDICARE PART D IMPLEMENTATION CONCERNS

10:00 a.m. – 11:00 a.m. – *Kirk S. Sobonage, Esquire*

LABOR AND EMPLOYMENT UPDATE

BACKGROUND CHECK UPDATE
UNIONIZATION UPDATE
RECENT PENNSYLVANIA CASES

11:00 a.m. – 11:15 a.m. MID-MORNING BREAK

11:15 a.m. – NOON – *Donald R. Reavey, Esquire*

TAX ASSESSMENT AND EXEMPTION UPDATE

REVIEW OF RECENT DECREASES IN ASSESSMENT RATES
SALES AND USE TAX EXEMPTION PROCESS CHANGES
RECENT PENNSYLVANIA CASES

NOON – 1:00 p.m. LUNCH (INCLUDED)

1:00 – 1:45 p.m. – *Michael B. Volk, Esquire*

ADMISSION AGREEMENTS AND COLLECTION ISSUES

RECENT PENNSYLVANIA CASES
STATUS OF ARBITRATION CLAUSES

1:45 p.m. – 2:30 p.m. – *Doreena Craig Sloan, Esquire*

GUARDIANSHIPS AND PROTECTIVE SERVICES

THE GUARDIANSHIP PROCESS
DEALING WITH FAMILY PROBLEMS
PROTECTING RESIDENT RIGHTS TO BENEFITS

2:30 p.m. – 2:45 p.m. AFTERNOON BREAK

2:45 p.m. – 3:30 p.m. – *Daniel K. Natirboff, Esquire*

REIMBURSEMENT APPEAL UPDATE

RECENT PENNSYLVANIA CASES
REIMBURSEMENT ISSUES AWAITING DECISION
OBTAINING FUTURE RATE RELIEF THROUGH SETTLEMENTS

3:30 p.m. – 4:15 p.m. – *Joseph F. Murphy, Esquire*

DEFENDING NURSING HOME LIABILITY CLAIMS

THE CURRENT CLIMATE OF NURSING FACILITY LIABILITY
CLAIMS IN PENNSYLVANIA.
WHAT IS INVOLVED IN DEFENDING A LIABILITY CLAIM?
WHAT IS SELF INSURANCE AND HOW DOES IT WORK?

4:15 p.m. – 4:30 p.m.

EVALUATION AND COMMENTS

ALL SPEAKERS PRESENT