



# Health Law Section

## The Mississippi Bar

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## Message from the Chair

Summer time is coming to a close as we prepare for the upcoming orientation day for our Section Officers for the 2014-2015 year. First and foremost, as I take over as Chair, I want to thank Stephen Clay for stepping up to serve as our Chair for 2013-2014. He has done a fine job of leading our Section and moving us forward. I hope to be able to continue that progress and continue to grow the membership and expand the involvement of the members of our Section. A special thanks is also due Jenny Tyler Baker, who has taken on the job of editing and publishing this Section newsletter. Great job, Jenny!

At this summer's Annual Meeting in Sandestin, we had the opportunity to hear from State Insurance Commissioner Mike Chaney on the implementation of the Affordable Care Act in Mississippi. It seems that we continue to hear something about the Affordable Care Act almost every week. With the constant efforts in the U.S. House of Rep-

resentatives to repeal the Act, I want to humbly suggest an initial "legislative fix" for the ACA: I think we should change its name to The Never-ending Story Act. Most of you heard, no doubt, about the conflicting rulings from the D.C. Circuit and the Fourth Circuit recently over the legality of the federal subsidies provided to those who purchase coverage through the federal insurance exchanges – the D.C. Circuit ruling the subsidies are unlawful and the Fourth Circuit ruling that they are lawful. The D.C. Circuit also recently handed down another decision rejecting an argument that the ACA violated the Origination Clause of the U.S. Constitution. The lawsuits just keep on coming, including one soon apparently from the House itself against President Obama, challenging some executive orders issued to implement the Act. As I say, it's the never-ending story.

Our Section hosted a broad-ranging CLE event on July 17 at the Mississippi Bar Center



**Bob Anderson, Chair**

which we entitled "Hot Topics in Health Care Law." Stephen Clay and I were speakers but I also want to thank all our other presenters, including: Katie Gilchrist, Jonathan Werne, Joyce Hall, Dinetia Newman, Jean Hess, Ray McNamara, Bobby Dallas and Adam Kilgore. This CLE was a real success thanks to the time and efforts of all the speakers and the help of Rene Garner at The Mississippi Bar. We plan to offer it on an annual basis. We also want to offer "brown bag" type one-hour CLE teleconference events, so if you have any ideas for topics, please feel free to send them along to me at [robert.anderson@usdoj.gov](mailto:robert.anderson@usdoj.gov). Meanwhile, I look forward to another exciting year for our Section. Please welcome Jonell Beeler and Julie Mitchell to our Executive Committee as they begin their terms of service with our Section.

## A Review of the Nonmonetary Compensation Stark Law Exception

By Jonathan R. Werne, Member  
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A hospital administrator approaches you and says, “The hospital received two free tickets to the upcoming black tie gala for being a premier sponsor and I would like to give the tickets to a member of the Hospital’s medical staff. Can I do it that?” A moment later, the chief of staff asks, “Can the hospital give the medical executive committee members Google Chromebooks for use during their meetings?” And as any good lawyer, you respond to both of them, “It depends.”

Under the physician self-referral law, commonly referred to as the “Stark Law,” a physician is prohibited from making referrals for certain services payable by Medicare to an entity with which the physician (or the physician’s immediate family member) has a financial relationship. 42 U.S. Code § 1395nn. Such entity is also prohibited from presenting or causing to be presented such claims to Medicare (or billing any individual, entity, or third party payer) for the DHS. *Id.* The Stark Law defines the term “financial relationship” very broadly and it includes any type of direct or indirect ownership or investment interest, or compensation arrangement. 42 CFR § 411.354. The Stark Law also establishes exceptions for certain financial relationships. *Id.*

§ 411.357. Thus, if the requirements of a particular exception are met, the general prohibition will not apply and the physician referral will be permitted.

For the purposes of the Stark Law, the giving of free black tie gala tickets or a Chromebook by the hospital to a physician is a “financial relationship.” Thus, unless an exception applies and its requirements are met, the physician would be prohibited from making a referral for certain services to the hospital that gave him or her the tickets or the Chromebook.

One of the possible exceptions that may apply to the proposed giving of the free black tie gala tickets or a Chromebook is the nonmonetary compensation exception. 42 CFR § 411.357(k). The nonmonetary compensation exception allows an entity (such as a hospital) to provide a physician with items or services that do not exceed a defined annual aggregate threshold. *Id.* § 411.357(k)(1). As the name of the exception implies, an entity only permitted to provide a physician with a nonmonetary item; the entity cannot provide a physician with cash or cash equivalents. Although the Stark Law does not specifically define “cash equivalents,” the exception prohibits an entity from providing gift certificates, stocks or bonds, or airline frequent flier miles to physicians. 63 Fed. Reg. 1,699. The exception originally had an annual aggregate threshold of \$300.00. 66 Fed. Reg. 920.

Starting in 2004, CMS began to adjust the threshold each year for inflation based upon the consumer price index. 69 Fed. Reg. 16,112, 42 CFR § 411.357(k)(2). For this year, the annual aggregate threshold is \$385.00. CPI-U Updates, <http://go.cms.gov/X6BcZE>.

A question that always arises with this exception is how is the value of the item or service provided to the physician determined? The value of the item or service provided to the physician is not the entity’s actual cost of the item or service. 72 Fed. Reg. 51059. Instead, the value is the amount the physician would have paid to purchase the item or service. *Id.* In the above example, the value of the gala tickets would be the actual cost to purchase the tickets to the events. The value would not be the amount paid by the hospital to sponsor the gala. In addition, the value would not be zero since the hospital received the tickets for free for sponsoring the gala. For the Chromebook, the value would be the amount a physician would have paid to purchase the Chromebook from an electronic store or an online retailer.

The nonmonetary exception only protects compensation provided to individual physicians. 66 Fed. Reg. 921. An entity cannot use the exception to provide a group practice gift. *Id.* CMS has previously cautioned, “the exception will not apply to gifts, such as holiday parties or office equipment or supplies, that are valued

## A Review of the Nonmonetary Compensation Stark Law Exception, *cont'd*

at not more than [\$385] per physician in the group, but are, in effect given or used as a group gift.” *Id.*

The physicians receiving the item or services from the hospital cannot have solicited the item or services from the entity. 42 CFR § 411.357(k)(1)(ii). The gift from the hospital to the physician must be “a voluntary transfer made without consideration or compensation expected or received in return.” 66 Fed. Reg. 921. This prohibition on solicitation of the gift also includes the physician’s practice, and its employees and staff members. 42 CFR § 411.357(k)(1)(ii).

The exception also requires that the compensation provided to the physician cannot be determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician. 42 CFR § 411.357(k)(1)(i). The compensation may not violate the Anti-Kickback Statute or any federal or state law or regulation that governs billing or claims. *Id.* § 411.357(k)(1)(iii).

The nonmonetary compensation exception does not specifically require an entity to track the items or services provided to a physician. Although tracking of the gifts is not specifically required by the exception, it is best practices to do so.

The exception also provides a “payback” option if a physician is inadvertently provided items or

services in excess of the annual aggregate threshold from a particular entity. 42 CFR § 411.357(k)(3). This option may only be used if the excess value provided to the physician is no more than 50% above the annual threshold. *Id.* § 411.357(k)(3)(i). In other words, for 2014, the option would only be permitted if the nonmonetary compensation the physician received from the entity was less than \$577.50 (\$385.00 x 150%). In such a circumstance, the physician must return the excess nonmonetary compensation (or an amount equal to the excess compensation) to the entity by the end of the calendar year in which the excess nonmonetary compensation was received or within 180 consecutive days following the date the excess compensation was received by the physician, whichever is earlier. 42 CFR § 411.357(k)(e)(ii). This option may only be once every 3 years for a particular physician. *Id.* § 411.357(k)(e)(iii).

Finally, the nonmonetary compensation exception permits an entity to provide its entire medical staff one local medical staff appreciation event per year (such as a holiday party). 42 CFR § 411.357(k)(4). However, any gifts given to medical staff during the medical staff appreciation event must comply with the requirements of the nonmonetary compensation exception. *Id.* § 411.357(k)(4).

Returning to our two initial questions, assuming the price of the two gala tickets is \$200, the

hospital administrator may give the tickets to a physician. Again, assuming the price of a Google Chromebook is \$350, the hospital may provide one to each of the medical executive committee members. The hospital would then track the value of the tickets and Chromebooks provided to the respective physicians. The hospital, however, cannot provide the gala tickets and the Chromebook to the same physician. If the hospital inadvertently provided both items to a particular physician, since total value of the items provided to the physician is less than \$577.50 (in this case, \$550), the physician could return one of the items to the entity or pay the entity an amount equal to the excess compensation (*i.e.*, \$165.00) within the time period allowed under the nonmonetary exception.

## Hot Topics in Health Care Law – A CLE Briefing

Health Care Law is a constantly changing area of the law. Whether lawyers are adjusting to new responsibilities under HIPAA so as to avoid an audit, trying to figure out what latest change the Mississippi Legislature has made in areas like provider appeals of Medicaid billing disputes (which now will be heard in Chancery Court), understanding what the employer mandate means under the Affordable Care Act, keeping up with the latest regulatory and enforcement developments which affect health care clients, or simply trying to put together a health care related transaction, there always seems to be a new hot topic in health care law. This CLE seminar covered some of these current hot topics.

During the CLE Seminar, Health Law Section Chair Stephen Clay offered an update on health care law issues addressed in the 2014 Session of the Mississippi Legislature. Attendees heard from Dinetia Newman of Bradley Arant Boult Cummings and Jean Hess of Horne LLP about the HHS Office for Civil Rights and its responsibility in enforcing the HIPAA privacy and security regulations. Veteran medical malpractice litigators Ray McNamara of Jones Walker and Bobby Dallas of Sessums Dallas offered a 10-year perspective on the impact of tort reform in Mississippi. Katie Gilchrist of Adams and Reese provided her insight on the employer mandate under Obamacare while health care practitioners Joyce Hall of Watkins and Eager and Jonathan Werne of the Brunini firm shared their perspective on the current status of co-management arrangements between doctors and hospitals and the status of non-monetary compensation under the Stark law. The Bar's General Counsel, Adam Kilgore, provided a presentation on social media from the Bar's perspective.



**Bob Anderson, chair of the Health Law Section, and Stephen Clay, past chair of the Section.**



## Health Law Section

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We are on the  
web!  
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## Upcoming Events

Wednesday, November 5, 2014  
Teleseminar on Ethical Challenges Faced in Preserving Privilege in  
Investigative and Compliance Roles

Tuesday, November 11, 2014  
Career Panel Lunch Meeting with Health Law Society at  
Mississippi College School of Law

Thursday, May 28, 2015  
6 hour CLE at the Mississippi Bar Center in Jackson.

Thursday, July 9, 2015  
Health Law Section Annual Meeting at the Sandestin Hilton.

## Health Law Section 2014-2015 Executive Committee

### Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Jenny Tyler Baker at [Jenny@tindelllawfirm.com](mailto:Jenny@tindelllawfirm.com).

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

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