

# H<sup>CCH</sup> Health Care Compliance LETTER

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## HCCA survey evaluates compliance training, budget

by Sheila Lynch-Afryl, JD, Contributing Editor

The Health Care Compliance Association's (HCCA) "7th Annual Survey - 2005 Profile of Health Care Compliance Officers" provides information about compliance training, budget, staff, staff education, and compensation, which compliance professionals can use to evaluate the progress and operation of their own compliance programs.

**Compliance training.** Eighty-seven percent of respondents reported that they provide regular compliance update training beyond the initial formal compliance training. Forty-six percent of the respondents reported that an employee spends on average one to three hours a year in compliance training, and 40 percent reported one hour or less.

Sixty-four percent of respondents report that the typical employee at their organization receives compliance update training annually, while nine percent report that the typical employee receives such training twice a year. The compliance training program includes compliance training as a component of new employee orientation for 91 percent of the respondents, and 90 percent reported that compliance awareness training for all employees constitutes a part of their training program. Seventy-six percent provide topic-specific or in-depth training that is separate and in addition to compliance awareness training, while 67 percent utilize compliance training for managers and leaders.

For compliance awareness training, 71 percent use instructor-led classroom training with the compliance officer as the instructor. Fifty-eight percent use computer- or web-based training, and 52 percent use instructor-led classroom training with instructors other than the compliance officer. Similarly, for topic-specific training, 57 percent use instructor-led classroom training with the compliance officer as the instructor, and 59 percent use instructor-led classroom training with instructors other than the compliance officer.

**Budget.** Seventy percent of respondents do not have a budgeted line item in their compliance budgets for the direct costs of training. For those who do not, 70 percent reported that the direct cost for compliance training is not absorbed by departmental budgets other than compliance.

Twenty-eight percent estimated the 2005 compliance training budget for their organizations to be \$50 to \$4999. Fourteen percent estimated it at \$5000 to \$14,999, and 34 percent did not know. For organizations with revenue less than \$100,000, 48 percent estimated their 2005 compliance training budget from \$50 to \$4999, while one percent estimated the budget to be \$200,000 or more. For organizations with revenue of \$600,000 or more, 11 percent estimated their 2005 compliance train-

## Trends (cont.)

ing budget at \$50 to \$4999; 15 percent estimated it at \$200,000 or more.

Twenty-five percent of respondents reported that the estimated annual budget of their compliance departments was less than \$100,000; 62 percent of the compliance budget is spent on salaries and seven percent is spent on training.

**Program maturity.** According to HCCA, corporate compliance programs, which were unknown to most health care organizations in 1997, have entered into a maturing phase, as evidenced by the top goals that respondents selected: monitoring and auditing (84 percent), staff training (75 percent), and conducting effectiveness evaluations of their compliance program (71 percent).

Eighty-eight percent of respondents include privacy and information security in their compliance program, 84 percent include conflict of interest, and 46 percent include the Sarbanes-Oxley Act.

Ninety-one percent of respondents reported that their organization has a

compliance committee. The compliance officer chairs the compliance committee for 78 percent of respondents. The compliance committee has the following responsibilities: planning (70 percent), disposition of investigations (61 percent), and reporting to the governing board (57 percent).

**Compensation.** The mean chief compliance officer compensation for respondents is \$152,852; the mean compensation for chief compliance officers with a bachelor's degree is \$141,275, while the mean compensation for those with a doctorate is \$177,500.

The mean compliance officer salary is \$95,174. This mean salary differs by the size of the organization: for organizations with 5000 or more employees, the mean is \$115,745, while the mean for organizations with 1000 or fewer employees is \$78,797. Sixty-four percent reported that the projected salary increase for the compliance officer in the upcoming year is between three and five percent.

Twenty percent of HCCA members (624 HCCA members) completed the survey. Since 1999, HCCA has conducted the survey in the summer and reported the results in the last quarter of the year. This year, however, the survey was conducted during December and January and tabulated during March so that HCCA could report the information to members during the HCCA annual meeting. ■

*CCH Chicago Bureau, May 5, 2005*

## Antitrust

### Settlement agreements of patent infringement lawsuits valid; FTC order vacated

by **Andra Popa, JD, LLM,**  
Contributing Editor

A Federal Trade Commission (FTC) panel improperly decided that the innovator and holder of a patent unreasonably restrained trade by entering into settlement agreements with two generic manufacturers. According to the terms of the settlement agreements, the innovator made payments to the generic companies, while the generic companies agreed to delay the entry or marketing of their generic products.

**Reverse payments and market delays.** The innovator possesses a valid formulation ('743) patent for a material that encapsulates a potassium supplement. To gain early market entry, the first generic manufacturer submitted an abbreviated drug application (ANDA)

of its version of the coating material to the Food and Drug Administration (FDA) pursuant to the Hatch-Waxman Act. The FDA granted the generic manufacturer permission to market its version of the coating. The innovator filed a patent infringement lawsuit, activating a 30-month delay in FDA approval. The innovator and the generic manufacturer settled the lawsuit, agreeing that the innovator would license five of the generic manufacturer's products and make an up-front royalty payment of \$60 million. The innovator did not bring the principal product that it licensed from the generic manufacturer to market.

In a separate matter involving the same formulation patent, another generic manufacturer filed an ANDA with the FDA to gain early market entry for its own generic version of the coating. Subsequently, the innovator brought a lawsuit for the infringement of its formulation patent. Through a court-supervised mediation, the innovator



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Unless otherwise noted, all paragraph references are to the CCH Health Care Compliance Reporter.

## Antitrust (cont.)

entered into a settlement agreement with the manufacturer, in which the generic manufacturer agreed to delay the introduction of its product. The innovator also agreed to pay the generic company up to \$10 million if it received FDA approval to market its generic version by a certain date.

**Rule of reason and *per se* analysis improper.** That the innovator owns a patent invalidates the use of both the rule of reason test and the application of a *per se* analysis for both settlements. The proper analysis considers the following: (1) the potential exclusionary rights of the patent; (2) the extent to which the settlement agreements exceed the scope of these rights; and (3) the anticompetitive effects that result.

**Within exclusionary rights of patent holder.** Without contrary evidence, the patent is presumed valid, which grants the innovator the right to exclude generic manufacturers from the market until the expiration of its patent.

Generic manufacturers are not permitted to enter the market prior to this date without the innovator's permission.

Both agreements to delay the introduction of the generic products are well within

**“That the innovator owns a patent invalidates the use of both the rule of reason test and the application of a *per se* analysis for both settlements”**

the exclusionary scope of the patent and do not constitute horizontal market allocation agreements. The inference cannot be drawn from either record that the innovator paid-off the generic manufacturers. Moreover, the U.S. Supreme Court has recognized that parties to the settlement of a patent infringement lawsuit are permitted to exchange consideration.

**Effects are not anti-competitive.** The practical effect of the settlement agreements is not anti-competitive. The parties simply settled the litigation in accordance with their perceived risk of prevailing or losing. The generic manufacturers risked only litigation costs. With the validity of its patent at stake, the innovator purchased the licenses and made payments to assure that its patent would remain valid and that the generic manufacturers could not infringe on its patent in the future. The settlement benefits the public, because the licensing agreements allow a competitor's product to be introduced to the market, which creates more competition and ultimately furthers innovation.

The FTC order that the pharmaceutical companies cease and desist from being parties to certain settlements of patent infringement lawsuits is vacated. ■

*Schering Plough v. FTC, 11th Circuit, ¶1264,018*

## Exempt Organizations

### Hospital-owned sports club not entitled to exemption

by CCH Editorial Staff

A nonprofit hospital that owned and operated a facility consisting of a sports club and medical pavilion was not entitled to an Indiana charitable use property tax exemption for the sports club portion of the facility because the members of the sports club paid membership fees comparable to

*Government Finance, Indiana Tax Court, No. 49T10-0012-TA-127, December 9, 2004).* However, a portion of the medical pavilion used by hospital departments was entitled to a charitable use exemption.

The sports club consisted of six tennis courts, racquetball and squash courts, a basketball court, a therapy pool, a running track, aerobics rooms, continued on page 8

**“However, a portion of the medical pavilion used by hospital departments was entitled to a charitable use exemption.”**

those charged by private for-profit health clubs for use of similar exercise facilities (*Indianapolis Osteopathic Hospital, Inc., d/b/a Westview Hospital v. Department of Local*

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# The new advisory role of the Federal Sentencing Guidelines after *Booker/FanFan*: What does it mean and how long will it last? (Part 2)

By Michael E. Clark

*The first part of this article, published in the CCH Health Care Compliance Newsletter on May 2, 2005, briefly retraced the development of the Federal Sentencing Guidelines. The second part of this article now examines what led the Supreme Court to recently hold that these once-mandatory and popular guidelines now are only advisory. Finally, the article addresses the likely effects from the change to advisory guidelines upon the investigation and prosecution of white-collar cases—including what this means for corporate entities and their ongoing compliance.*

### **United States v. Booker: Mandatory Sentencing Guidelines Violate the Sixth Amendment**

Last year, in the narrow (five to four) majority opinion announced in *Blakely v. Washington*,<sup>22</sup> the Supreme Court relied upon *Apprendi* to hold that the Sixth Amendment's right to a jury trial was violated when a judge in Washington enhanced a sentence under that state's determinant sentencing scheme (which closely resembled the Federal Sentencing Guidelines) on facts that the defendant did not admit, and that the State had not alleged nor proven to a jury:

Our commitment to *Apprendi* . . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.<sup>23</sup>

The final piece of the Sixth Amendment jury trial entitlement puzzle was supplied by this year's major ruling where the Supreme Court decided appeals involving two cases arising in different Circuits<sup>24</sup> that were consolidated. These government appeals resulted in the two fractured plurality opinions recently announced in *United States v. Booker*.<sup>25</sup> The outcome in *Booker* was twofold: First, a five-to-four plurality of the Court held, in an opinion authored by Justice Stevens, that the statutory requirement which made the Guidelines *man-*

*datory* was unconstitutional.<sup>26</sup> Second, a different five-to-four plurality held, in an opinion authored by Justice Breyer, that the remedy was to make the Guidelines only advisory—so that the Court avoided having to invalidate the body of sentencing procedure and case law developed under the Guidelines over these past two decades.<sup>27</sup>

A huge amount of scholarly work has already been developed to address various aspects of the landmark *Booker* decision.<sup>28</sup> In reviewing *Booker*, it now seems rather clear that the Supreme Court, after its decisions in *Apprendi* and *Blakely*, had to invalidate the longstanding practice of using mandatory Sentencing Guidelines since doing so offended the Sixth Amendment;<sup>29</sup> still, the Court's incremental expansion of the Sixth Amendment jury trial protections made it difficult to see this outcome, as the following excerpt explains:

*Booker's* holding, that the Sixth Amendment prohibits Congress's system of mandatory Guidelines, is by no means obvious. The Amendment's terms state only that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." On their face, however, the mandatory Guidelines did nothing to prevent criminal defendants from receiving a jury trial, nor did they displace the constitutional requirement of proof "beyond a reasonable doubt" at that trial.

The recent Guidelines cases concern, not the absence of a jury trial, but a punishment that exceeds the maximum sentence authorized by such conviction or plea bargain. The idea is that, where some increment of the defendant's sentence was not authorized by the jury's guilty verdict, such increment of punishment was not imposed consistently with the requirement of a jury trial.<sup>30</sup>

## Conclusion: What Lies Ahead for Individuals and Entities in the Aftermath of Booker

Justice Breyer's plurality remedial opinion in *Booker* acknowledged that the Court's decision did not represent the final word about how federal courts would handle sentencing matters in the future: "Ours . . . is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."<sup>31</sup>

Many scholars have criticized Justice Breyer's Solomonic approach in *Booker* as being too vague and legally unsupported.<sup>32</sup> Already federal courts of appeal and district judges have issued conflicting opinions addressing issues not fully explained by *Booker*—including how much weight and consultation needs to be given during sentencing to the newly "advisory" Guidelines,<sup>33</sup> and how courts should evaluate whether cases sentenced under the prior Guidelines regime were properly preserved for review of sentencing error.

In the near time, as Congress holds hearings to determine what kind of "fix" to craft to remedy the *Booker* decision, and as some elected officials are calling for the use of more "mandatory minimums" to get around the Sixth Amendment problem,<sup>34</sup> the playing field that once was heavily tilted by the mandatory Sentencing Guidelines in favor of the government has been leveled somewhat. But this may depend on the luck of the draw as to the particular federal judge who may be assigned to handle a federal criminal case, the Circuit in which the case is pending, and the complexity of the case itself since the government may have to overcome more challenges to the evidence that it used to be able to introduce without difficulty to seek an enhancement of punishment for defendants in the pre-*Booker* era.

While some pundits have argued that *Booker* makes plea bargaining more meaningful,<sup>35</sup> each individual's case should be assessed in light of the factors noted above. In smaller federal districts having fewer judges, counsel may more accurately assess the impact of *Booker* as to how an Assistant U.S. Attorney may view a case, and about whether a judge may see the case in the same manner. In larger districts, however, such forecasting may have to wait until a judge is randomly assigned—which may be too late for having meaningful plea discussions.

With perhaps one minor exception,<sup>36</sup> corporations and other artificial persons generally will be unaffected by the tempest spawned by *Booker* since compliance measures and full cooperation with government agencies continue to be critical tools for avoiding an indictment and the many associated bad events that often follow—including shareholders' derivative suits (for publicly traded entities), class action suits, and, last but not least, possible ruinous agency actions such as suspension and debarment/exclusion. Finally, in the aftermath of the Delaware Chancery's *Caremark* decision<sup>37</sup> and its progeny,<sup>38</sup> officers and directors of such entities operating

businesses in the post-Sarbanes-Oxley environment must ensure that their actions are beyond question to avoid incurring personal liability for having provided inappropriate oversight.

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<sup>22</sup> \_\_ U.S. \_\_, 124 S.Ct. 2531 (2004).

<sup>23</sup> *Blakely*, 124 S.Ct. at 2538-2539.

<sup>24</sup> The underlying cases were *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) and *United States v. FanFan*, 2004 WL 1723114 (D. Me.).

<sup>25</sup> \_\_ U.S. \_\_, 125 S.Ct. 738 (2005).

<sup>26</sup> As the Court explained:

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. . . . [E]veryone agrees that the constitutional issues . . . would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges . . . .]

The Guidelines as written, however, are not advisory[.] . . . While subsection (a) of [18 U.S.C.] § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court "shall impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws. . . .

\* \* \*

Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Booker*, 125 S.Ct. at 750; 756.

<sup>27</sup> Justice Breyer's plurality opinion gave some limited answers to federal courts about how they are to handle sentencing matters and the role of the Guidelines for future cases (but left unanswered many other questions):

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp. 2004), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (main ed. and Supp. 2004), which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).

*Booker*, 125 S.Ct. at 756–757.

<sup>28</sup> An excellent source of information about how the courts are attempting to address the unanswered issues presented by the *Booker* decision is a blog provided by Professor Douglas A. Bermann of the Moritz College of Law at The Ohio State University, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/](http://sentencing.typepad.com/sentencing_law_and_policy/). Other good sources of information include the "White Collar Crime Prof Blog" provided by Professor Peter J. Henning of Wayne State University Law School, at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/](http://lawprofessors.typepad.com/whitecollarcrime_blog/), and the U.S. Sentencing Commission's compilation of "Booker and FanFan materials," at <http://www.ussc.gov/bf.HTM>. < Sites last visited on April 14, 2005.>

<sup>29</sup> See, e.g., Kirgis, *The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth*, GEORGIA L. REV., Vol. 39 (2005), at 3. ("With its decision in *Blakely v. Washington* . . . , the Supreme Court appeared to take the logic of *Apprendi* to its natural conclusion. *Blakely* extended *Apprendi* by defining the 'statutory maximum' . . . as 'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.' In other words, *Blakely* appeared to hold that any factual determination that operates to increase the maximum sentence to which the defendant is subject must be admitted by the defendant or made by the jury. . . ."). (Internal notes omitted).

<sup>30</sup> Green, *The Untimely Death (and Rebirth) of the Federal Sentencing Guidelines*, GEORGETOWN L.J. at 4. (Internal notes omitted).

<sup>31</sup> *Booker*, 125 S.Ct. at 768.

<sup>32</sup> See, e.g., Paul Rosenweig, Testimony Before the United States Sentencing Commission, *Sentencing in a Post-Booker World—It's Deja Vu All Over Again* (Feb. 15, 2005), available at [www.heritage.org/Research/LegalIssues/tst021505a.cfm](http://www.heritage.org/Research/LegalIssues/tst021505a.cfm) (last visited on March 6, 2005) ("The instability of *Booker* . . . and the uncertainty of the régime it creates derives from theoretical, analytical, and political flaws that cannot be concealed . . . [.] . . . I perceive myself to be in the minority on this point among academics and policy makers but I candidly do not believe that the push-me-pull-you solution in *Booker* can long withstand either political or constitutional scrutiny. \*:\* First, as a broad theoretical matter *Booker* lacks coherence. . . . \*:\* . . . Only in *Alice in Wonderland* does a Constitutional requirement for greater jury participation in sentencing determinations admit of a remedy that empowers the judiciary and excludes the jury altogether. Neither logic nor the law can withstand that tension over the long haul.").

<sup>33</sup> See, e.g., Irvin B. Nathan, *Supreme Court Gives the Defense a Boost in Plea Bargaining*, 12 BUS. CRIMES. BULL. No. 2 (March 2005) ("[W]e are already seeing a wide divergence in how judges treat the persuasiveness of the guidelines. Some have said they will give the guidelines 'heavy weight' and depart from their dictates only in extraordinary circumstances. Others have said that the guidelines are now but one factor amongst the many factors enunciated in section 3553(a) to be considered and they won't be given any decisive weight. Others, perhaps most remarkably, have concluded that the discretion they have been given allows them to adopt the *Blakely*-ized mandatory guidelines system that was rejected by the *Booker* majority and championed by its dissent.") (Internal notes omitted and page references not available).

<sup>34</sup> One such "Booker-fix" provision was introduced on April 6, 2005 by Rep. James Sensenbrenner (R-Wis.), Chairman of the House Committee on the Judiciary, as part of a drug sentencing bill (H.R. 1528) ("Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005") and would effectively make the Sentencing Guidelines a system of mandatory minimum sentences.

<sup>35</sup> See *id.* ("*Booker* appears to have weakened the prosecution's principal cudgel in bargaining for cooperation agreements under the Guidelines. Before *Booker*, virtually the only way a defendant could receive a substantial downward departure was for the prosecution to submit a letter to the court, pursuant to § 5K1.1 of the Guidelines, attesting to the significance of the defendant's cooperation. . . . *Booker* may mean that a defendant can now receive a substantial reduction in sentence—even for cooperation—without such a letter. A district court could "reasonably" adjust a sentence downward, and thus be upheld by a court of appeals, upon finding, even without the government's concurrence, that a defendant had cooperated significantly with prosecutors, with other authorities, or even with the victim of his crime. Indeed, the court can impose a lesser sentence for any articulated reason consistent with the standards in the Sentencing Reform Act of 1984. Because the defendant may no longer need the once indispensable § 5K1.1 letter, defense counsel will have more leverage to strike a better bargain.").

<sup>36</sup> The narrow exception that may benefit companies facing possible criminal exposure in the post-*Booker* era extends from the reduced threat of certain, lengthy imprisonment (post-*Booker*) for individual officers and employees of such entities who are targets of governmental investigations. The reduced threat may make it harder for government investigators and prosecutors to coerce such individuals into cooperating with the government as their only real hope of avoiding imprisonment. But this is a somewhat pyrrhic benefit since an indictment will ordinarily result in reduced shareholder values, loss of customers and profits, and an uncertain future..

<sup>37</sup> *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996) (Holding that when a director exercises a good faith effort to be informed and to exercise appropriate judgment, the director should be deemed to fully satisfy the duty of attention to a corporation's affairs.).

<sup>38</sup> See, e.g., *McCall v. Scott*, 239 F.3d 808, 817 (6th Cir. 2001) ("Unconsidered inaction can be the basis for director liability because, even though most corporate decisions are not subject to director attention, ordinary business decisions of officers and employees deeper in the corporation can significantly injure the corporation and make it subject to criminal sanctions.") and *In re Abbott Laboratories Derivative Shareholders Litigation*, 325 F.3d 795, 806 (7th Cir. 2003) ("[R]easonable inferences . . . from . . . the facts . . . are exactly the opposite of *Caremark*; members of the board in *Abbott* were aware of the problems. Where there is a corporate governance structure in place, we must then assume the corporate governance procedures were followed and that the board knew of the problems and decided no action was required.").

## Solutions to sticky HIPAA issues

by Catherine Hubbard, MA,  
Contributing Editor

Health care organizations can avoid several pitfalls in complying with the HIPAA Privacy Rule, by training employees according to their access to PHI, reviewing state laws, and securing physical privacy in hospitals and emergency rooms, according to Barry Herrin, a partner at Smith Moore, Atlanta, Georgia.

During an April 19 audio seminar on solutions to sticky HIPAA issues, presented by the American Health Information Management Association, Herrin said organizations need to make sure they thoroughly assess their employee training programs. "It's important to train to the level of access and use of the information, not the employee worker time," he stressed.

Many facilities still use the 'lunch and learn' method to train volunteers and people who work at the sites occasionally. These short sessions, often held over a lunch break, are usually not structured, full-format training regimens, Herrin said. In contrast, organizations often have more thorough training programs for medical staff and paid employees, Herrin observed.

Instead of basing the training regimen on numbers of hours worked or employee status, the structure should be geared to whether the employees have access to certain types of private health care information. "If you have access to the entire patient census, you're going to have to have training on how you're going to use that and under what circumstances," said Herrin. "It doesn't matter what you do, it's what you have access to," he added.

**State laws.** In addition, facilities should be aware of state privacy laws and their interactions with HIPAA, said Herrin. "The importance of state privacy laws in preemption cannot be

[over]estimated," he said. "If you are of the mindset that HIPAA is the be all and end all of your privacy compliance efforts, you may have a rude awakening," he cautioned.

In Georgia, for instance, about 175 state laws relate to the creation, maintenance, destruction and use and disclosure of medical information, said

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**“Instead of basing the training regimen on numbers of hours worked or employee status, the structure should be geared to whether the employees have access to certain types of private health care information.”**

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Herrin. "You need to look at those rules and statutes and how they relate to HIPAA," he emphasized.

**Creating physical privacy.** Herrin also provided several examples of how hospitals have improved privacy by making minor changes in their emergency rooms and other parts of their facilities.

One emergency room he visited had a small, open reception area that lacked a private area for patients to discuss their cases. "The physical intimacy of the environment creates a virtual impossibility to discuss anything in a confidential manner," he said, adding that many employees and patients were concerned about the lack of privacy.

The organization simply started using two private rooms in the treatment areas to register patients who asked for privacy, one that had been set aside for isolation and one for labor and delivery. For very little money, the facility put up a sign letting patients know they could discuss their cases in

private by notifying the registrar. "It's created an expectation of privacy," Herrin said. "We thought that was a pretty good solution."

At another hospital, patients were screened in a private area that was away from the reception area waiting room, yet around the corner were vending machines, where a person could loiter and overhear the conversations. Herrin recommended the hospital move the machines to the far end of the waiting area, which solved the problem.

Leaving documents out in the open also can cause privacy problems, said Herrin. At one emergency care facility, all of the registrars used a single printer, located down the hallway. Ordinarily this would not be a problem, he said, except that the printer was located by an exit.

As a test, Herrin removed a stack of newly printed materials off the printer. The employee simply printed another copy without trying to find the original. "That's an obvious security problem," he said. The facility solved the problem by putting additional printers in the registrars' offices and by making sure the papers stay with the registrars and patients.

Herrin also illustrated the privacy problems that can occur when a facility fails to dispose of old documents. One hospital had been storing x-rays since the 1950s. Since it had run out of storage room, employees had set about two hundred newer x-rays on a rolling cart at the end of a hallway in an unsecured area. Anyone could browse through the x-rays without attracting much attention. In fact, Herrin looked at one for several minutes, even holding it up to a light. "Every time I go to a hospital or patient care facility, it makes me want to buy more stock in off-site document storage companies, because nobody throws anything away," he quipped. ■

*CCH Chicago Bureau, May 6, 2005*

## Exempt Organizations (cont.)

and rehabilitation facilities. Members paid an initial fee and an additional monthly fee to have unlimited access to the facilities and received a comprehensive health risk assessment, or “mini-physical.”

Despite the fact that the sports club was built to encourage people to become regularly physically active to reduce the high cost of diagnosis and treatment of disease, the sports club provided a variety of services to members who were

not under a doctor’s care. In addition, members chose the sports club over competing clubs that did not receive favorable tax treatment.

As a result, the hospital was not entitled to a charitable use exemption because, even though the sports club promoted health through physical activity, the sports club was not predominantly used for a charitable purpose. However, the hospital was entitled to a charitable use exemption for portions of the medical

pavilion used by various hospital departments for activities substantially related to, or supportive of, the hospital’s inpatient facility.

Finally, the Marion County Property Tax Assessment Board of Appeals did not violate Indiana Const. Art. 1, Sec. 23, because the hospital did not convince the court that the board denied the hospital a privilege shared by members of a class of similarly situated people. ■

*CCH Chicago Bureau, April 22, 2005.*

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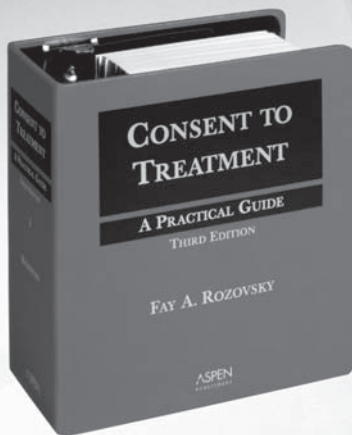
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