HEALTH LAW
AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

AMERICAN BAR ASSOCIATION
Young Lawyers Division

Committee Newsletter | Fall 2015

TABLE OF CONTENTS

ARTICLES >>

NEWS AND ANNOUNCEMENTS >>

ARTICLES

What I Wish I Had Known

By William W. Horton, 2015-2016 Chair, ABA Health Law Section

In what some might describe as a checkered career, I've been a judicial law clerk, an associate and then a partner at a mid-sized (by local standards) law firm, a successful and moderately well-known general counsel at a public company, a somewhat better-known former general counsel from a public company caught up in a major scandal, and a law firm partner again, at three different firms. That makes it somewhat of a challenge to focus on what I wish I had known as a young lawyer, because most days I have difficulty enough with what I wish I knew as an old lawyer. In trying to think about what might be useful to share, though, I thought I'd capitalize on the experience of having been both a lawyer and a client, and share some perspectives on how young lawyers can build stronger relationships with healthcare clients:

1. Clients don't want lawyers; they want answers. In law school and in law firm summer associate programs, law students get rewarded for doing comprehensive, even elegant analyses. Issues are carved up and subdivided, pros and cons are analyzed, ambiguities are identified, and facts are often replaced with assumptions. What gets rewarded gets repeated, so young lawyers tend to approach clients with the same sort of work product: long memoranda with detailed parsing of cases, BlueBook-perfect footnotes, lots of "prior tos" and "in the event thats" and "notwithstanding the foregoings", and "if the facts are X, then Y, but if the facts are not X, then Z".

But clients, even clients who are lawyers (like general counsel), don't admire that sort of work product in the way that law schools and hiring partners do. Clients are generally dealing with specific sets of facts, not with assumptions. Clients don't especially want to know what approaches you considered and rejected; they want to know what the answer is, and sometimes enough about how you got there to have confidence in that answer. Ask questions. Find out the facts. Tell the client whether it can do what it wants to do and, briefly, why; if it can't, tell the client what it can do that will be the nearest approximation of what it wants to do. Legal theory and analysis is fun, and it has to be done to get to the answer for the client, but the client doesn't want to see it; the client wants the answer.

2. Clients want the answer, even if the answer is uncertain. One of the great challenges in healthcare law is that almost anything the client wants to do is likely to be at least arguably illegal, and perhaps even criminal. The client who comes to you with a plan or proposal that leads to a clear, black-and-white answer is a rare thing, and to be cherished. More often, the client will present you with a proposed course of action that may—or may not—violate the Stark Law or the Anti-Kickback Statute, but the real answer is not clear. It may depend on fine variations in facts. It may depend on current enforcement priorities, or how that new case comes out. It may depend on what that odd little phrase in the regulatory preamble really means. But clients are looking for your best advice, even in the face of uncertainties. Tell the client what you think the answer is, along with a realistic assessment of the risks (and what might be done to reduce those risks). But don't just give the client raw legal principles, with no recommendation

as to how to apply those principles to the client's goals. The client doesn't need a human search engine; the client needs—and wants—legal advice.

3. Clients want lawyers they can like as people. At any given price point, there are lots and lots of lawyers who can do the same quality of work, from a technical perspective. How do clients decide which of those lawyers to hire? Sometimes, it's based on reputation. Sometimes, it's based on historical law firm relationships. But a great deal of the time, it's because the lawyer has made himself or herself someone the client wants to talk to. How do you become that someone? There are lots of ways. One is responsiveness, of course—timely work product, promptly returned calls, deadlines met and promises kept. Another, often underrated way is recognition that the client doesn't work for the lawyer—clients have businesses to run, families to be with, and schedules of their own to keep; a lawyer who assumes that the client is just going to be sitting around the office, waiting to sign documents the lawyer has delayed sending over until the last minute, is a lawyer who will soon have an irritated client. But one of the most important things a lawyer can do to build client loyalty is simply to treat clients like people. Find out about common interests and talk about them. Ask about families. Give a little free advice from time to time. Share a joke, or a story, or a good dinner or situationally appropriate beverage. And always, always, try to find out what's important to the client in terms of business objectives, and focus your work on serving those priorities. Contrary to popular mythology, clients don't hate lawyers—they just hate lawyers who think that the client's main business is listening to legal advice.

There are few things as satisfying about the practice of law as developing long-term, productive relationships with clients who like and respect you, and vice versa. The best way to develop those relationships is to learn to focus early on what clients want, to offer them solutions when you tell them about problems, and to be someone that they can talk with, not just someone who talks to them. And it's not that hard to do – just try to be the lawyer you'd want if you were the client.

About the Author: Mr. Horton is a Partner at Jones Walker LLP, where he focuses on representing healthcare providers. Mr. Horton currently serves as the Chairman of the ABA Health Law Section.

Criminal Liability: The Difference between Conditions of Participation and Conditions of Payment.

By Danielle "Dani" Borel

It's no secret that the Department of Justice's new favorite toy is the False Claims Act. In September of 2015 alone, the Department of Justice ("DOJ") assessed or settled for upwards of $35 million. The recent successes have caused more aggressive prosecutions of False Claims Act violations. As providers sit in the cross hairs of the DOJ and *qui tam* relators, it becomes increasingly important to ensure that allegations of False Claims Act violations are supported.

A False Claims Act violation cannot be supported by allegations of violations of a condition of participation. Often times, False Claims Act accusations will include a false certification theory, alleging that a provider falsely certified that services or procedures billed for were rendered and necessary. In such allegations, plaintiffs frequently lose sight of the distinction and difference in liability between conditions of participation and conditions of payment.

As far as liability, the difference between conditions of participation and conditions of payment is substantial. “Conditions of participation, as well as a provider's certification that it has complied with those conditions, are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program. Conditions of payment are those which, if the government knew they were not being followed, might cause it to actually refuse payment.” *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008).

Explaining it succinctly, the United States Court of Appeal for the Sixth Circuit stated that “[t]he success of a false certification claim depends on whether it is based on ‘conditions of participation’ in the Medicare program (which do not support an FCA claim) or on ‘conditions of payment’ from Medicare funds (which do support FCA claims).” *U.S. ex rel. Hobbs v. MedQuest Associates, Inc.*, 711 F.3d 707, 714 (6th Cir. 2013). If the requirements of the statute the plaintiff alleges were violated “are conditions of participation and not conditions of payment, violations are punishable only by administrative remedies including expulsion from the Medicare program.” *Id.* at 717. Without this distinction, the DOJ or *qui tam* plaintiffs could “assert that defendants' quality of care failed to meet medical standards” in violation of the False Claims Act, which “would promote federalization of medical malpractice, as the federal government or the *qui tam* relator would replace the aggrieved patient as plaintiff.” *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

More importantly, providers should be cognizant of the difference because the “courts are careful to distinguish between conditions of program participation and conditions of payment.” *Id.* Nearly all the United States Court of Appeal Circuits have rendered decisions upholding the notion that a claim under the False Claims Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment.

Accordingly, providers should carefully scrutinize the basis for False Claims Allegations. A finding that the only violations at hand are violations of conditions of participation removes a matter from the Department of Justice’s jurisdiction, assuming no other allegations are present. This is the case because once grounds of fraud are removed, the allegations properly fall within the jurisdiction of the administrative branch. Knowing the difference between a condition of participation and a condition of payment could mean the difference in criminal liability.

About the Author: Ms. Borel is an Associate at Breazeale, Sachse & Wilson. She practices in Breazeale’s Healthcare section and Commercial Litigation section.

False Claims Act & Stark Law Update: *United States ex rel. Drakeford v. Tuomey Healthcare System*

By Catherine A. Breaux

On July 2, 2015, the U.S. Court of Appeals for the Fourth Circuit affirmed a judgment of $237,454,195 against Tuomey Healthcare System in *United States ex rel. Drakeford v. Tuomey Healthcare System, Inc.,* 792 F.3d 364 (4th Cir. 2015). This decision highlights the complex regulations of Stark Law and the harsh penalties that can accompany a violation when coupled with the False Claims Act (FCA). Further, *Tuomey* exemplifies that relying on the advice of legal counsel will not always provide a defense to alleged violations of the False Claims Act.

This case centered around Tuomey's part-time employment agreements with physicians. Tuomey is a nonprofit hospital located in Sumter, South Carolina. The hospital serves a rural community that is designated as a medically underserved area. Most of the physicians that practiced at Tuomey were not employed directly by the hospital and performed most, if not all, outpatient surgeries at offsite surgery centers. In an effort to curb their losses from not having these outpatient surgeries, Tuomey sought to negotiate part-time employment contracts with numerous local physicians. As a result, Tuomey employed 19 physicians. The part-time employment contracts all had similar terms. In summary, each physician was required to perform all outpatient procedures at Tuomey. Further, the physicians were paid an annual base salary which was adjusted year to year solely based on the amount the physician collected from services rendered in the previous year. The majority of the physicians' compensation was earned in the form of a productivity bonus, which "paid the physicians eighty percent of the amount of their collections for that year."

Tuomey was unsuccessful in reaching an agreement with one physician, Dr. Michael Drakeford. Drakeford believed the contracts violated the Stark Law because the physicians stood to be compensated in excess of their collections, and the compensation did not reflect the fair market value of their services and could be viewed as unlawful payment for the doctor's facility-fee-generating referrals. Consequently, Tuomey and Drakeford sought the advice of attorney Kevin McAnaney. McAnaney advised the parties that the proposed employment contracts "raised significant red flags under Stark Law . . . and presented an easy case to prosecute for the government." Drakeford never entered into a contract with Tuomey and instead sued the hospital under the qui tam provisions of the FCA. Drakeford alleged that Tuomey knowingly submitted false claims for payment to Medicare. The federal government subsequently intervened in the case.

This case contains a rather lengthy procedural history, culminating in the U.S. Court of Appeals for the Fourth Circuit's ruling. The case initially went to trial in the U.S. District Court of South Carolina in 2010, and the jury found that Tuomey violated Stark Law but did not violate the False Claims Act. 31 U.S.C.A. §§ 3729-3733; *Tuomey Health Care System,* 792 F.3d at 370. Next, the jury's decision was vacated by the district court, who identified various procedural errors, and granted the government a new trial. In the second trial, the jury found that Tuomey did in fact violate both Stark Law and the False Claims Act by knowingly submitting 21,730 false

claims to Medicare for reimbursement. The district court subsequently entered a final judgment for the government, awarding damages and civil penalties totaling $237,454,195. *Id.*

On appeal before the U.S. Court of Appeals for the Fourth Circuit, Tuomey presented the following issues: whether the district court erred in granting the government's motion for a new trial on the FCA claim, whether the district court erred in denying Tuomey's motion for judgment as a matter of law following the second trial, and finally whether the court erred in awarding damages and penalties against Tuomey.

1. Stark Law: Aggregate compensation can implicate Stark Law's "volume or value" standard.

When it comes to Stark Law, a hospital may not submit to Medicare a claim for services that were rendered pursuant to a prohibited referral. 42 U.S.C.A. §1395nn *et seq.* Stark Law is designed to prevent the "overutilization of physicians who stand to profit from referring patients to facilities or entities in which they have a financial interest." *Tuomey Health Care System*, 792 F.3d at 373. Further, both inpatient and outpatient hospital services are considered Designated Health Services under the law. The court went on to explain that while a referral includes "the request by a physician or the item or service," it does not include, "any designated health service personally performed by the referring physician." Conversely, an action is considered a referral when the hospital bills a "facility fee" in connection with the personally performed service.

In this case, Tuomey argued that it was entitled to a judgment as a matter of law because the employment contracts at issue did not run afoul of the Stark Law because, among other reasons, it did not implicate Stark Law's volume or value standard. In rejecting this argument, the court explained that the Stark Law's volume or value standard "can be implicated when aggregate compensation varies with the volume or value of referrals." The court then summarized, that in this case, "the more procedures the physicians performed at the hospital, the more facility fees Tuomey collected," and in turn, "the more compensation the physicians received." The nature of the agreement was confirmed by Tuomey's former Chief Financial Officer, who admitted that every time one of the 19 physicians did a procedure on a Medicare patient at the hospital pursuant to the terms of the employment contract, "the doctor got more money." In concluding this issue, the court determined that a reasonable jury could find that the physician's compensation varied with the volume of referrals. Thus, the district court did not err in denying Tuomey's motion.

2. FCA: "Advice of counsel" defense to False Claims Act liability rejected.

The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to an employee of the United States Government." The court clarified that the purpose of the scienter requirement is to avoid punishing honest mistakes or mere negligence. Therefore, to meet this requirement, the actor must have actual knowledge of the information, act in deliberate ignorance of the truth, or act in reckless disregard of the truth or falsity of the information. A defendant may avoid liability under the FCA if it can show that it acted in good faith on the advice of counsel. Nevertheless, the

court was careful to point out that "consultation with a lawyer confers no automatic immunity from the legal consequence of conscious fraud." Tuomey sought legal counsel from McAnaney originally, who warned of the possible issues with the employment contracts, and later from Tim Hewson, counsel for Tuomey. Tuomey then retained Steve Pratt, a prominent healthcare lawyer who rendered two opinions that approved the employment contracts. However, Pratt did so without being told McAnaney's unfavorable assessment.

The court then affirmed the district court's order granting a new trial based on the grounds that the government was prejudiced by the exclusion of McAnaney's warnings to Tuomey regarding the legal issues surrounding the employment contracts. In order to make its case that Tuomey "knowingly submitted false claims under the FCA, the government must show that Tuomey knew there was a risk related to the contracts in that they violated the Stark law, and deliberately ignored that risk." The court noted that McAnaney was of the opinion that compensation arrangements under which the contracting physicians are paid in excess of their collections "were basically a red flag to the government." The court opined, "we think the importance of McAnaney's testimony to the government's case is self-evident . . . . It is difficult to imagine any more probative and compelling evidence regarding Tuomey's intent than the testimony of a lawyer hired by Tuomey, who was an undisputed subject matter expert on the intricacies of the Stark Law, and who warned Tuomey in graphic detail of the thin legal ice on which it was treading with respect to the employment contracts."

The court also rejected Tuomey's argument that they relied in good faith on advice of their legal counsel, Pratt. The court opined that a reasonable jury could have concluded that Tuomey was no longer acting in good faith reliance on the advice of its counsel when it refused to give full consideration to McAnaney's negative assessment of the part-time employment contracts and terminated his representations. Evidence before the jury suggested that Tuomey tried to procure an opinion most favorable to their position. The jury was able to consider whether Tuomey reasonably relied on "*all* the advice given to it by *any* source." This included the favorable and unfavorable advice given to Tuomey, by each and every source.

3. Constitutionality: $237,454,195 award upheld as constitutional.

Finally, the court rejected Tuomey's challenges to the award. The court explained, "A defendant found liable under the FCA must pay the government a civil penalty of not less than $5,500 . . . plus 3 times the amount of damages which the Government sustains because of that person." The jury found that Tuomey submitted 21,730 false claims and awarded $39,313,065, which the district court trebled. The district court added a civil penalty of $5,500 for each false claim, totaling $119,515,000. Tuomey argued that the civil penalty was improper because the jury considered both inpatient and outpatient procedures performed by the physicians. The court clarified that, "Stark Law prohibits the physician from making *any* referral to that hospital for the furnishing of designated health services." Tuomey further argued that the measure of actual damages was incorrect, as the true measure is not the sum total of all claims the government paid, but instead the difference between the true value of services and what the government actually paid. The court again rejected this argument, explaining "the Stark law prohibits the government from paying *any* amount of money for claims submitted in violation of the Stark Law." Thus, compliance with Stark law is a condition of payment by the government. In

summary, by reimbursing Tuomey for services that it was legally prohibited from paying, the government suffered injury equivalent to the full amount of reimbursement. Last, while the court found the award to be substantial, the court did not find it to be unconstitutional.

The court concluded by acknowledging the issues raised by the concurring opinion, but reemphasized that "it is for Congress to consider whether changes to the Stark Law's reach are in order." Circuit Judge Wynn penned a brief concurring opinion in order to highlight, "the troubling picture this case paints: An impenetrably complex set of laws and regulations," the effect of which is likely a "death sentence" for a community hospital in an already medically underserved area. He concluded by opining, Stark Law has become a "booby trap," especially when coupled with the False Claims Act for healthcare providers. However, Judge Wynn ultimately concurred in the outcome reached by the majority.

About the Author: Ms. Breaux is an Associate at Breazeale, Sachse & Wilson. She practices in Breazeale's Healthcare section.

NEWS AND ANNOUNCEMENTS

Get Involved!

Health Law Section Liaisons
The ABA Health Law Section is looking for YLD members to serve as liaisons to the section's Interest Groups for the current bar year. This is an opportunity to work with the Interest Groups' leadership and participate in the monthly calls.

- ADR and Conflict Management
- Breast Cancer
- Government Attorney
- In-House Counsel
- Healthcare Litigation & Risk Management
- Life Sciences
- Managed Care & Insurance
- Nursing and Allied Healthcare
- Military
- Payment & Reimbursement
- Tax & Accounting

If you are interested, contact Theresa Livingston, HLS Associate Director at theresa.livingston@americanbar.org.

Call to Authors
Do you have a Health Law article or topic of interest? Submit your article to the ABA YLD Health Law Committee for publication in our Newsletter. The ABA YLD Health Law Committee has

several opportunities for young lawyers to be published. This is a great opportunity for young lawyers to get published and get noticed! Email Dani Borel at Danielle.borel@bswllp.com.

Call for Ideas
How can the ABA YLD Health Law Committee serve you better? Would you like more articles, teleconferences, emails? Would you like to join an email list to discuss Health Law issues with other practitioners? Let us know! Email Stephen Angelette at SAngelette@Polsinelli.com.

In the Works
The Health Law Committee leadership is currently in the works with developing a mentor/mentee program with the ABA Health Law Section. The program will be designed to create a mutually beneficial relationship between a junior and senior lawyer. For the junior lawyer, it is a chance to publish an article or speak with a senior lawyer, expand their network, receive thoughts and advice in a particular focused practice area, as well as advice on their career goals in health law generally. Stay tuned!

Upcoming Events

10/08/2015— Fundamentals of Federally Qualified Health Centers: Handling an HRSA Site Review and Recent Regulatory Trends, *webinar, 1.50 CLE Hours.*

> Federally Qualified Health Centers have become increasingly important with the passage of the Affordable Care Act. As well, the Health Resources and Services Administration is ramping up their site inspections after facing increased scrutiny in recent years. This webinar will cover new regulatory developments applicable to FQHCs. It will also guide you through the process of site inspections, from preparation through correction of deficiencies that may arise during the site review. The program will help lawyers understand how the process works from someone who has been through it first-hand.

10/15/2015–10/17/2015— YLD 2015 Fall Conference, *conference*
10/15/2015–10/16/2015— Medical Device Law 2015, *conference, 11.75 CLE hours*
12/07/2015–12/08/2015— 13th Annual Washington Health Law Summit, *conference*

Updates

Update from YLD Public Service Project:

Inaugural Outreach: The Public Service Team will hold its inaugural “World Wise Web (“WWW”) outreach on Friday, October 16, 2015 at 9:00 a.m. at Henderson Middle School in Little Rock,

Arkansas. This outreach is in conjunction with the ABA YLD Fall Conference. If anyone is interested in volunteering for this outreach, please contact ckannenb@fclaw.com .

Update from YLD Member Services Project:

- On October 14, the ABA YLD will host a Twitter chat at 3PM PT/6 PM ET entitled Addressing Mental Health Stigmas in the Legal Profession. Rachael Barrett of The Dave Nee Foundation (@Neefoundation) will host the chat.
- On October 15, Hilary Chancy will present an Ethics-CLE program entitled “The Bipolar Attorney: When the Mental Impairment is Your Own.”
- October 16, Judi Cohen of Warrior One will present a CLE program entitled “Chaos to Mindfulness.”
- The Fit to Practice program will be launched at Fall Conference.