

## OFFICE—BASED SURGERY GUIDELINES REINSTATED

By Ellen F. Kessler



Ellen F. Kessler

A recent decision by the New York State Court of Appeals has effectively permitted the New York State Department of Health (DOH) to regulate office-based surgery performed in a private doctor's office. Although the DOH's authority extends only to hospitals, ambulatory surgery centers and similar facilities, the Court's ruling of *New York State Association of Nurse Anesthetists v. Novello* has reinstated the Clinical Guidelines for Office-Based Surgery originally issued by DOH in December 2000.

The guidelines were originally attacked by Certified Registered Nurse Anesthetists (CRNAs). They claimed that the guidelines were tantamount to regulations and were illegal because they were beyond DOH's scope of authority. The guidelines, among other things, provided that when anesthesia is administered by a CRNA in a doctor's office, the procedure should be supervised throughout by a physician, dentist or podiatrist who is qualified to administer and supervise anesthesia and who is physically present throughout the procedure. The CRNAs contended that they would be "injured," since the guidelines would have the effect of eliminating the use of CRNAs in office-based surgeries because it would not be cost effective to hire an anesthesiologist to supervise them. The office-based surgeon would use the anesthesiologist to handle all aspects of the administration of anesthesia, thereby completely displacing the CRNAs. DOH conceded in court that it had no authority to regulate surgery performed in private doctors' offices, but claimed the guidelines were not regulations but rather "non-mandatory recommendations."

In 2001, two lower courts in New York State rejected DOH's position and found that the guidelines were indeed tantamount to regulations, intended to prescribe the legal standard by which medical professionals in private offices would be judged. The lower courts found that the Commissioner had exceeded her authority and that the guidelines were illegal and void. DOH was prohibited from issuing or enforcing the guidelines.

### INSIDE UPDATE

Liquidated Damages Clauses In Physician Non-Compete Agreements: Is Less More?.....	2
JCAHO Issues Universal Pre-Surgery Protocol ...	3
New Overtime Regulations Take Effect.....	3

### *From The Editor's Corner*

This issue covers several issues critical to healthcare providers today—be they in private practice or employed at a healthcare facility. These include recent changes in employment law, as well the reintroduction of guidelines for office-based surgery. As always, we look forward to your comments and feedback at [smaliszewski@rmfpc.com](mailto:smaliszewski@rmfpc.com).

— Sandra Maliszewski, Esq.

In its recent ruling in March 2004, the Court found that the alleged "injury" of the CRNAs was speculative because it was based on the unproven assumption that the guidelines would be "vigorously enforced as regulations." The Court found that there was no actual proof that the doctors themselves would not be able to supervise the CRNAs and that the CRNAs would in fact be eliminated. Since the injury to the CRNAs was deemed speculative by the Court of Appeals, it was premature for them to bring suit to challenge the guidelines. Interestingly, the Court did not foreclose the possibility that CRNAs or others might, in the future, be able to show actual harm to establish standing to sue, and a new challenge might be brought again in the future to challenge the legitimacy of the guidelines.

In the current state of uncertainty, physicians who perform office-based surgeries would be wise to review the guidelines and follow them. The guidelines were revised and reissued by the DOH in May 2004, following the Court's decision. The guidelines state that they are intended to provide uniform standards of professional care and underscore that all medical care provided by physicians is subject to review by the DOH through its disciplinary arm, the Office of Professional Medical Conduct (OPMC). Even if DOH or OPMC decline to actively enforce the guidelines as mandatory requirements, they may nevertheless be viewed as medical standards of practice that may be invoked against the physician in the context of a malpractice action brought by a patient. Although the guidelines may have been issued without proper authority, in the end, they may end up setting the standard of practice for office-based surgery. The guidelines can be accessed online at [www.health.state.ny.us](http://www.health.state.ny.us) or <http://www.health.state.ny.us/nysdoh/obs/council.htm>.

Ellen F. Kessler is a partner in the firm's Health Law Department where she brings special expertise as a Registered Nurse. She can be reached at 516-663-6522 or [ekessler@rmfpc.com](mailto:ekessler@rmfpc.com).

# LIQUIDATED DAMAGES CLAUSES IN PHYSICIAN NON-COMPETE AGREEMENTS: IS LESS MORE?

By Douglas J. Good and Kellie E. Lagitch



Douglas J. Good



Kellie E. Lagitch

Physician employment agreements often include non-competition provisions. Generally, those non-competes prevent a former physician-employee from practicing in the same area once his/her employment ends. Courts usually enforce those provisions where their geographic scope and duration are “reasonable.” Typically, the remedy sought for a breach of a non-compete is an injunction – a court order barring the physician from practicing in the prohibited zone.

However, some physician-employers, fearful an injunction alone will not adequately protect their interests, have taken an extra measure to protect their business interests: they include liquidated damages clauses with their non-competition provisions. A liquidated damages provision is an agreement on what the economic consequences of a breach will be. Liquidated damages clauses eliminate the need to prove actual monetary damages – often an arduous and costly task. Indeed, it is virtually impossible to prove, especially in today’s managed care environment, how long a particular patient would continue (or be permitted) to see the same physician and what the fees (and consequently, profits to the treating physician) would be in the future.

While liquidated damages clauses have some obvious benefits, they present some not-so-obvious risks. Generally, a liquidated damages clause will be enforced if:

- the anticipated damages are uncertain in amount or difficult to prove; and
- the stipulated sum is not so grossly disproportionate to the probable anticipated loss as to be viewed a penalty to compel performance with the contract.

As stated above, damages stemming from breach of a physician non-compete agreement are difficult to ascertain and prove. Thus, it would appear that the first prong of the test is satisfied. But don’t start revising your employment agreements just yet! The very same “difficulty in proving actual damages” that satisfies the first prong of the liquidated damages test creates a pitfall that may prevent a physician-employer from satisfying the second prong. Specifically, many physician-employers overestimate the actual damages they will suffer in the event of a breach. The tendency to set too high a liquidated damage figure is further fueled by human nature: the desire to assure that the employee will not violate the non-compete often leads the employer to select a number

designed to make the financial risk to the employee of violation intolerable. But that is precisely the coercive (or penalty) element of a liquidated damages clause that may render it unenforceable.

It is thus important to set the amount of liquidated damages wisely and be certain that the amount is grounded in some objective measures. In setting liquidated damages, it would appear that “less is more.”

A lower liquidated damages figure may help assure that the liquidated damages provision will be enforced by the court, saving the legal fees of either a protracted battle over the liquidated damages or proving actual damages (likely requiring an expert witness, too).

Remember, a main objective of non-compete agreements is to enjoin the (former) employee in the event of a breach. But an injunction is only available where there is no adequate remedy at law; that is, where money damages will not make the employer whole. Thus, efforts to enforce a liquidated damages provision may jeopardize the physician employer’s ability to obtain injunctive relief. There is, therefore, a risk that a court might determine that an injunction and liquidated damages would give the physician-employer double relief; and the court might not let the employer choose which of the two results it wants.

Inclusion of a liquidated damages provision in a physician employment agreement may well be prudent and advantageous. But it is a decision that must be made carefully, with due regard to all of the relevant circumstances – not merely the notion that if the liquidated damages are high enough there is no risk the employer will violate the non-compete. Careful planning and drafting are necessary to maximize your legal protection.

Douglas J. Good is a partner and co-chair of the firm’s Litigation Department, chair of the Employment Law Group and member of the Corporate Governance Practice Group. He can be reached at 516-663-6630 or dgood@rmfp.com.

Kellie E. Lagitch is an attorney in the firm’s Litigation Department, as well as the Employment Law Group. She can be reached at 516-663-6579 or klagitch@rmfp.com.

## FIRST FEDERAL HIPAA CONVICTION

A former employee of Seattle Cancer Care Alliance pled guilty to wrongful disclosure of individually identifiable health information. He used a patient’s name, date of birth and social security number to obtain credit cards, against which he then charged items. Under the plea agreement, he could be sentenced to 10 – 16 months in jail and ordered to pay restitution to the credit card companies and patient. A federal judge will review the agreement in November and decide whether he will accept it. Under the HIPAA Privacy Rule, criminal use of a patient’s information for personal gain is punishable by imprisonment for up to 10 years and a fine of up to \$250,000.

## JCAHO ISSUES UNIVERSAL PRE-SURGERY PROTOCOL EFFECTIVE JULY 1, 2004

By Keshia B. Thompson



Keshia B. Thompson

On July 1, 2004, a "Universal Protocol for Preventing Wrong Site, Wrong Procedure, Wrong Person Surgery" issued by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) became effective. This universal protocol requires specific precautionary steps to be taken before certain surgical procedures are performed. Such procedures include those involving puncture or incision of the skin or insertion of an instrument or foreign

material into the body. Certain "routine minor procedures" identified by JCAHO do not trigger compliance with the universal protocol.

Pre-surgery protocols are not new to health care practitioners in New York. In 2001, the New York State Department of Health (DOH) issued New York State's Pre-Operative Protocols. Like JCAHO's universal protocol, New York State's Pre-Operative Protocols aim to decrease the number of wrong site, wrong procedure and wrong patient surgeries. New York's Protocols recommend a pre-surgery verification process including but not limited to the following: (1) implementation of policies and procedures to assure three independent verifications of the surgical site, location and correct patient, and (2) a requirement to spell out the word "left" or "right" on the operative schedule and consent form when laterality is involved.

JCAHO's universal protocol requires: (1) a pre-operative process to verify the correct patient, procedure and site; (2) marking of the operative site with an unambiguous mark or signature; and (3) institution of a "time out" process immediately before commencement of the procedure. The "time out" process must incorporate verification of the patient, side and site of the procedure, agreement on the procedure to be performed and verification of the availability of correct implants, special equipment or special requirements in connection with the procedure.

Although not identical, the JCAHO and New York State protocols both aim to increase patient safety and to decrease surgical errors by enhancing pre-surgery communication between health care providers and patients. In 2001, when the New York State protocols were issued, the New York State Department of Health encouraged monitoring of the effectiveness of the protocols via the existing New York Patient Occurrence Reporting and Tracking System (NYPORTS). Now that JCAHO is requiring implementation of its universal protocol, facilities subject to JCAHO's review will have an additional incentive—the JCAHO survey process—to follow pre-surgery protocols intended to prevent wrong site, wrong procedure and wrong person surgeries.

Keshia B. Thompson is an attorney in the firm's Health Law Department and Seniors' Housing Group and co-chair of the HIPAA Compliance Group. She can be reached at 516-663-6635 or [kthompson@rmfp.com](mailto:kthompson@rmfp.com).

## NEW OVERTIME REGULATIONS TAKE EFFECT

By Jeffrey M. Schlossberg



Jeffrey M. Schlossberg

Revised regulations governing overtime pay became effective in August, marking the most sweeping change in defining which employees will be exempt from the "time-and-a-half" requirement for overtime work. Here are a few highlights:

Salaried employees earning less than \$455/week are automatically entitled to overtime compensation. Employees earning more than \$100,000 per year will be exempt if they are paid salary of at least

\$455/week, customarily/regularly perform at least one of the exempt duties of an executive, administrative or professional employee, and perform office/non-manual work.

An employee qualifies for the executive exemption if he is paid a salary of at least \$455/week, has, as his primary duty,

management of the business or a customarily recognized department, regularly directs work of two or more employees, and has the authority to hire/fire employees, or his recommendations regarding hiring, firing, promotion or other change of status are given particular weight.

Employees paid at least \$455/week salary will qualify for the administrative exemption if their primary duties involve the exercise of discretion and independent judgment regarding matters of significance and they perform office/non-manual work directly related to management/business operations of the employer/employer's customers.

A "learned professional" is exempt if compensated on a salary basis more than \$455/week and her "primary duty" requires advanced knowledge in a field of science or learning. Registered nurses generally meet the exemption if paid on a salary basis, but do not if paid hourly.

continued on page 4

continued from page 3

## NEW OVERTIME REGULATIONS TAKE EFFECT

The new regulations include a "safe harbor" provision that allows an employer to preserve an employee's exempt status even where the employer makes improper deductions from the employee's salary. The employer must have a "clearly communicated" policy, including a complaint procedure, prohibiting improper pay deductions, reimburse employees for any impermissible deductions, and make good faith efforts to comply with the regulations once aware of a violation.

If the employer does not comply with these provisions or willfully violates the regulations after receiving employee complaints, it may lose that employee's exempt status and the exemption for other employees.

Employers should ensure compliance with the revised regulations: Review salary levels in accordance with the new weekly minimum for exemption and reclassify employees as necessary, evaluate your workforce's job responsibilities to determine if they satisfy the required exemption tests and implement and publish an "improper pay deduction" policy.

Jeffrey M. Schlossberg serves as counsel to Ruskin Moscou Faltischek, where he is a member of the firm's Employment Law Group. He can be reached at 516-663-6554 or [jschlossberg@rmfp.com](mailto:jschlossberg@rmfp.com).



## ABOUT THE FIRM

Founded in 1968, Ruskin Moscou Faltischek, P.C. is one of the most respected and largest multi-practice law firms in the New York metropolitan area and is headquartered in Uniondale, New York. With 65 attorneys in 20 practice areas, the firm offers innovative legal services, keeping focus on the client's goals, in the areas of corporate & securities, corporate governance, employment, energy, environmental, financial services, banking & bankruptcy, business reorganization, commercial lending, health law, healthcare professionals, intellectual property, life sciences, litigation, municipal & regulatory affairs, real estate, construction, seniors' housing, technology, trusts & estates, and white collar crime & investigations. Clients include large and mid-sized corporations, privately held businesses, institutions and individuals.

The Health Law Update is published to provide clients, colleagues and friends of Ruskin Moscou Faltischek, P.C. with information about developments in health law matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.

Fall 2004 Vol. 4, No. 3

### RUSKIN MOSCOU FALTISCHEK, P.C.

East Tower, 15th Floor  
190 EAB Plaza  
Uniondale, New York 11556-0190  
(516) 663-6600  
[www.rmfp.com](http://www.rmfp.com)

#### Health Law: Transactional, Regulatory Healthcare Professionals and Seniors' Housing

Leora F. Ardizzone  
Alexander G. Bateman, Jr.  
Andrew T. Garbarino  
Wayne L. Kaplan  
Ellen F. Kessler  
Sandra Maliszewski  
Gregory J. Naclerio  
Melvyn B. Ruskin  
Jay B. Silverman  
Keshia B. Thompson

Copyright © 2004 Ruskin Moscou Faltischek, P.C.  
All Rights Reserved.

EXCELLENCE. PERIOD.