

# HEALTH LAW UPDATE

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## CRITICAL ISSUES INVOLVED IN TELEMEDICINE CONTRACTS

By Kirk W. Morgan

Simply defined, “Telemedicine” is the clinical use of medical information exchanged from one site to another via electronic communications. Telemedicine may involve a wide range of disciplines such as radiologists, pathologists, neurologists, cardiologists, and mental health professionals. Typically, telemedicine services are an important means of providing access to nighttime, weekend and holiday medical coverage in areas where such coverage might otherwise be unavailable. Healthcare providers face an ever increasing demand to provide 24-hour coverage for services. This is especially true in regard to radiology services and interpretation of CT scans, MRIs, ultrasounds, and nuclear medicine studies.

With that in mind, there are a number of issues to consider before an organization enters into a contract telemedicine services. For instance, consideration must be given to the location of the professional providing the interpretive services whether that location is in the continental United States or in a foreign country such as Australia, South Africa, or Israel. While the specific facts and circumstances of each contractual agreement are different and require separate analysis, the following points should be considered in the drafting of a telemedicine agreement.

1. Licensure. The most obvious issue the agreement must consider is whether the physician providing the services meets all applicable licensure requirements. This includes not only possessing the license to practice medicine in the state of Michigan, but also consideration of whether the jurisdiction in which the foreign physician is located requires a license to treat patients no matter where they are located.
2. Corporate Practice of Medicine. Due diligence should be conducted to determine the nature of the entity with

which your organization is contracting. Michigan prohibits the corporate practice of medicine and care should be taken to ensure the contracting entity does not run afoul of Michigan’s prohibition. In other words, the organization must either be a professional corporation, a sole practitioner, or a nonprofit entity.

3. Informed Consent for Services. Consideration should be given to obtaining the patient’s informed consent and acknowledgement that health records may be sent electronically to another state or a foreign country.
4. Professional Liability Malpractice Insurance. Prior to entering into any agreement with an entity to provide telemedicine services, you should confirm that the professional providing the services possesses adequate professional liability insurance coverage and obtain written proof. Additionally, attention should be given to your organization’s insurance coverage for this type of relationship.
5. Credentialing and Medical Staff Requirements. Prior to entering into any contract for telemedicine services, it should be determined that the individual physicians providing the services will qualify and be authorized under your organizational staff bylaws, rules, regulations, and policies.
6. Reimbursement of Payor Impediments. Prior to entering into any agreement, your organization must make an accurate determination that the services being provided will meet the reimbursement policies of third-party payors and government health insurers.

7. Fraud and Abuse Considerations. Depending upon the nature of the contract, federal anti-kickback and Stark rules may apply. The agreement must comply with these federal laws.
8. Tax Consequences. In situations where the telemedicine services will be provided by an overseas entity, internal revenue service tax rules and policies may be implicated. Consequences of those rules and policies should be evaluated prior to entering into the contract.
9. Immigration Issues. Again, when contracting with an overseas entity, the issue of immigration should not be overlooked. A full disclosure of the providing physicians' citizenship status should be obtained and a determination should be made as to whether that status needs to be addressed in the contract.
10. Privacy and Security Concerns. Whether the contract is with an entity located within the United States or a foreign jurisdiction, consideration should be given to entering into a business associate agreement and complying with all HIPAA requirements.
11. Technological Advancements. An issue often overlooked in telemedicine contracts is that of technology. The contract should

at a minimum consider the medium in which the information will be transmitted and that the parties are in agreement with this method of transmission. Consideration should also be given to security standards for this technology and how the parties will resolve technological issues and/or advancements made in technology to transmit information.

12. Miscellaneous. The contract between the parties should also consider issues such as dispute resolution, restrictive covenants and choice of law. Considerable thought and critical analysis of these legal issues are imperative. Written agreements should address how the parties are going to deal with disputes, whether the parties are agreeing to non-competition, non-solicitation, and/or non-disclosure provisions and most importantly what law the parties will use in the event of a dispute.

Regardless of the factual situations the parties are confronted with prior to negotiating and entering into a telemedicine contract, the transaction is complex. Indeed, all of the issues previously discussed deserve your attention. It is far easier to address those issues prior to inking the agreement than to have to litigate them in court no matter the jurisdiction.

## THE DEFICIT REDUCTION ACT – BROADER FRAUD AND ABUSE TRAINING FOR STAFF REQUIRED PROVIDER UPDATE

By Adil A. Daudi

On February 8, 2006, the Deficit Reduction Act of 2005 (“DRA”) was signed into law. Beyond making dramatic reductions to Medicaid funding, the DRA contains several important provisions targeting Medicaid fraud. The DRA should draw the attention of certain institutional providers in Michigan as it is the first instance of the federal government ***requiring*** providers to furnish fraud and abuse education and implement certain fraud and abuse policies.

Two provisions of the DRA require close attention: (1) the requirement that organizations receiving more than five-million dollars (\$5,000,000) in Medicaid money train employees, vendors, managers, agents and contractors on state and federal false claims laws;

and (2) the requirement which seeks to induce states to pass false-claims laws. According to these provisions, Medicaid providers will be required to establish and distribute written policies ***and*** include in their employee manuals and handbooks information about the Federal False Claims Act, federal administrative remedies for false claims and statements, state laws pertaining to civil and criminal penalties for false claims and the protection for whistleblowers created under these laws. Michigan is among a growing number of states that have adopted their own versions of the Federal False Claims Act. Michigan’s False Claims Act was recently amended to provide enhanced protections for whistleblowers by prohibiting employers from penalizing employees

who initiated, assisted, or participated in investigations or actions under the Act. Under the terms of the Act, qualifying providers will have to include in all policies and employee manuals and handbooks information on Michigan's False Claims Act and the protections afforded to whistleblowers under Michigan law. For more information on Michigan's False Claims Act, please refer to the January 16, 2006 Legal Alert titled "Michigan Adopts Medicaid Qui Tam and Whistleblower Statute."

Prior to the passage of the DRA, regulators have encouraged the voluntary adoption by providers of measures to combat fraud and abuse. Consequently, many providers have already adopted compliance programs consistent with the voluntary guidance offered by the Office of Inspector General ("OIG"), U.S. Department of Health and Human Services.

However, according to the new provisions of the DRA the implementation of anti-fraud policies will become a condition of participation.

The new requirements of the DRA are scheduled to take effect on January 1, 2007. In light of the statutory directive, qualifying providers should begin now to revise and modify their policies and manuals. Providers that do not have comprehensive compliance programs should begin preparations to implement the new requirements of the DRA in order to remain eligible for Medicaid reimbursement.

*If you have any questions regarding the Deficit Reduction Act or would like us to review or develop your policies, manuals or handbooks to comply with the DRA, please contact any member of the Health Care Team.*

## MICHIGAN SUPREME COURT ISSUES FAVORABLE RULING ON CHARITABLE PROPERTY TAX EXEMPTION

By Ann-Mary Petroskey

A long-awaited ruling by the Michigan Supreme Court has provided much needed guidance on the requirements for the charitable property tax exemption of Michigan's General Property Tax Act. Under Michigan law, nonprofit charitable organizations that own and occupy real property are exempt from paying ad valorem property taxes. A charitable organization, such as a 501(c)(3) hospital, may be able to take advantage of this important exemption to lower operating costs in today's challenging economic times. The Court not only ruled in favor of the taxpayer in *Wexford Medical Group v. City of Cadillac*, but it also clarified and set out new guidelines for other nonprofit charitable organizations to take advantage of this important exemption from property taxes in the state. The Court held that if the overall nature of an institution is charitable, it is a charitable institution, for purposes of property tax exemption, regardless of how much money it devotes to charitable activities in a particular year.

In *Wexford*, the Supreme Court took the opportunity to establish not only a revised test to determine the ability to obtain the exemption, but also set out the appropriate focus of the analysis and several factors that should be considered.

The new test to assess whether a taxpayer is entitled to the tax exemption for charitable institutions is as follows: (1) the real estate must be owned and occupied by the taxpayer; (2) the taxpayer must be a nonprofit charitable institution; and (3) the exemption exists only when the buildings and other property thereon are occupied by the taxpayer solely for the purposes for which it was incorporated.

The Court then set out the appropriate focus for the analysis. First, the institution's activities as a whole must be examined; and it is improper to focus on one particular activity. It is the overall nature of the institution, as opposed to its specific activities, that should be evaluated. The second requirement is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. Generally stated, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group.

After setting out the definition of “charity” the Court set out various considerations for the analysis. Among those are: Does the charity serve any person who needs the particular type of charity being offered? Does the charity charge not more than what is needed for its successful maintenance of its services? And possibly most importantly, there is no monetary

threshold of charity to merit the charitable institution exemption. While these are only some of the factors that are now to be considered, each nonprofit charitable organization should take this opportunity to see if it too can take advantage of this important exemption.

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