MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

FALL 2009

IS YOUR OFFICE DUE FOR A LEGAL CHECK-UP?

REVIEWING AND ASSESSING PHYSICIAN PRACTICES

BY: KENNETH R. LARYWON AND THOMAS A. MOBILIA

The evolution of complex federal and state health care statutes, greater governmental and private insurance company scrutiny of provider billing, and deeper cuts in physician reimbursement rates, coupled with steadfast corporate, employment tax and public health laws, to name a few, have made the "business" of running a medical practice more challenging than ever before. In this article, we provide an overview of some of the more common legal issues we have encountered when reviewing and assessing a physician's practice.

Corporate Concerns

The failure to maintain the integrity of a physician's professional corporation ("P.C.") may result in a plaintiff's attorney in a medical malpractice action being able to "pierce the corporate veil" and recover a judgment against the defendant-physician's personal assets. Regardless of its size, it is imperative that a P.C. comply with New York Business Corporation Law and that corporate resolutions and minutes from meetings of shareholders, directors and officers of the P.C. be maintained in the corporate kit.

Primary/Excess Insurance Coverage for Health Care Providers

A practice must retain copies of primary and excess medical malpractice insurance policies for each health care provider who renders care and treatment, and track each policy's expiration date. Whether the insured is covered under an "Occurrence" or a "Claims Made" policy, and whether, for example, there has been or will be a change from a "Claims Made" policy to an "Occurrence" policy — warranting the purchase of "Tail" coverage — are all significant considerations. Excess coverage each physician receives through a Hospital affiliation should also be taken advantage of when a claim arises.

Risk Management

The failure to promptly notify an insurance carrier of a lawsuit will result in a denial of coverage. A medical office should have a written procedure for notification of primary and all excess carriers upon receipt of a summons and complaint in a medical malpractice action. Any

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summons and complaint received by the physician or other health care provider must be forwarded immediately to each primary and excess carrier by certified mail-return receipt requested, with a cover letter referring to the summons and complaint, the insurance policy number and requesting coverage and legal representation. A physician should never appear for any deposition without legal representation, and even subpoenas to take the physician's non-party testimony should be sent to the carrier.

An office should also keep copies of requests for medical records from any attorney representing a patient, as well as a copy of the medical record provided to the attorney in response. All legal correspondence and documents should be kept in a separate file distinct from the patient's chart.

Practice Personnel

A vast array of federal, state and local employment and labor laws governs the relationship between a professional practice and its office staff. While the extent of these laws may not be fully appreciated by a physician, the repercussions of non-compliance is all too real. The retention, management and termination of staff, whether an office worker should be deemed an independent contractor (for which no taxes are withheld and a Form 1099 is issued) or an employee (with full withholding and a W-2), and the appropriate course to be taken when an employee becomes disabled, are a few examples of the issues facing the physician as employer. Consultation with employment counsel can reduce the institution of lawsuits and administrative actions.

Physicians and their staff will often seek to have their employer-employee relationship governed by written agreements, but the contract itself must be compliant with applicable laws. For example, any agreement between a physician and a physician's assistant or nurse practitioner, whether verbal or written, to share profits in a medical practice is legally impermissible. This includes any salary structure which bases their bonus on the profitability of the practice.

Prior to employing a physician, the practice is well advised to retain counsel to prepare an employment agreement. The duties and responsibilities of the physician, the physician's obligation to maintain medical malpractice insurance, termination with or without cause, HIPAA compliance, and restrictive covenants, are just a few of the terms and conditions that should be appropriately addressed in the contract.

Physician's Rental of Space to Specialists

The renting of office space by a physician or his P.C. to another physician or specialist may violate the Federal Anti-Kickback Statute. A definitive fair market value of the space rented to the other physician or specialist must be obtained, and there must be compliance with the guidelines set forth in Office of Inspector General Special Fraud Alert, dated February, 2000.

Medical Billing

In an era of recovery audit contractors ("RACs"), data mining software, and civil and criminal proceedings under State and Federal False Claims Acts, a practice should give serious consideration to retaining a medical billing expert to review its billing practices. The review will include an assessment of sampled patient office charts and the associated billing codes for each health care provider in the practice. In some cases, the medical practice's ability to bill may be compromised by improper billing codes and/or inadequate documentation in patient office charts.

Patient Co-Payments and Deductibles

While a physician may have the best of intentions in not billing a patient for the portion of the bill that was not covered by medical insurance, e.g., deductibles and co-payments, the inference drawn by insurance companies is quite to the contrary. Opinions of Office of General Counsel for New York State Insurance Department, dated April 4, 2003 and April 8, 2005, have made clear that a waiver of co-payments — the failure to balance bill the patient — has been deemed by carriers to be insurance fraud. The physician may, however, (i) have patients sign a Financial Disclosure Statement indicating they are unable to pay the co-payment or the deductible; or (ii) bill the patient at least two times, retaining copies of each bill for their records.

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SUPREME COURT STRIKES NEW BALANCE FOR FEDERAL CIVIL RIGHTS

... BUT OLD RULES MAY STILL APPLY TO STATE CLAIMS

BY: STEVEN M. BERLIN AND JANET O. LEE

BY ruling against the City of New Haven in *Ricci v. DeStefano* and ruling in favor of an employer in *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court has recast federal civil rights laws, making it more difficult to prove some claims, but opening the door to others. However, the impact of these decisions remains to be seen, particularly on the more protective civil rights laws of New York and New Jersey.

Ricci

Ricci, the more notorious of the two cases, involved 118 firefighters in New Haven, Connecticut, who took an examination to qualify for a promotion. When white candidates drastically out performed black and most Hispanic candidates, the city discarded the results because it believed the examination had an unintentional unlawful discriminatory impact on the minority candidates. The firefighters who passed the exam but were never promoted sued, claiming the city discriminated against them. The district court dismissed the case, and in a now well-known ruling in which Supreme Court Justice Sonya Sotomayor participated, the US Court of Appeals for the Second Circuit affirmed.

In reversing, the U.S. Supreme Court found there was a tension between "disparate treatment" and "disparate impact," concepts the dissent referred to as the "twin pillars" of protection explicitly provided for in Title VII of the Civil Rights Act of 1964, as amended. The former prohibits intentional acts of employment discrimination based on race, color, religion, sex and national origin. The latter bans policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on a group, unless they can be justified by legitimate business needs or by establishing that another approach with a less adverse effect does not exist.

Although New Haven argued its actions avoided any discrimination because no firefighters were to be promoted until it could offer a valid less discriminatory exam, the Court concluded the City unjustifiably discriminated against the mostly white successful candidates. This was a novel ruling because in prior Title VII cases, at least in the Second Circuit, the intent to remedy the disparate impact of an employment practice was not held to be the equivalent of the intent to discriminate against those who had not suffered the adverse disparate impact.

The *Ricci* majority created a new legal standard, holding that before an employer can engage in a race-conscious action for the asserted purpose of avoiding an unintentional disparate impact, it must have a "strong basis in evidence" to believe it would have been subjected to disparate impact liability. The Court determined that the city failed to meet this newly applied burden and therefore ruled in favor of the mostly white firefighters.

What constitutes a "strong basis in evidence" is not addressed with clarity in the *Ricci* decision. Will an employer effectively have to show it will lose a disparate impact case, i.e. admit liability, before it can try to eliminate that impact? Until clarified, the Court appears to have created a "Catch 22" for the employer that attempts to remedy a practice which disparately impacts one group by creating a cause of action for disparate treatment in favor of the candidates who benefited from the practice. To some, this ruling expands Title VII protection by recognizing that successful candidates are disparately treated when an employer disregards the results of a test or practice that otherwise disparately impacts a protected group. Others will argue that by requiring an employer to determine that there is a "strong basis in evidence" to believe that it would lose a claim for disparate impact discrimination, the Court has narrowed Title VII by raising the bar for a disparate impact claim. What seems clear is that the balance between disparate treatment and disparate impact protection has been altered.

Ricci's Likely Impact on State Civil Rights Laws

Unlike Title VII, neither New York nor New Jersey statutes explicitly prohibit practices with a disparate impact. However, the courts in both states generally apply Title VII disparate impact theory to their respective laws—the New York State and City Human Rights Laws (the "HRLs") and the New Jersey Law Against Discrimination (the "LAD"). See, for example,

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State Division of Human Rights v. Kilian Mfg. Corp. (New York) and *Giammario v. Trenton Board of Education* (New Jersey).

The *Ricci* holding may apply to the New York State HRL, which largely follows federal interpretations of Title VII. It may have less applicability to the New York City HRL, which, as the Appellate Division, First Department recently held in *Williams v. New York City Housing Authority*, was specifically enacted to afford greater protections than either the federal statutes or the New York State HRL. It may also have little bearing on the LAD since the New Jersey courts require LAD plaintiffs in a reverse discrimination case to make a threshold showing that the defendant is the "unusual employer who discriminates against the majority," and does not accept a showing of efforts to combat discrimination or pursue affirmative action as evidence of reverse discrimination. See, the NJ Supreme Court decision in *Erickson v. Marsh & McLennan Co.* and the Appellate Division decision in *Wachstein v. Slocum.*

Gross

In *Gross*, the U.S. Supreme Court raised the bar for employees seeking to establish a claim under the Age Discrimination in Employment Act (ADEA), which makes it unlawful to take adverse action against an employee over 40 because of the individual's age. Now, when an employer claims that factors other than age motivated its conduct, the employee must establish that age was the determinative factor—that "but-for" age, the action would not have been taken.

"What constitutes a 'strong basis in evidence' is not addressed with clarity in the Ricci decision; what the decision will ultimately mean to federal civil rights claims remains to be seen."

Jack Gross, a 54-year-old, long-time employee of FBL Financial Services, Inc., sued when he was reassigned to a new position and several of his responsibilities were delegated to an employee in her early 40s, alleging he was demoted, at least partly, because of his age. Following an established approach promulgated by the Court in 1989, in *Price Waterhouse v. Hopkins*, the district court provided what is referred to as a "mixed motives" jury instruction; once a plaintiff establishes that a discriminatory reason was one factor in an adverse employment decision, the employer must prove that it would have made the same decision absent the unlawful motive.

However, the *Gross* Court held that since *Price Waterhouse* construed Title VII, a different civil rights law, it was inapplicable to the ADEA. In 1991, after *Price Waterhouse*, Congress amended Title VII to explicitly state that an employment action is unlawful when race, color, religion, sex, or national origin is a motivating factor even if other factors also motivate the action. Since Congress did not likewise add such language to ADEA, the Court held it did not intend the mixed-motives analysis to be applicable to age claims. The Court also suggested that *Price Waterhouse* may not be doctrinally sound and criticized the mixed-motives framework as difficult to apply.

As a result, the Court held, based on the language of the ADEA that "[i]t shall be unlawful for an employer … to … discriminate against any individual … *because of* such individual's age," which is similar to the pre-amendment Title VII language reviewed in *Price Waterhouse*. Now, an ADEA plaintiff must prove that "but for" age, the adverse decision would not have been made.

Thus, it is no longer enough for an ADEA plaintiff to establish that age was a motivating factor and the employer does not have to show that it would have taken the action regardless of age. Instead, to prevail, the employee must now rule out any non-discriminatory reasons for the challenged adverse action and prove that age was the determinative factor, certainly a higher hurdle for plaintiffs to jump.

Gross's Likely Impact on State Civil Rights Laws

Both New York State and City and New Jersey encompass age within their civil rights laws, unlike the federal civil rights statutes, which protect individuals from age discrimination under the ADEA while other types of discrimination are barred under Title VII. Also, New York and New Jersey courts have generally applied the *Price Waterhouse* standard to mixed-motives cases under the HRLs and the LAD. See *Klausner v. Propper Mfg. Co.* (New York) and *Myers v. AT & T* (New Jersey).

On one hand, since the *Gross* Court based its rul-

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USING LITERATURE TO IMPEACH EXPERT WITNESSES

BY: ANTHONY M. SOLA AND ELLEN B. FISHMAN

The experienced trial attorney will enjoy the challenge of cross-examining expert witnesses and testing their credibility. One skill to be mastered on cross-examination of this kind entails confronting scientific experts with passages from learned treatises, articles, or other relevant literature that is at variance with their opinion testimony.

Expert witnesses paid by one side in litigation may not always present to a lay jury a completely fair and candid exposition on complicated scientific matters, but instead may bend or skew the science to the advantage of their side. In order to ensure that a jury verdict is grounded on an intellectually honest opinion based on reliable scientific principles and methods,[1] it is imperative that the opposing side has the opportunity to challenge an expert's opinion with reliable learned treatises.

As anyone who has tried cases in New York courts can verify, so-called expert witnesses who are experienced at testifying, not infrequently present opinion testimony that is flawed. All too often, such witnesses cynically refuse to recognize anything as authoritative, as they know the jury in New York State courts will then never learn that there is literature that contradicts their opinions and exposes their testimony as scientifically untenable.

For many years, the federal courts have allowed cross-examination of expert witnesses by "statements contained in published treatises, periodicals...on a subject of...medicine, or other science or art, established as a reliable authority *by the testimony or admission of the witness or by other expert testimony or by judicial notice.*"[2] In other words, in the federal courts, the relevant literature used to cross-examine an expert needs to be established as a reliable authority, but this can be done by any expert on any side, or by judicial notice.

The majority of states outside New York follow the federal rule or an analogous rule on this point, or in some other way prohibit the expert who has given testimony from controlling which literature opposing counsel can use for impeachment purposes. In New York State courts, however, in order to cross-examine an expert with scientific literature that might expose the expert's testimony as junk science, the expert under cross-examination must admit that the literature about to be used for impeachment is a reliable authority. In recent years, the courts in New York have recognized this problem.

GROUNDS FOR IMPEACHMENT

An expert who testifies to having consulted a particular chapter in a book in formulating an opinion can be cross-examined on this basis, including any statement therein that does not support the expert's opinion.[3] This is in keeping with the familiar rule that experts can be cross-examined about anything they review in preparing for their trial testimony.

It has long been held that cross-examination along these lines is proper when an expert acknowledges familiarity with or recognizes particular books as standard works.[4] In addition, it is well settled that "[w]here an expert testifies that he has read the treatise [about which the expert is being questioned], the scope of the examination may be broader."[5] Of course, "this practice is not limited to those cases in which the expert admits that he has read the book or article concerning which he is being questioned."[6]

The classic formulation permits cross-examination of an expert with a work of the type commonly relied upon in the profession and which the expert admits is authoritative.[7] Since experienced and well-prepared expert witnesses often seek to frustrate this line of inquiry by refusing to recognize the authoritative nature of a

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[1] Fed. R. Evid. 702.
[2] Fed. R. Evid. 803 (18) (emphasis added).
[3] *Watkins v. Labiak*, 6 AD3d 426, 427 (2d Dep't 2004); *McEvoy v. Lommel*, 78 App Div 324, 327 (1st Dep't 1903).
[4] *Egan v. Dry Dock, E.B. & B.R. Co.*, 12 App Div 556, 557 (1st Dep't 1896).
[5] *Hastings v. Chrysler Corp.*, 273 AD 292 (1st Dep't 1948).
[6] *Mark v. Colgate Univ.*, 53 AD2d 884, 886 (2d Dep't 1976).
[7] *Kirker v. Nicolla*, 256 AD2d 865 (3d Dep't 1998); *Benson v. Behrman*, 248 AD2d 153 (1st Dep't 1998).