

MEDICAL/LEGAL NEWSLETTER



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NEW YORK'S FALSE CLAIMS ACT

Effective April 1, 2007 New York finally has a False Claims Act. Why? In part, because the Federal government has provided a powerful financial incentive to do so in the Deficit Reduction Act of 2005 (DRA). Effective January 1, 2007 states which adopt a qualifying false claims law act will be entitled to a 10% increase in their share of Medicaid fraud recoveries litigated under that act. So if a state funds 40% of its Medicaid program, it could retain 50% of the recovery – a 10% bonus – if it recovered the money under its qualifying false claims law. On April 9, 2007 Governor Spitzer signed legislation which included New York's False Claims Act (New York FCA). The New York FCA is effective as of April 1, 2007.

To be a qualifying false claims act the state false claims law must (1) have liability provisions comparable to those in the Federal False Claims Act (Federal FCA); (2) contain provisions that are at least as effective as the Federal FCA in rewarding and facilitating "qui tam" actions; (3) contain a requirement for filing an action under seal for 60 days with review by the state Attorney General; and (4) contain a civil penalty that is not less than

the

“A person found to have violated the New York FCA is liable for three times the amount of the damages sustained by the State or affected local government plus a civil penalty for each claim of between \$6,000 and \$12,000.”

amount authorized by the Federal FCA. The determination of whether a state false claims act qualifies for the "bonus" is made by the Inspector General of the Department of Health and Human Services in consultation with the United States Attorney General. It is expected that the New York FCA will qualify under the DRA.

The New York FCA is modeled on the Federal FCA. Some of the highlights of the New York FCA include:

- The New York FCA prohibits a person from "knowingly" submitting false or fraudulent claims to the State or a local government. The Act does not cover claims made to a private party such as an insurance company or HMO. A person need not have intent to defraud or have actual knowledge of the false or fraudulent claim. A provider who acts in deliberate ignorance or with reckless disregard of the truth or falsity of the claims which it has submitted may have liability under the Act. However, false claims caused by mere negligence or mistake would not be covered by the Act.
- New York State, any local government and any private citizen (as a "qui tam" plaintiff) can institute an enforcement action.
- A person found to have violated the New York FCA is liable for three times the amount of the damages sustained by the State or affected local government plus a civil penalty for each claim of between \$6,000 and \$12,000.
- The New York FCA authorizes enforcement actions--known as "qui tam" actions--to be brought on behalf of the State or a local government by a private party having direct knowledge of the fraud. With only limited exclusions, any private citizen with knowledge of the fraud may bring a "qui tam" action. Potential "qui tam" plaintiffs include employees, patients, contractors, advisors or competitors of a provider. Employees who initiate or assist in an action filed under the New York FCA may not be discharged, demoted, threatened, harassed or otherwise discriminated against. Remedies to an affected employee include

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IT PAYS TO ADVERTISE—BUT AT WHAT COST?

Someone once remarked that an advertising agency was 85% confusion and 15% commission. As the use of the media increases to market the availability of healthcare services, physicians must be cautious to avoid that 85% part – for both ethical and legal reasons.

The Code of Ethics of the American Medical Association permits advertising by physicians so long as it is not false or deceptive. It allows advertisements to include (1) the educational background of the physician, (2) the basis on which fees are determined (including charges for specific services), (3) available credit or other methods of payment, and (4) any other nondeceptive information. Testimonials of patients as to the physician's skill or the quality of the physician's professional services *may* be considered deceptive when they do not reflect the results that patients with conditions comparable to the testimoniant's condition generally receive.

Objective claims regarding experience, competence, and the quality of physicians and the services they provide may be made only if they are factually supportable. Similarly, generalized statements of satisfaction with a physician's services may be made if they are representative of the experiences of that physician's patients.

Statements that a physician has an exclusive or unique skill or remedy in a particular geographic area, if true, are permissible. Similarly, a statement that a physician has cured or successfully treated a large number of cases involving a particular serious ailment is deceptive if it implies a certainty of result and creates unjustified and misleading expectations in prospective patients.

The Medical Society of the State of New York also provides guidance on advertising. The Principals of Professional Conduct allow physicians to engage in advertising so long as it is not materially false or deceptive with respect to the physician's skills or expected results.

Although the AMA and MSSNY guidelines are helpful, it is the New York professional misconduct statute that must be closely adhered to in order to avoid a career damaging disciplinary action. The New York statute is quite different, and somewhat more restrictive, than the AMA and MSSNY guidelines.

New York permits advertisements containing the prices or range of prices for specified routine professional services, but if there is an additional charge for related services which are an integral part of the overall service being provided by the physician, the advertisement must say so. This is intended to avoid teaser rates and bait-and-switch tactics.

A physician may not make any claim which cannot be substantiated, including any claims of professional superiority (the physician bears the burden of proof), or which guarantees a particular result. Moreover, demonstrations, dramatizations or other portrayals of professional practice are not permitted in advertising on radio or television. Testimonials from former or existing patients are expressly prohibited, unlike under the AMA Code of Ethics.

A violation of the advertising rules can result in disciplinary action by the Office of Professional Medical Conduct, including suspension or revocation of a professional license.

These rules are intended to strike a fair balance between consumers need (and desire) for truthful information about physicians and the interest of the state to insure that the public is not misled by aggressive mar-

“Unlike the AMA Code of Ethics, New York prohibits advertising that includes testimonials from former or existing patients.”

keting tactics. As a constitutional matters, professionals, like other businesses, have a right of commercial free speech which is guaranteed by the First Amendment of the Constitution, but the right is not unlimited.

The boundaries of commercial free speech have evolved over the years by the courts and will continue to be further defined. Earlier this year, new and more restrictive advertising rules were adopted for lawyers, including prohibitions against the portrayal of any judge, the use of monikers and nicknames that implies an ability to obtain particular results, and the portrayal of lawyers exhibiting characteristics unrelated to legal competence. Syracuse attorneys Alexander & Catalano have gone to federal court to challenge the legality of the new rules, including their right to continue use of the trade name “Heavy Hitters”. As of the date of this article, a decision has not been issued in the case, but it could have ramifications for physician advertising as well.

Interestingly enough, the lawyer advertising rules actually permit client testimonials so long as they include a written disclaimer that “prior results do not guarantee a similar outcome.”

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reinstatement, double back pay plus interest, special damages, costs and attorneys' fees.

- The rewards to "qui tam" plaintiffs under the New York FCA, like its Federal counterpart may be substantial. If the government prosecutes the case, the plaintiff is entitled to between 15% and 25% of the recovery, depending on its contribution to the prosecution of the action. If the "qui tam" plaintiff prosecutes the case, the plaintiff is entitled to between 25% and 30% of the recovery.

In addition to adopting the New York FCA, substantial resources are being allocated to beef-up Medicaid fraud detection and enforcement. James G. Sheehan, a high profile Assistant US Attorney specializing in health care fraud enforcement has been appointed New York's Medicaid Inspector General. This year, the Office of Medicaid Inspector General will add 157 new employees in its Medicaid Audit and Fraud Prevention Program, 100 of whom will be auditors.

We should assume that in the coming years investigative and enforcement activity in this area will be increasing.

TELEMEDICINE IN NEW YORK: IT'S THE SAME, ONLY DIFFERENT
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In addition to licensing concerns, telemedicine practice raises other substantive legal and business issues including reimbursement, medical staff membership and credentialing, malpractice concerns involving both the use of technology and variations in standards of care among the states, fee splitting, corporate practice of medicine and fraud and abuse. Physicians providing telemedicine services must ensure that their activities are covered by their malpractice and/or general liability insurance policies. New York physicians providing telemedicine services outside of New York should not assume that their services are covered under their New York malpractice policy. Not only should they carefully review their policies' description of coverage and exclusions, but they also should seek written confirmation of coverage. A critical inquiry by the carrier will be whether the activities require licensure in the states in which the physician is providing telemedicine services.

Although technology is changing the way medical care is delivered it has not, to this point, changed the expectations, standards and requirements for physicians treating patients in New York.

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TELEMEDICINE IN NEW YORK: IT'S THE SAME, ONLY DIFFERENT

Telemedicine can be described as the use of communication equipment to link health care practitioners and patients in different locations. Examples of telemedicine include a physician discussing a case over the telephone or by e-mail with a colleague; a physician answering a patient's questions through on-line information services; a physician performing a surgical procedure robotically on a patient hundreds of miles away; transmittal of digital MR, CT or X-ray images to an out-of-state or foreign physician for interpretation in a "nighthawk" arrangement; or real-time examination, treatment and diagnosis of a patient through interactive television.

The New York State Department of Health has identified telemedicine as one of its "global" strategies to decrease medical errors, increase efficiency and lower costs. New York's commitment to telemedicine is demonstrated in the dozens of grants, initiatives and projects that it helps fund or sponsor. These range from sponsoring an initiative to provide access to neurologist/stroke

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specialists in rural communities to supporting telemedicine projects involving home health and hospice. Other states and the Federal government have likewise made substantial financial commitments to the development of telemedicine.

Despite the rapid advances in technology which present opportunities to access medical care on a national and international basis, the regulation of telemedicine is parochial. While telemedicine can be, and often is practiced across state or national boundaries, telemedicine – like the traditional practice of medicine – is regulated by the individual states. Although a few states have professional licensing structures that accommodate telemedicine and do not require full licensure for an out-of-state physician providing telemedicine services in-state, most states, including New York, require full licensure.

In response to the increase in the use of telemedicine the New York State Department of Health Board for Professional Medical Conduct adopted Statements on Telemedicine. The Board described the practice of telemedicine as:

- The geographic separation between two or more participants and/or entities engaged in health care,
- The use of telecommunication and related technology to gather, store and disseminate health-related information, and
- The use of electronic interactive technologies to assess, diagnose and/or treat medical conditions.

The Board also confirmed that it is the location of the patient that determines where the care has been delivered and the jurisdiction of applicable regulations. Therefore, if a patient is in New York, New York's laws and regulations apply regardless of where the physician is located.

In determining whether a physician is engaging in telemedicine – and therefore needs to be licensed – New York looks to the existence of a physician-patient relationship. If a patient receives professional advice or treatment, even without compensation, there is prima facie evidence that a physician-patient relationship exists. Absent an exception – like Section 6526(3) of the New York Education Law which permits a physician licensed in another jurisdiction to consult with and offer professional advice to a New York-licensed physician on an occasional basis – a physician who practices or engages in any physician-patient relationship in New York must be licensed in New York.

Physicians who engage in the practice of telemedicine in New York are expected to maintain the same standards of care, encompassing both quality and ethical practice, as physicians engaged in a traditional medical practice. That an electronic medium is used as a substitute for face-to-face consultation does not change the standards of care. A physician licensed in another state or a foreign country who provides telemedicine services in New York must be aware of – and follow – New York's laws concerning the practice of medicine including, among others, those relating to emancipation, privacy, access to medical information, medical records and informed consent.

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