

# VIRGINIA MEDICAL LAW REPORT

Volume 7, Number 1

LEGAL NEWS FOR THE MEDICAL COMMUNITY

JANUARY 2010

## Med-mal cap is not on agenda of the Assembly

BY ALAN COOPER

The cap on medical-malpractice damages will remain at \$2 million for at least another year.

Representatives of healthcare organizations and the Virginia Trial Lawyers Association met with the chairmen of the House and Senate Courts of Justices Committees earlier this month to advise them of a cease-fire.

Jack L. Harris, executive director of the VTLA, said the two sides met several times over the last year to discuss what he described as "serious proposals." Because progress continues to be made, the parties agreed to take the cap off the table and meet in late April, Harris said.

The cap legislation was last altered in 2001 with a cap that increased from \$1.5 million in annual increments through 2008. It stands now at \$2 million.

Harris said the parties are in the same posture on another issue, the degree of privilege health care providers should have in their investigation of medical errors for the purpose of assessing and improving health care.

Health care providers contend that a 2006 case from the Supreme Court of Virginia, *Johnson v. Riverside Hospital Inc.* (VLW 006-6-108), left them with too little protection to pursue such investigations without having the results used against them in malpractice cases.



## Doctors and hospitals back 'tort reform' before Assembly

BY PETER VIETH

Virginia doctors and hospitals are backing legislation in the 2010 General Assembly to encourage a "disclosure/early offer" pilot project aimed at averting medical malpractice litigation.

House Bill 306, offered by the Joint Commission on Health Care, would authorize the state health commissioner to work with private health care facilities to implement a test program providing for full disclosure to patients when things go wrong and a "pre-claim resolution process" to head off lawsuits.

Supporters say the concept could be a "silver bullet" for eliminating contentious and costly medical malpractice litigation. "Numerous publications extol disclosure, apology and early set-

tlement conversations as the solution – the key to containing costs, even while compensating patients appropriately, and almost magically making everyone happier," a study panel wrote in a 2008 report.

"There's a lot of anecdotal evidence out there that these programs do save money, and people express satisfaction with the process," said Jaime H. Hoyle, senior staff attorney and health policy analyst with the JCHC. She said the pilot project would be to test the concept in practice in Virginia.

Under the proposal, the state health commissioner would authorize health care facilities to operate disclosure programs to encourage "accurate, timely, and complete communications"

■ See TORT REFORM, on PAGE 11

## Influential Women OF VIRGINIA

### 'Influential Women' nominations sought

Virginia Lawyers Media, publishers of the Virginia Medical Law Report, is now receiving nominations for the second annual "Influential Women of Virginia" awards program.

The "Influential Women" program honors high-achieving women across the commonwealth. The Class of 2010 will be honored in May.

The awards recognize the outstanding efforts of women in all fields, including law, health care, business, education, real estate and the arts. The honors are given to individuals making notable contributions to their chosen professions, their communities and society at large.

Their energy, ideas, achievements and commitment to excellence and progress give us all a look to the future.

We will be accepting nominations until March 1.

A nomination form appears on page 2 of this issue; it is also available at [www.valawyersweekly.com](http://www.valawyersweekly.com).

The Class of 2010 will be feted at a luncheon at the Omni hotel in downtown Richmond on May 20.

## Settlement will be a benefit to Reciprocal policyholders

BY ALAN COOPER

The State Corporation Commission approved last week a confidential settlement that backers of the deal say will make policyholders and general creditors of Reciprocal of America close to whole.

Reciprocal of America and two related entities – American National Lawyers Insurance Reciprocal and Doctors Insurance Reciprocal – at one time were major legal and medical malpractice insurers in Virginia.

However, the SCC put ROA

into receivership in January 2003, and ANLIR and DIR also were declared insolvent in Tennessee, where they were based, because ROA provided reinsurance for them.

Insurance Commissioner Alfred W. Gross filed suit against General Reinsurance Corp., which had provided reinsurance for ROA, and several other defendants, including Milliman Inc., ROA's actuarial consultant; PricewaterhouseCoopers LLP, ROA's accountant; and Wachovia Bank, a lender to ROA that the insurer

contends received improper repayments in some instances.

That action was consolidated with several other suits against ROA in multi-district litigation in federal court in Memphis, Tenn.

The cases languished until a settlement was reached during mediation in 2008 and 2009.

Patrick H. Cantilo, the Austin, Texas, lawyer who represents Gross in the case, said the deal is worth about \$500 million in cash and in the removal of liability for ROA.

■ See ROA, on PAGE 11

## INSIDE

### OFFICE MANAGEMENT

Our expert provides a list of best practices for avoiding an employment lawsuit...

Page 3

### AUDITORS

The RAC auditors are coming. Are you ready for them?...

Page 5

### DOCTORS & LAWYERS

Ownership is important to physicians as they build a practice...

Page 4



INSIDE:  
Lawyers investigating contraceptive-gall bladder link... Page 6

# Influential

# Women OF VIRGINIA



# Call for Nominations

*Recognizing exceptional achievement among Virginia's professional women*  
Entries are due March 1, 2010

Virginia Lawyers Weekly will honor high-achieving women across the commonwealth with our "Influential Women of Virginia" awards this May. The awards will recognize the outstanding efforts of women in all fields, including law, business, health care and education. The honors will be given to individuals who are making notable contributions to their chosen professions, their communities and society at large.

Nominee: \_\_\_\_\_

Title: \_\_\_\_\_

Company/organization: \_\_\_\_\_

Business address: \_\_\_\_\_

City, state, zip: \_\_\_\_\_

Nominee's phone number: \_\_\_\_\_

Nominee's e-mail address: \_\_\_\_\_

Birthdate: \_\_\_\_\_

Education (dates/type of diplomas, degrees, technical training): \_\_\_\_\_

\_\_\_\_\_

Business accomplishments: (job responsibilities, special projects, business-related affiliations): \_\_\_\_\_

\_\_\_\_\_

Community involvement (nonprofits, civic, state and national organizations): \_\_\_\_\_

\_\_\_\_\_

Achievements and awards: \_\_\_\_\_

\_\_\_\_\_

Nominated by (name/title) optional: \_\_\_\_\_

Business address and phone number: \_\_\_\_\_

### Three ways to submit a nomination form:

- (1) E-mail to [deborah.elkins@valawyersmedia.com](mailto:deborah.elkins@valawyersmedia.com)
- (2) Fax it to Influential Women of the Year at 804.343.7365
- (3) Mail it to: Influential Women of the Year, Virginia Lawyers Media, 707 E. Main St., Suite 1750, Richmond, VA 23219

Feel free to attach additional sheets if necessary.

Self nominations are accepted. the Influential Women of the Year will be profiled in Virginia Lawyers Weekly and honored at a special event.

**For more information or to learn about sponsorship opportunities, call toll free 800.456.5297 or email [Sherma.Mather@valawyersmedia.com](mailto:Sherma.Mather@valawyersmedia.com).**

# Uncharted territory for EEOC: Regulating social networking

By **MATT BUNK**  
DOLAN MEDIA NEWSWIRE

The Equal Employment Opportunity Commission is about to tread into uncharted territory: regulating what employers can purposefully view on social networking sites.

It's become routine for employers to use search engines such as Google to learn more about job applicants. Those searches often take hiring managers to personal Web pages such as those on Facebook and MySpace, which have become hubs for postings that are both

personal and professional. It's also common for supervisors and their employees to become Facebook "friends" or to share information on LinkedIn.

Soon, however, the federal government may choose to regulate how employers can use social networking sites to access genetic information about job candidates and employees already on the payroll.

It all started in 2008 when Congress passed the Genetic Information Nondiscrimination Act (GINA) in an effort to ban workplace discrimination based on the genetic information of employees

and job candidates. But that act of Congress left myriad questions that are now up to the EEOC to answer.

It's relatively common for Congress to write well-meaning but vague laws and leave open a wide range of interpretation. But this one is really fouled up.

There are way too many loopholes to discuss all at once, so I'm going to focus on the most unique aspect of GINA: the part about regulating social networking sites.

The EEOC will have to decide whether employers can use social networking sites deliberately to access job applicants' genetic information, such as medical history, and then use that information against them when making decisions on hiring, promotions, etc.

The EEOC issued a draft set of instructions in May and danced timidly around the social networking aspect of GINA enforcement. The commission asked for public comment and was expected to clarify the scope of GINA in October, but it has yet to provide final guidance on the part of the act that would dictate what information sources would be off limits to employers.

Among the special-interest groups that submitted comments to the EEOC were the U.S. Chamber of Commerce and the American Civil Liberties Union. Business advocates generally oppose wide interpretation of GINA that would create liability for employers, while the ACLU was among those that urged the EEOC to give broad privacy protections to employees and job seekers.

The sections that differentiate between intentional and unintentional acquisition of genetic information is where it gets really hazy. It's so difficult to define that the EEOC has provided several examples of legitimate ways employers could obtain genetic information, as well as several that could open them up to lawsuits.

Even though the Americans with Disabilities Act allows an employer to require a medical examination of all employees to whom it has offered a particular job, for example, to determine whether they have heart disease that would affect their ability to perform a physically demanding job, GINA would prohibit inquiries about family medical history of heart disease as part of such an examination.

On the other hand, Congress carved out an exception to address what it called the "water-cooler problem" in which an employer unwittingly receives otherwise prohibited genetic information in the form of family medical his-

tory through casual conversations with an employee or by overhearing conversations among co-workers.

Also, an employer would not violate GINA if it learned, for example, that an employee had the breast cancer gene by reading a newspaper article profiling several women living with the knowledge that they have the gene. The statute identifies newspapers, magazines, periodicals, and books as potential sources of genetic information. The proposed regulation adds to that list information obtained through electronic media, such as the Internet, television, and movies. So, presumably, information in all of those places would be considered publicly available, and employers would be exempt from lawsuits if that information was used in making workplace decisions.

Yet – here's the kicker – the EEOC didn't outline how to handle information obtained from personal Web sites or social networking sites. In fact, it asked for public comment on whether those sources should be included in the list of excepted sources or the list of prohibited material.

To clarify: The EEOC hadn't found a clear way to regulate the acquisition of genetic information on Web sites such as Facebook or MySpace. It leaves open the question about whether those should be considered sources of public or private information.

While GINA pertains only to obtaining and using genetic information, any regulation of what employers can and can't view on personal Web pages would create a whole new standard when it comes to online interaction between employers and employees.

Based on my experience using social networking sites, they clearly are used by people with divergent views on what sort of information to make available about themselves: Some people post material that's purely professional in nature and intended for the general public; others, however, post very personal information, including stuff that could be used to determine family medical history.

The problem is and always has been this: No matter how you think the information should be used, once the information is out there, it's out there for just about anybody. Nobody should expect it to remain confidential or that it will be shared only among friends. All sorts of people use social networking sites to find all sorts of information. So do potential employers – at least for now.

## For employers, how to avoid lawsuits

By **RICH MENEGHELLO**  
DOLAN MEDIA NEWSWIRE

*Editor's Note: Here is a tip list for employers, including medical practices, of best practices to use to avoid an employment lawsuit down the road:*

**1. Ensure a hiring procedure is in place.** Many employers get caught up in the rush to hire new employees and fail to take basic steps in the hiring process. Employers should be patient and use available screening tools. They should use an employment application form with legal disclaimers such as: employment is "at will," and no one can change that status except in writing; the employee is subject to drug testing at any time; and statements on the application and in the screening process are truthful. References should be solicited using a separate form authorizing a background check. Other essential screening tools include in-person interviews; drug and alcohol testing; criminal, educational, credit and/or driving-record checks.

**2. Ensure employers' expectations are known.** Employers should communicate basic policies and procedures as well as relevant job information to their employees. New employee orientation, employee handbooks, benefits summaries and other forms of communication are essential in informing employees of their employers' expectations. The communication of expectations signals to employees that the employer is professional and will not settle for mediocre performance. Also, favorable first impressions will be formed that can influence employee morale. If it becomes necessary later to terminate the employee, written communications can be used to prevent or defend unemployment claims, charges of discrimination or

wrongful termination lawsuits.

**3. Ensure that employees are correctly classified as exempt.** There has been a recent surge in wage and hour claims filed across the country. To prevent these claims, employers need to conduct audits to make sure employees are properly classified. If a particular employee's exempt status is in doubt, the employer should consider the employee nonexempt (maintaining an accurate record of the employee's hours worked and paying the employee at least the minimum wage for all hours worked and overtime at one and one half the employee's "regular rate" of pay for each workweek in which the employee works more than 40 hours).

**4. Take employees' complaints of discrimination and harassment seriously.** Employees are aware of their rights to work in an environment free of harassment and discrimination. Employers become sitting ducks if they do adopt strong policies and regularly train their managers and employees. Moreover, employers must spring into action to investigate and remedy claims of harassment. Failure to take such actions and to maintain a culture free of harassment and discrimination can undermine defenses that might otherwise be available.

**5. Don't retaliate against employees for complaining.** Virtually every law has some sort of retaliation or whistleblower protection. Almost one out of three charges filed with the Equal Employment Opportunity Commission includes some form of retaliation claim. They can be viable even if the underlying event that was the source of the initial complaint lacks merit. In addition, retaliation claims are generally more believable -

■ See **LAWSUITS**, on PAGE 11

Keep your  
finger on  
the pulse.

Get the state's best  
source for medical  
legal news and  
information.

VIRGINIA  
MEDICAL LAW REPORT

WOOTENHART PLC

Our experienced trial attorneys  
provide health care law counseling including:

- Medical malpractice defense
- Board of Medicine complaints
- Breach of standard of care
- Medical products liability
- Informed consent issues
- Workplace seminars
- Preparation and attendance of depositions
- Contract reviews and dispute resolutions
- Government compliance reviews and defense
- OSHA, HIPAA and other federal and local statutes

Paul C. Kuhnel, Esq.  
Charles L. Downs, Jr., Esq.  
Martha "Mollie" Elder, Esq.

707 South Jefferson Street • Roanoke, VA 24016-5189  
(800) 269-5588 • [www.wootenhart.com](http://www.wootenhart.com)

# The importance of ownership for doctors

By **EDWARD POLL**  
DOLAN MEDIA NEWSWIRE

For insight into the legal profession's current troubles, compare the career experience of lawyers with that of doctors.

In the medical profession, interns work with older practitioners, learning both practice and client/patient communica-

tion skills. Eventually, the young physician takes over the practice as the old doctor progresses to retirement.

In big law, a young associate works as part of the ranks for as many as 10 years and is then either invited to become one of the partners or is asked to find employment elsewhere.

In a small firm, a young associate

works for a few years, then feels entitled to partnership. While the associate may be a good lawyer, he or she has yet to develop rainmaking skills and still has no personal client following or book of business.

The result is a classic "Catch-22"—the associate wants to become a partner but has no ownership stake in the firm without a book of clients.

Consider the contrasting perspectives of the people involved in each of these scenarios. In the medical example, there generally is no discussion of money; the young doctor is happy to have a job, likes and respects the older doctor, and is eager to learn as much as possible from the experienced doctor.

The older doctor, on the other hand, is happy to have a younger person to help out and to mentor so that his patients will receive both his experience and the new learning coming out of a recent medical graduate.

In the big law scenario, there is no mutual benefit dynamic. If the associate does become a partner, that status likely translates to the lack of a voice in the corporate-style firm governance that rests in the hands of the management committee.

And, of course, the risk exists that the associate could be laid off or asked to leave long before becoming a partner. Either way, the situation does not encourage a sense of ownership and commitment.

In a small firm, the young associate may be thrilled to be considered for the partnership—but having never developed clients, he or she has no real idea of what "ownership" as a partner means.

Often associates believe that their time and effort, working at partner direction, are substantially responsible for creating value in the firm and warrant due credit. Yet everyone in a firm creates value in this way, including staff. One does not hear a staff person asking for a partnership interest.

The difference comes down to ownership versus entitlement. The concept of ownership and the ownership responsibility is the only way to build a meaningful professional service career, getting away from the broken model in which people are chewed up and spit out, whether through layoffs or failing to make partner.

Ownership expectations make the difference between young Dr. Kildare and young Perry Mason. Without having responsibility for business development that contributes to the success of the firm, the associate feels entitlement rather than ownership and may well end up with neither.

The doctor ends up with patients, a practice and professional satisfaction.

*Attorney Edward Poll is a speaker, author and board-approved coach to the legal profession.*

## One-third of verdicts in VLW annual survey were med-mal

By **ALAN COOPER**

A third of the 21 million-dollar jury verdicts recorded in 2009 by Virginia Lawyers Weekly were medical malpractice verdicts.

The Medical Law Report's sister publication also recorded six seven-figure malpractice settlements.

Arlington lawyer William E. Artz recorded three of the jury verdicts, and the med-mal cap was a factor in all three cases.

His three verdicts totaled \$18.4 million but they were reduced to a total of \$4 million under the cap.

He contends the cases are an illustration of the unfairness of the cap because the evidence justified the verdicts the juries returned. All the cases involved dire consequences—a death, a heart transplant and brain damage to an attorney—from a failure to diagnose symptoms that Artz contended could have been treated with no permanent damage to the patients.

An allegedly missed diagnosis was also a factor in three of the other four jury verdicts. In one case, a radiologist did not interpret a relatively minor abdominal injury incurred in an automobile wreck. The plaintiff contended that prompt detection of the injury would have resulted in an exploratory laparotomy and repair of the injury.

Because of the delay, the woman has been hospitalized five times, undergone 10 surgeries and incurred \$690,000 in medical expenses.

Another case alleged that a woman's chance of survival dropped because ear, nose and throat specialists failed to conduct a fiberoptic exam of the patient's complaints of ear pain and a sore throat that lasted more than a year.

She was later diagnosed with laryngeal cancer and lung cancer, which her attorneys contended was a result of the laryngeal case.

The original error alleged in the third case was the use of a Helical tack too close to the patient's heart during surgery to treat gastrointestinal reflux. The tack penetrated through the diaphragm and punctured a blood vessel in the pericardium.

The bleeding that resulted could have been treated with proper monitoring of the woman during surgery, her medical experts testified. Instead she suffered cardiac tamponade, cardiac arrest and anoxic brain injury.

The final malpractice verdict was awarded to a child who suffers from Erb's palsy as a result of a brachial plexus injury incurred during delivery.

Two of the settlements involved injuries caused by medication errors. In one, a patient went into a diabetic coma and died because the wrong amount of insulin was administered. In the second, a patient who was allergic to narcotic medications went into cardiac arrest and suffered anoxic brain injury after a nurse inadvertently administered fentanyl.

The other cases involved perforation of an artery during angioplasty and the failure to recognize the error when it occurred, failure to diagnose an epidural abscess that resulted in paraplegia and incontinence, perforation of the popliteal artery during knee replacement surgery that resulted in the amputation of the leg of a diabetic patient, and the failure to recognize the leak of urine into the abdomen of a 4-year-old girl after she had a kidney removed.

She died after anesthesia was administered before the anesthesiologist had reviewed laboratory reports that revealed the cause of a distended abdomen and labored breathing.

## TABLE OF CONTENTS

- 3 For employers, how to avoid lawsuits**
- 3 Uncharted territory for EEOC: Regulating social networking**
- 4 The importance of ownership for doctors**
- 4 One third of verdicts in VLW annual survey were med-mal**
- 5 The RAC auditors are coming to Virginia! Are you ready?**
- 6 Legal / Medical News in Brief**
- 7 Verdicts & Settlements**

## VIRGINIA MEDICAL LAW REPORT

707 East Main Street, Suite 1750

Richmond, VA 23219

804.783.0770 • 1.800.456.LAWS

FAX: 804.783.8337

*Publisher & Editor-in-Chief*

**Paul E. Fletcher**, ext. 14016

*Executive Editor*

**Deborah Elkins**, ext. 14021

*News Editor*

**Alan Cooper**, ext. 14019

*Legal Editor*

**Peter D. Vieth**, ext. 14017

*Web Editor*

**Sarah Rodriguez**, ext. 14024

*Advertising Director*

**Sherma Mather**, ext. 14011

*Account Executives*

**Katie Lee**, ext. 14023

**Joe Timberlake**, ext. 14020

**Bill Varjabedian**, ext. 14014

*Art Director*

**M. Christine Watson**, ext. 14026

*Graphic Designer*

**Joseph A. Sichel**, ext. 14012

*Circulation Marketing Director*

**Barbara Dimauro**, ext. 12168

*Office Manager*

**Denise M. Woods**, ext. 14010

### DOLAN MEDIA COMPANY

*Chairman, President/CEO*

**James P. Dolan**

*Executive Vice President/CFO*

**Scott J. Pollei**

*Executive Vice President/Newspapers*

**Mark W.C. Stodder**

*Group Publisher*

**Christopher A. Eddings**

### Virginia Medical Law Report

is published bimonthly by Virginia Lawyers Media, 707 East Main Street, Suite 1750 Richmond, VA 23219.

Price is \$10.00 per copy, plus shipping and handling, or \$49.99 per year.

POSTMASTER: Send address changes to Virginia Medical Law Report, Circulation, 10 Milk Street, Suite 1000, Boston, MA 02108

©2010 Virginia Lawyers Media, All Rights Reserved

*Photocopying and data processing storage of all or any part of this issue may not be made without prior consent.*

**M DOLAN MEDIA COMPANY**

# The RAC auditors are coming to Virginia! Are you ready?

By RACHEL J. SUDDARTH

To date, Virginia providers have been spared from the Medicare Recovery Audit Contractors (RAC) that have been targeting providers elsewhere in the country. However, that is all about to change.

During recent conversations with Connolly Healthcare, the RAC assigned to audit Virginia providers, Ingram Haley of the Virginia Hospital & Healthcare Association (VHHA) learned that Connolly Healthcare plans to begin auditing Medicare Part B claims in Virginia as early as the end of January, 2010.<sup>1</sup> This new implementation timeframe has surprised many Virginia providers, who believed that the RAC would not start Virginia operations until CMS appointed Virginia's Medicare Administrative Contractor (MAC).

The new RAC auditing timeframe for Virginia has left Medicare Part B providers, specifically physicians, with little time to complete their RAC preparations. If history serves as any guide, Virginia providers are in for millions of dollars in RAC-identified overpayments and multi-year appeals over disputed claims. This article provides an overview of the RAC program as well as some initial suggestions for those providers who may need assistance with their last-minute RAC preparations.

## Overview of the RAC Program

The RAC program first made its appearance as a three-year CMS demonstration project beginning in March 2005. CMS appointed three RAC contractors to review claims submitted from providers in six states.<sup>2</sup> At the end of the demonstration project, the RACs had identified a staggering \$980 million in alleged overpayments to Medicare providers.<sup>3</sup> The U.S. Congress deemed the RAC demon-

stration project to be an overwhelming success and authorized the permanent RAC program in 2006.<sup>4</sup>

Under both the demonstration project and the permanent program, the RACs are paid on a contingency fee model and receive a percentage of all identified overpayments.<sup>5</sup> Accordingly, the RACs are highly incentivized to identify potential overpayments to Medicare providers and have been extremely aggressive in their auditing efforts.

## The RACs' Auditing Powers

The RACs are permitted to review claims from almost all Medicare providers.<sup>6</sup> Under the demonstration project, the RACs focused their efforts on inpatient hospital claims, as these claims tended to correspond to the biggest Medicare payments.<sup>7</sup> However, under the permanent RAC program, CMS has instructed the contractors to review claims from all provider types, not just the high-dollar inpatient claims. Accordingly, non-hospital providers, including physicians, should anticipate higher levels of RAC scrutiny in the coming years.

CMS has given the RACs significant discretion in determining which Medicare claims they will audit but has imposed a few important limitations. Unlike other CMS contractors, the RACs are not permitted to randomly select claims for review. Rather, the RACs must demonstrate that they have a "good cause" reason to examine a claim<sup>8</sup> and must obtain pre-approval from a CMS "RAC Validation Contractor" for each new audit target area.<sup>9</sup> Additionally, the RACs are only permitted to review claims that were paid within the past three years, and may not review any claims paid before October 1, 2007.<sup>10</sup>

The RACs are able to use two types of reviews to identify improper payments to Medicare providers. First, the RACs are permitted to use "automated" reviews to identify errors that are discoverable from an examination of the provider's submitted claim form.<sup>11</sup> Automated reviews are conducted using data

mining software and are most commonly used to look for issues such as duplicate claims, pricing mistakes, or claims for services that are never covered by the Medicare program. Second, the RACs may use "complex" reviews when there is a high probability a billing error occurred, but that error cannot be identified solely from an examination of the submitted claim. During complex reviews the RACs utilize a "human review" of the relevant medical records to determine whether the services rendered were medically necessary and covered by the Medicare program.<sup>12</sup>

CMS has implemented limits on the number of medical records the RACs may request for complex reviews. These limits vary based on provider type and the size of the facility or physician office being audited. Once the RAC has issued a record request, the provider has 45 days to submit the requested records. If the RAC does not receive the records within the 45-day window, the RAC may treat the claim as a default overpayment.<sup>13</sup>

## Providers' appeal rights

Providers who receive RAC denials have access to a multi-level appeals process. There are five levels of appeal the provider may choose to pursue: 1) Redetermination through the provider's Fiscal Intermediary, Carrier or MAC; 2) Reconsideration through a Qualified Independent Contractor (QIC); 3) A hearing before an Administrative Law Judge; 4) Review by the Department of Health and Human Services Medicare Appeals Council; and 5) Judicial review before a United States District Court.<sup>14</sup> Providers may also file an optional request for reconsideration directly with the RAC before entering the formal appeal process.<sup>15</sup>

The full appellate process can be incredibly onerous and expensive, with appeals through all five levels taking between 12 and 24 months per claim. However, if history is any guide, providers may benefit from appealing questionable RAC findings, despite the time and money involved in pursuing the appeal. Accord-

ing to CMS, providers appealed approximately 22.5 per cent of denials from the demonstration project. As of January 2009, an astounding 34 per cent of the appealed claims had been overturned at some level of appeal.<sup>16</sup>

## RAC preparedness strategies

Connolly Healthcare may begin reviews of Medicare Part B claims as early as the end of January, 2010. While this does not leave much time for preparation, Part B providers can take several important steps to ensure they are as prepared as possible for the RAC reviews, including:

### 1. Become familiar with the RAC program.

Providers can gain valuable knowledge about the permanent RAC program by reviewing two important documents. First, CMS' RAC demonstration project evaluation report gives an overview of the RAC demonstration project and the permanent program.<sup>17</sup> Second, the RAC Statement of Work provides detailed information regarding the scope of the RAC program and the audit procedures.<sup>18</sup> Additional information is available through a number of provider advocacy groups including the Virginia Hospital & Healthcare Association, the American Hospital Association, and the Medical Society of Virginia.

### 2. Appoint a RAC contact within your practice or facility.

Connolly Healthcare will permit providers to appoint a single individual to serve as the contact for all RAC record requests, denial notices and other correspondence. Providers may appoint a contact by following the instructions on the Connolly website at [www.connolly-healthcare.com/RAC/pages/provider\\_contact\\_information.aspx](http://www.connolly-healthcare.com/RAC/pages/provider_contact_information.aspx). If a contact is not specifically appointed, Connolly will send all correspondence to the correspondence address listed on the provider's Medicare enrollment application, which may be out of date.

### 3. Track approved RAC audit issues.

The RACs are only permitted to review issues that have been approved by the

■ See AUDITORS, on PAGE 11



SUDDARTH

## Timberlake, Smith, Thomas & Moses, P.C. congratulates



### C. J. STEUART THOMAS, III

upon his selection to become a Fellow of the  
American College of Trial Lawyers,  
one of the premier legal associations in America.

The College is composed of the best of the trial bar from the United States and Canada. Fellowship in the college is extended by invitation only and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

Mr. Thomas' practice focuses on civil litigation, particularly the defense of medical malpractice actions.

Timberlake, Smith, Thomas & Moses, P.C.  
25 North Central Ave., Staunton, Virginia 24401  
(540)885-1517  
[www.tstm.com](http://www.tstm.com)

## trust the healthcare attorneys who always stick with you

Your reputation is your livelihood. When it's challenged, you want legal representation you can trust to stick with you until the matter is resolved. Our lawyers make your legal points with intensity and skill. Call Randy Wimbish at (804) 783-7257 and he'll introduce you to our healthcare team.



Mikhail D. Charnoff Colleen M. Gentile L. Thompson Hanes Margaret F. Hardy Paige A. Levy Michael T. Marr  
Joel M. McCray Robin A. R. McVoy Kenneth T. Roeber M. Pierce Rucker J. Jonathan Schraub Carlyle R. Wimbish, III

RICHMOND - CHRISTIANSBURG - FREDERICKSBURG - MCLEAN - RESEARCH TRIANGLE, NC  
801 E. Main Street, Post Office Box 1998,  
Richmond, Virginia 23218-1998  
(804) 648-1636, Fax: (804) 783-7291

SANDS ANDERSON  
MARKS & MILLER  
[www.SandsAnderson.com](http://www.SandsAnderson.com)

# LEGAL / MEDICAL NEWS IN BRIEF

## Plaintiffs' lawyers investigating contraceptive-gallbladder link

In addition to blood clotting injuries related to the contraceptive Yaz/Yasmin, plaintiffs' attorneys are investigating claims that the fourth generation birth control pills also cause gallbladder problems.

The litigation has been consolidated in multi-district litigation in the U.S. District Court for the Southern District of Ohio under Judge David Herndon.

The suits, which number several hundred, allege that Bayer failed to warn about increased risks caused by the drug's progestin component, drospirenone.

So far the suits have focused on injuries that involve blood clots, such as deep vein thrombosis, pulmonary embolisms, heart attacks and strokes.

However, plaintiffs' attorneys have found that a large number of patients have also suffered gallbladder problems.

"We didn't see this issue. ... It's baffling. We're going to be investigating it very closely. We're going to be working very closely with experts to try to get to the bottom of this," said Janet Abaray, a managing shareholder of Burg Simpson Eldredge Hersh in Cincinnati, which represents hundreds of plaintiffs.

Abaray, who estimates that one-third of the plaintiffs have suffered from gallbladder disease, said that gallbladder problems were unusual in other birth control cases. Abaray serves as co-lead counsel in the Ortho-Evra (contraceptive patch) litigation.

She noted that the medical literature on this issue is scant, but that in Bayer's early clinical trials four women out of 432 had their gallbladders removed.



Abaray said 1 percent is a high percentage for such a serious injury.

"This is something taken by millions of women. If 10 million take it, and 1 in 100 had to remove their gallbladder, those are ferocious numbers," she said.

## Justice Department joins Risperdal whistleblower suits

The U.S. Attorney's office in Boston announced that the Justice Department has filed a False Claims Act complaint against Johnson & Johnson and two subsidiaries for allegedly paying millions of dollars in kickbacks to nursing homes to prescribe its anti-psychotic drug Risperdal.

New Jersey-based Johnson & Johnson allegedly paid the kickbacks to Omnicare, the nation's largest pharmacy, which specializes in dispensing drugs to nursing home patients.

Omnicare in November 2009 agreed to pay \$98 million for taking kickbacks from Johnson & Johnson.

In a statement, U.S. Attorney Carmen Ortiz said, "Kickbacks in the nursing home pharmacy context are particularly nefarious because they can result in excessive prescribing of strong drugs to patients who have little or no control over the medical care they are receiving.

"Nursing home doctors should be able to rely on the integrity of the recommendations they receive from pharmacists, and those recommendations should not be a product of money that a drug company is paying to the pharmacy."

According to the complaint, Johnson & Johnson understood that Omnicare's pharmacists reviewed nursing home pa-



tients' charts at least monthly and made recommendations to physicians on what drugs should be prescribed for those patients. The government further alleges that Johnson & Johnson knew that physicians accepted the Omnicare pharmacists' recommendations more than 80 percent of the time, and that the pharmaceutical company viewed such pharmacists as an "extension of [J&J's] sales force."

In return for the kickbacks, Omnicare allegedly engaged in a "Risperdal Initiative," aimed at convincing doctors to prescribe Risperdal to elderly dementia patients.

The Food and Drug Administration has mandated a "black box" for Risperdal, warning that elderly patients with dementia-related psychosis who are treated with anti-psychotic drugs such as are at an increased risk of death.

The U.S. filed its complaint in two consolidated whistleblower lawsuits currently on file in U.S. District Court in Boston.

## FDA reverses its position on bisphenol-A



Fifteen months after declaring controversial chemical bisphenol-A safe, the Food

and Drug Administration has reversed its position, citing concerns about possible health risks associated with the substance—which is found in a host of plastic containers including baby bottles and sippy cups.

The change comes after several lawmakers, consumer groups and plaintiffs in a number of lawsuits cited studies in medical journals suggesting a link between exposure to the chemical and a wide range of health problems including cancer, diabetes, hyperactivity, miscarriage and heart disease in animals and humans.

The FDA officials expressed concern about the potential effects of the chemical—known as BPA—on the brain and behavior and specifically in infants and children. The chemical is a strengthening agent that allows plastic to keep its clarity. In addition to baby products, BPA is often found in water bottles, jars and cans.

"We have some concern, which leads us to recommend reasonable steps the public can take to reduce exposure to BPA," said Joshua Sharfstein, the FDA's deputy commissioner.

The FDA decided to revisit its safety classification last June after lawmakers and consumer groups voiced growing concern over its safety.

But the FDA stopped short of a ban on the chemical, saying the available data does not support such action.

Sharfstein said that the agency is conducting targeted studies of BPA, as part of a two-year, \$30 million effort by the administration to answer key questions about the chemical that will help determine what action, if any, is necessary to protect public health.

A recent study by Consumer Reports found that many food products, including canned soups, juice, tuna, packaged organic foods and items labeled "BPA-free," contained measurable levels of bisphenol-A.

## Litigation puts a wrinkle in Botox

Botox is the most popular cosmetic procedure in the United States.

But among the fans seeking to erase their worry lines are plaintiffs alleging serious injuries, from muscle weakness to difficulty swallowing or breathing to death.

Botox – and a similar drug, Myobloc – are made of botulinum toxin. The Food and Drug Administration has approved Botox for "therapeutic" conditions, such as involuntary eye blinking, involuntary contractions of the neck muscles, excessive sweating and crossed eyes.

Botox Cosmetic is approved for the temporary smoothing of wrinkles between the eyebrows, and Myobloc is approved for adults who suffer from severe neck muscle spasms. Neither product has been approved for children less than 12 years of age for any purpose.

But some patients, including children, are receiving the drugs for off-label uses, such as combating limb spasticity in cerebral palsy patients, migraines or excessive salivation.



In August, after evaluating reports of numerous adverse reactions from both approved and unapproved uses of Myobloc and Botox, the FDA announced that both products would be required to carry a black box warning.

The warning highlights "the possibility of experiencing [a] potentially life-threatening distant spread of toxin ... from the injection site after local injection," according to the FDA.

The updated warning label amounts to "a tacit admission that the previous label was inadequate," argued Jeffrey Lowe of the Lowe Law Firm in St. Louis, Mo.

Earlier this month, Lowe filed a failure to warn suit against Allergan, the maker of Botox, and the doctor who administered injections to his client. He also filed a Federal Tort Claims Act suit against the VA hospital where his client received the drug.

The plaintiff, Richard Hart, received the injections for an off-label use – muscle spasticity – and now suffers from botulism poisoning, Lowe said. Hart shakes, has difficulty swallowing and has a condition known as torticollis, which is an abnormal functioning of the muscles in the neck.

The question is, "What did Allergan know and when did they know it?" Lowe said. By the time the FDA required the company to update the Botox label, "they had a quite a bit of information" about the possible spread of the toxin from injection sites, he claimed.

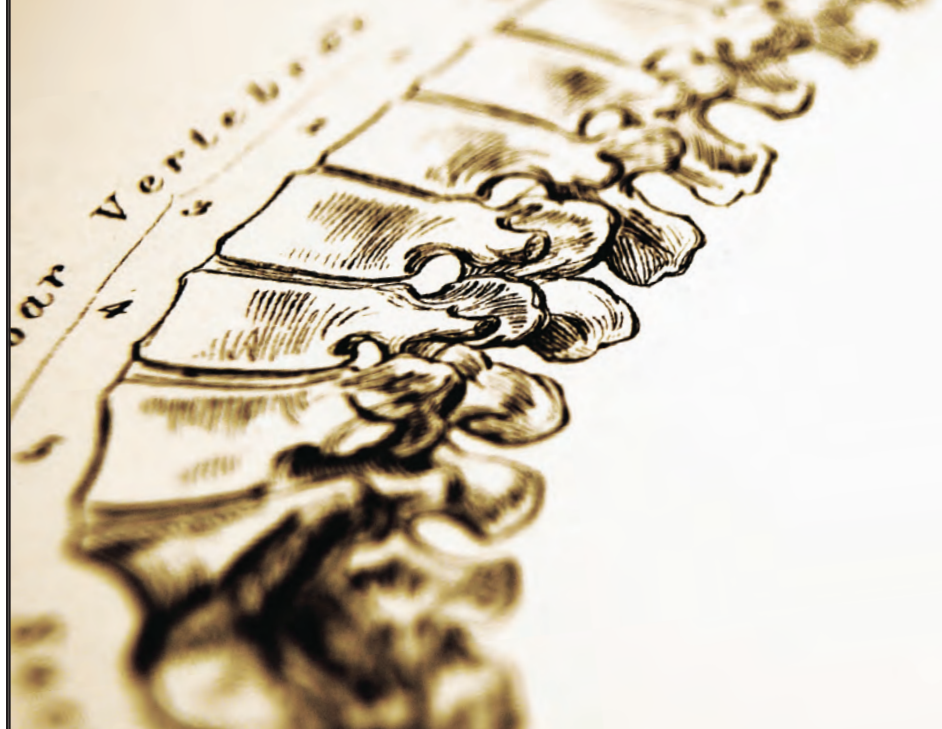
Because the label was changed just a few months ago, "people are just now starting to come forward," Lowe said, and more cases are likely to be filed.

Ray Chester, a lawyer in Austin, Texas, has filed about a dozen cases against Allergan, with the first slated to go to trial this month. His clients allegedly suffered various injuries due to botulism poisoning.

"I feel very confident in these cases," he said.

Kellie Reagan, a spokesperson for Allergan, said the company does not comment on legal matters.

## RELENTLESS DEVOTION. PROVEN RESULTS.



Our firm is devoted to individuals and families devastated by catastrophic injury or wrongful death. We can't fix injured bodies or prevent fatal mistakes, but we are committed to helping clients find comfort, regain their dignity, and empower them to a new independence.

To dedicate our firm to achieving results for your patients, please visit our website at [www.VirginiaTrialFirm.com](http://www.VirginiaTrialFirm.com) or call us at 1-800-648-1488.



CANTOR STONEBURNER FORD  
GRANA BUCKNER



## VIRGINIA MEDICAL LAW REPORT

Your source for  
medical legal news  
and information.

VERDICTS & SETTLEMENTS

# Helical tack alleged to cut vein inside pericardium

## \$2,249,672 Verdict

Plaintiff's decedent was a 49-year-old single mother of a 17-year-old daughter. She worked as a unit secretary at Inova Fair Oaks Hospital, the hospital where she died.

Years before the events at issue in the lawsuit, plaintiff's decedent had undergone a Nissen fundoplication procedure to treat gastroesophageal reflux, performed by the defendant, Barry F. Walter MD. In this procedure, a portion of the fundus of the stomach is wrapped around the junction where the stomach and esophagus meet to prevent gastric contents from refluxing back into the esophagus. This repair failed through no fault of the defendant.

On April 11, 2007, the decedent underwent a Nissen fundoplication redo with hiatal hernia repair, performed by the defendant. A composix mesh was used to reinforce the area of the hiatal hernia repair. To affix the mesh to the diaphragm, the defendant surgeon used 3.8 Helical tacks (like a corkscrew) that are fired into the diaphragm with an Autosuture ProTacker.

Both the tacker manufacturer and the

FDA had issued warnings that these tacks should not be employed in an area where the tissue could be compressed to a thickness of 4 mm or less when vital organs, including the heart, were on the opposite side of the target tissue. The heart rests on the diaphragm in the chest just opposite the area where a tack was fired into the decedent.

Plaintiff's surgical experts testified that the defendant deviated from the standard of care by firing a tack into a thin area of diaphragm, and that the tack penetrated through the diaphragm and cut a vein inside the pericardium, the sac around the heart. As a result of the bleeding into the pericardium, the decedent suffered cardiac tamponade, cardiac arrest, anoxic brain injury and brain death before the injury was found and repaired in a subsequent exploratory surgery.

The decedent lived for approximately 40 hours after the surgery to relieve the tamponade. Her hemodynamic status improved with a decreasing requirement for medication to support her blood pressure. However, tests revealed that she was brain dead, and she was then allowed to die.

At autopsy, a massive saddle pulmonary

embolism was found along with a blood clot in the right side of the heart. Plaintiff's experts testified that this clot and this embolism were caused by a prolonged low blood flow, low cardiac output and were directly attributable to the cardiac tamponade caused by the surgical injury.

Defense experts testified that the injury to the heart was not caused by the defendant and did not occur during the hiatal hernia repair surgery. Instead, defense experts testified that the pulmonary embolism was an independent event caused by an undiagnosed deep vein thrombosis that occurred around the time of the surgery. The defense contended that the pulmonary embolism caused the blood pressure collapse, cardiac arrest and death.

Since the heart vein injury and cardiac tamponade had been diagnosed in exploratory surgery, the defense had to come up with an explanation as to how that hap-



SMITH



SHEVLIN

pened if it did not occur during the hiatal hernia repair. Defense experts opined that the epicardial vein was injured by chest compressions administered when the decedent suffered cardiac arrest from the pulmonary embolism. Plaintiff's experts testified that no case had ever been reported in medical literature where this injury had occurred during chest compressions.

[09-T-163]

# Man suffers heart attack after delay in treatment

## \$690,000 Settlement

A 59-year-old man was transported to the emergency room with complaints of acute chest pain, diaphoresis and pain radiating to the left arm with numb-



LIVINGSTON

ness. In route to the hospital, an emergency medical technician called to alert hospital personnel to prepare the catheterization lab. An EKG was performed on arrival, which revealed a left bundle branch block.

The patient had a prior heart catheterization in 2003. Medical records were ordered and received by fax at 10 a.m., but were not charted until 3:17 p.m. on the day of admission. The records indicated an ejection fraction of 42 percent, compared to a normal level of 55 to 70 percent, and evidence of infarcts.

These records were inconsistent with the patient's understanding and his report in the ER that he had a clean history after a prior cardiac work-up.

Initial cardiac enzymes were not elevated. Only after the enzymes became elevated (approximately nine hours after admission) was the patient given a cardiac consult. Catheterization was

performed but not before the patient suffered a myocardial infarction. The patient was discharged nine days after admission. The patient's ejection fraction after alleged malpractice was reduced to between 22 percent and 35 percent.

Plaintiff's experts were prepared to testify that the patient should have undergone heart catheterization within 90 minutes of admission to the ER. The patient waited for approximately 13 hours and suffered an acute myocardial infarction.

The case settled before experts were identified.

[09-T-170]

**Type of action:** Medical malpractice – failure to diagnose and treat myocardial infarction

**Name of case:** Confidential

**Special damages:** \$192,000 in medical expenses

**Verdict or Settlement:** Settlement

**Amount:** \$690,000

**Date:** April 2009

**Plaintiff's attorney:** R. Lee Livingston, Charlottesville

# Severed artery during surgery results in amputation of leg

## \$1,275,000 Settlement

In preparing the femur for insertion of a component for a total knee replacement, the defendant drilled through the back of the femur and severed the popliteal artery. Attempts at repair were unsuccessful, resulting in amputation.

Plaintiff was in her late 50's and weighed over 300 pounds. She had a multitude of unrelated co-morbidities and was declared 100 percent disabled by Social Security due to neuropathies related to pre-existing diabetes, which rendered her unable to work. The plain-



MIMS



DESMOND

tiff's unrelated medical conditions drove down the settlement value.

[09-T-203]

**Type of action:** Medical malpractice

**Injuries alleged:** Above the knee amputation

**Name of case:** Confidential

**Court:** Fairfax Circuit Court

**Tried before:** Mediation

**Name of mediator:** Johanna Fitzpatrick

**Special damages:** \$360,000 medicals and \$18,000 lost wages

**Verdict or Settlement:** Settlement

**Amount:** \$1,275,000

**Date:** December 2009

**Plaintiff's attorneys:** Gary B. Mims and Zach Desmond, Reston

bankruptcy & creditors' rights | construction | corporate | environmental | estate planning  
family law | health law | intellectual property | **labor & employment** | litigation  
local government | real estate & land use | regulated industries | tax

## partnership

labor & employment



Acrobatics is all about strength, agility and coordination. Those traits combine to form a partnership where the pieces make the whole stronger. Our labor and employment attorneys work with companies like yours in much the same way. We work closely with you, as an extension of your team, to develop a long-term relationship that supports your organizational goals when issues arise.

**Woods Rogers — our strength is in our partnerships.**



woodsrogers.com | 800 552-4529

ROANOKE | DANVILLE | LYNCHBURG | RICHMOND

Authorized by Nicholas C. Conte, Chairman, on behalf of the firm.

VERDICTS & SETTLEMENTS

# Patient dies four days after aortic valve surgery

## Defense Verdict

Plaintiff's decedent was her 18-year-old daughter who suffered from a ventricular septal defect (VSD) with aortic insufficiency and suspected aortic valve incompetence. She sought care from the defendant, a cardiothoracic surgeon, who recommended an elective procedure to correct those problems.

During the operation, the surgeon repaired the VSD and determined that aortic valve repair or replacement was also required. Intraoperative findings caused him to reject more conservative options and implant an aortic homograft (i.e., human donor tissue) to replace the diseased aortic root and valve.

Four days later, the patient suffered a cardiac arrest. After extended CPR, a surgery resident opened the patient's chest for cardiac massage. A cardiologist heard the resident to say that the patient was in cardiac tamponade. Several members of the patient's family recalled that the resident reported to them that the patient had "bled out" because the surgeon had originally sewn into "diseased tissue." The resident, however, testified that he saw only 50 cc of fresh blood when he opened the patient's chest. He concluded that the patient had suffered a primary cardiac arrhythmia and not tamponade.

The resident noted a loosened suture at the distal anastomosis site, but concluded that chest compressions likely caused that



CALLAHAN McCHESNEY

disruption. He revived the patient with heart massage and epinephrine. The records showed that primary arrhythmia, not tamponade, was thought to be the likely cause of the patient's arrest.

Although the patient was revived, she suffered massive brain damage. The family withdrew life support and the patient died.

The plaintiff claimed that the defendant surgeon committed negligence that led the patient to suffer cardiac tamponade, cardiac arrest and, ultimately, death. Her expert testified that the surgeon took inadequate steps to plan the operation, resulting in unduly long and complex surgery. He further testified that the surgeon caused the anastomosis to leak by choosing a significantly undersized donor valve.

The defendant's experts testified that the surgeon's direct view of his patient's anatomy at the time of surgery provided the best indication of what specific procedure was appropriate. They explained that it would

<b>Type of action:</b> Medical malpractice	<b>Name of judge:</b> Edward Hogshire
<b>Injuries alleged:</b> Death	<b>Verdict or Settlement:</b> Defense Verdict
<b>Name of case:</b> Lois Dale Huff v. Commonwealth of Virginia, et al.	<b>Date:</b> June 1, 2009
<b>Court:</b> Charlottesville Circuit Court	<b>Demand:</b> \$1,200,000
<b>Case No.:</b> 02-196	<b>Highest offer:</b> None
<b>Tried before:</b> Jury	<b>Defense attorneys:</b> Joseph Callahan and John McChesney, Richmond

have been harmful and unnecessary to abort the surgery and try again later. They maintained that the defendant's method of measuring the cardiac anatomy and choice of homograft were appropriate. Finally, the experts opined that a primary arrhythmia was likely the cause of arrest given the length of time from the sur-

gery and the absence of evidence of tamponade found during the emergency sternotomy.

The jury returned a verdict for the defendant after a trial of five days. [09-T-182]

## Metastatic melanoma blamed on failure to obtain biopsy

### \$175,000 Verdict

Plaintiff, a 26-year veteran of the District of Columbia police force, saw defendant in 1999 for a new mole on his shoulder and again in 2004 and 2005 after the mole began to bleed.

Defendant failed to biopsy the mole on any of these occasions and, as a result, the diagnosis of malignant melanoma was not made until April 2005, by which time the plaintiff had advanced metastatic disease.

Plaintiff, a husband a father of three, was told that he had less than six months to live. His life was saved (at least temporarily) by experimental, extreme



KOPSTEIN

treatment that he received at the National Institutes of Health and which he claimed would not have been necessary if the mole had been timely biopsied and removed.

Defendant argued that the mole for which plaintiff saw him in 2004 and 2005

was not the same as the one for which plaintiff saw him in 1999. [09-T-184]

<b>Type of action:</b> Medical malpractice	<b>Verdict or Settlement:</b> Verdict
<b>Injuries alleged:</b> Delayed diagnosis of malignant melanoma	<b>Amount:</b> \$175,000
<b>Name of case:</b> Blevins v. Moshell MD	<b>Date:</b> Nov. 19, 2009
<b>Court:</b> Fairfax County Circuit Court	<b>Demand:</b> \$800,000
<b>Case No.:</b> 2008-2116	<b>Highest offer:</b> None
<b>Tried before:</b> Jury	<b>Experts:</b> Martin Cohen MD – oncology; Donald Richardson MD - dermatology
<b>Name of judge:</b> Stanley Klein	<b>Insurance carrier:</b> ProAssurance
<b>Special damages:</b> \$82,000	<b>Plaintiff's attorneys:</b> David M. Kopstein, Fairfax Station; Kevin McCarthy, Bowie, Md.

## Second surgery required by fusion of wrong disk



LIVINGSTON

### \$350,000 Settlement

A spine surgeon who intended to perform lumbar spine surgery at one level mistakenly performed a discectomy before realiz-

ing he was at the wrong level. This resulted in a two-level fusion in a patient who only needed a single level lumbar discectomy and fusion. A revision surgery was successful in alleviating subsequent pain. The patient was not working at the time of the injury.

The case was settled before experts were identified. [09-T-173]

<b>Type of action:</b> Medical malpractice – wrong level lumbar surgery	<b>Amount:</b> \$350,000
<b>Name of case:</b> Confidential	<b>Date:</b> September 2009
<b>Special damages:</b> \$154,477 in medical expenses	<b>Plaintiff's attorney:</b> R. Lee Livingston, Charlottesville
<b>Verdict or Settlement:</b> Settlement	



## The Power to Represent.

The people to make it happen.

The strength of Goodman Allen & Filetti is in our experience, our commitment to providing quality legal representation and our proven results. Our comprehensive legal services are devoted primarily to the needs of physicians, hospitals, healthcare systems, and other health care providers, closely held corporations, and small businesses.

GOODMAN ALLEN & FILETTI PLLC

RICHMOND  
(804) 346-0600

CHARLOTTESVILLE  
(434) 817-2180

NORFOLK  
(757) 625-1400

WWW.GOODMANALLEN.COM

Have feedback or suggestions?

Let us know what you think by sending a letter to the editor.

E-mail Paul Fletcher at editor@valawyersmedia.com

# RAWLS & MCNELIS

A T T O R N E Y S   A T   L A W

## ACCUSED OF MALPRACTICE?

YOUR REPUTATION AND YOUR FUTURE ARE ON THE LINE.

YOU NEED AN EXPERIENCED TRIAL LAWYER.

YOU NEED A LAWYER WHO ACTUALLY GOES TO COURT  
AND TRIES MEDICAL MALPRACTICE CASES.

At Rawls & McNelis, we try medical malpractice cases, lots of them  
and in all parts of Virginia. For over twenty years our lawyers  
have aggressively defended hundreds of doctors accused of malpractice.

Medical trial work is all we do – and we do it well.

The experience of your lawyer can make a significant difference  
in the outcome of your case. If you are sued  
for medical malpractice, our knowledgeable attorneys can help you.  
This is our mission. We like doing it and, most important, we are good at it.

---

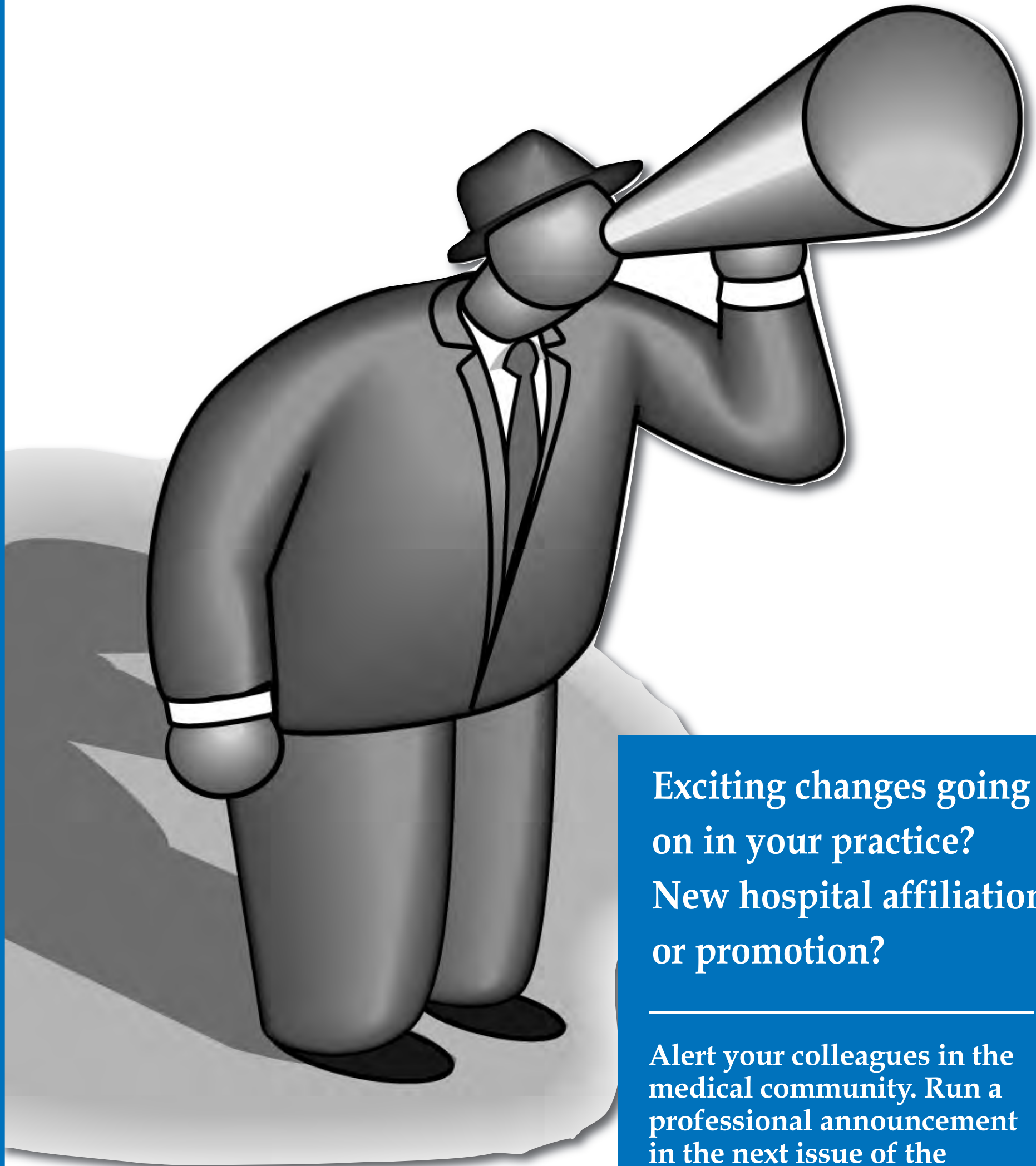
# RAWLS & MCNELIS

A T T O R N E Y S   A T   L A W

1111 EAST MAIN ST. SUITE 1701  
RICHMOND, VA 23219  
PHONE: 804-344-0038  
TOLL FREE: 877-838-4838  
FAX: 804-782-0133

1800 DIAGONAL ROAD  
SUITE 600  
ALEXANDRIA, VA 22314  
PHONE: 703-647-7538

# PAGING ALL DOCTORS...



Exciting changes going on in your practice?  
New hospital affiliation or promotion?

---

Alert your colleagues in the medical community. Run a professional announcement in the next issue of the  
**Virginia Medical Law Report!**

Contact Sherma Mather  
**E-mail:** [Sherma.Mather@valawyersmedia.com](mailto:Sherma.Mather@valawyersmedia.com)  
**Call:** 1-800-456-5297, ext. 14011

# Lawsuits

■ continued from PAGE 3

and thus harder to defend - than harassment or discrimination, if the case is ultimately heard by a jury.

**6. Treat everyone equally and fairly.** Terminated employees who feel they were treated unfairly seek counsel and file unlawful discrimination claims. Current employees who have such feelings turn to unions for help. In any case, inconsistent treatment exposes employers to unwanted legal issues. Of course, the need to be consistent should be balanced by the employers' obligation to reasonably accommodate qualified individuals with disabilities.

**7. Pay attention to employees' medical issues.** The Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities and requires reasonable accommodations; the

Family and Medical Leave Act requires covered employers to grant eligible employees 12 weeks of job-protected, benefits-continued leave each year; and the Employee Retirement Income Security Act prohibits discrimination against persons because they may file for covered benefits. To avoid problems, employers should thoroughly consider the extent to which sick or disabled employees are covered by these and other laws before taking any adverse action against them.

**8. Adapt policies regarding the proper use of computers.** Problems caused by improper use of computers in the workplace can include: claims of harassment, discrimination, retaliation and invasion of privacy; loss or theft of intellectual property and trade secrets; licensing issues; electronic fraud or forgery; and even union-related disagreements. To avoid these problems, employers should adopt policies regarding the proper use of electronic systems and protection of business records, confidential information and trade secrets. No-harassment policies

should prohibit employees from using these systems in ways that might be deemed harassing, discriminatory or retaliatory. At a minimum, employees should be instructed about the etiquette of e-mail and computer use to minimize problems caused by misuse of such systems.

**9. Establish and follow a procedure for employment termination.** Although employers should be cautious about promising "progressive discipline," they should be reluctant to terminate employees immediately and without warning. Before terminating an employee without warning, an employer should at least suspend the employee to give an appearance of diligence and due process and to verify all the surrounding facts. Termination without warning may be appropriate for certain serious acts of misconduct that violate well-communicated and consistently applied rules. Poor or unsatisfactory performance should almost never result in immediate termination. In handling performance issues, employers

should apply the anagram NEAT, and provide: Notice of the performance problem; Explanation of the performance that is expected; Assistance to improve the performance; and Time to improve. There are no specific guidelines for how much assistance or time the employer should provide, but longer-tenured employees generally expect more of each.

**10. Don't create false reasons for terminating employment.** Employers should not risk their credibility by giving false reasons for terminations. Jurors are generally skeptical of employers and hold them to high standards. Jurors may be persuaded in close cases to rule against the employer on credibility grounds. Moreover, courts will not dismiss cases when employers give conflicting reasons for a discharge, even if the reasons might be legitimate.

*Rich Meneghello is a management lawyer in Portland, Ore. This article first appeared in The Daily Journal of Commerce, another Dolan Media publication.*

# Tort Reform

■ continued from PAGE 1

to a patient or family when a health care outcome involves patient injury or death. Coupled with early disclosure would be voluntary negotiation, mediation, or another resolution process to forestall litigation. The disclosures and offers from the health facility would be privileged and inadmissible if litigation ensued. The program would encourage quality control measures to prevent further problems.

Doctors involved could avoid disciplinary action until the resolution process is complete unless the Board of Medicine finds continued practice would pose a substantial danger to the public.

Del. John O'Bannon, a Richmond area neurologist who patroned the bill for the JCHC, hoped a major hospital group like Riverside, Carilion or Sentara might consider testing the waters.

Susan C. Ward, vice-president and general counsel of the Virginia Hospital and Healthcare Association, said the group is backing the measure. "Several of our hospitals have developed such programs, and we support this concept as one that improves patient-provider satisfaction, communication and relationships and helps to identify quality problems so that they can be addressed effectively," she wrote in an e-mail.

The proposal also has the support of the Medical Society of Virginia. It is opposed, however, by the Virginia Trial Lawyers Association.

It was awaiting action in the civil subcommittee of the House Courts of Justice Committee at press time.

## Chamber measures

O'Bannon, R-Henrico, also was carrying two familiar but ill-fated tort reform measures for the Virginia Chamber of Commerce. The proposals met an early demise in the civil subcommittee of the House Courts of Justice Committee.

The subcommittee referred the measures to the Virginia Small Business Commission for study, where no further action is expected by the end of this legislative session.

One, House Bill 309, would allow depositions to be used for summary judgment and the other, HB 310, would establish an offer of judgment process. Tyler Craddock with the chamber said the measures would make trial lawyers think twice about filing frivolous lawsuits or going forward after getting "solid, good-faith offers."

Del. Robert G. Marshall, R-Manassas, told subcommittee members that he intended HB 87, by far the most sweeping medical malpractice reform measure to be submitted this year, to be merely a vehicle to start a discussion about eliminating "the practice of defensive medicine in this country."

He asked the subcommittee to hold the bill and refer it to Courts of Justice Committee Chairman David B. Albo, R-Fair-

fax, for possible consideration by the full committee. The committee did so but no one appeared to expect Albo to present it to the committee.

The bill would have created a no-fault system similar to the Virginia Birth Injury Fund, but W. Scott Johnson, a lobbyist for health care interests, said the bill has far too many unintended consequences to be supported by physicians and hospitals. The Virginia Trial Lawyers Association also opposes the bill.

Still pending are two less ambitious proposals from Marshall, House Joint Resolution 14, which calls for a study to reduce the cost of defensive medicine, and House Joint Resolution 29, which proposes a study of the shortage of medical doctors.

Marshall has the support of the Medical Society with HB 11, which would ban insurance companies from using decision makers who are not in the same specialty or scope of practice as the treating provider.

The VTLA and healthcare interests are united in their support of Senate Bill 191, which provides that the exchange of information between health-care review and regulatory bodies does not create a waiver of any privilege.

Sen. Toddy Puller, D-Mount Vernon, recommends a study of the Virginia Board of Medicine in Senate Joint Resolution 46, citing studies saying the board is slow and ineffective.

Other bills focus on professional regulation. HB 35, sponsored by Marshall, would require any physician to report surgical complications to the Board of Medicine, even if the professional was not involved in the surgery. HB 662 would allow the Department of Health Professions to accept surrender of a license to terminate disciplinary actions. HB 710 would mandate ranking of health care providers under a reporting program for health data.

Podiatrists might finally get some respect as trial experts under legislation introduced in response to a railroad worker's case. HB 723 and SB 82 would expressly recognize podiatry as including the *diagnosis* of foot ailments. A circuit judge ruled in 2008 that podiatrists were not qualified under Virginia law to testify about the cause of a plaintiff's foot problems because the code did not acknowledge the diagnostic role of their practice.

Physicians also are closely watching SB 263, which would expand the authority of nurse practitioners to provide care without physician supervision. They oppose the bill.

The issue of most concern to physicians, however, may be money - specifically a possible cut in Medicaid reimbursements for them. The budget of former Gov. Timothy M. Kaine did not call for cuts, but Johnson said physicians are well aware that Gov. Robert F. McConnell will have to make substantial cuts, especially if he stands by his campaign promise not to raise taxes.

# ROA

■ continued from PAGE 1

Cantilo said he understands a deal also is in the works in the chancery division of Davidson County Circuit Court in Nashville, which has jurisdiction over insurance reorganizations in Tennessee. As part of the proposed coordinated settlements, the Tennessee risk retention groups will withdraw their claims against ROA, Cantilo said.

Those claims are estimated at \$338 million.

A settlement there is important for doctors and lawyers who were insured by ANLIR and DIR because the SCC ruled

that they do not have a priority claim on ROA assets. ROA continued to provide liability and workers' compensation insurance for healthcare facilities until it failed, and those policyholders do have priority claims.

The key allegation in the lawsuits filed by Gross is that Gen Re made a series of secret deals with ROA and its Bermuda-based affiliate, First Virginia Reinsurance, that concealed the precarious condition of the companies from state insurance regulators. The suits allege that Gen Re appeared to be ROA's reinsurer, when the risk had been transferred secretly to FVR.

Gen Re is one of the largest reinsurers in the world and is owned by Berkshire Hathaway, which is controlled by investment guru Warren Buffett.

# Auditors

■ continued from PAGE 5

RAC Validation Contractor. Connolly Healthcare posts all issues that have been approved on its website: [www.connollyhealthcare.com/RAC/pages/approved\\_issues.aspx](http://www.connollyhealthcare.com/RAC/pages/approved_issues.aspx). Providers should regularly monitor the website to keep abreast of which claims are subject to RAC review.

## 4. Become familiar with the RAC appellate process.

Providers should take the time to familiarize themselves with all five levels of the RAC appeal process, including filing deadlines, procedural requirements and evidentiary rules.

## 5. Establish a tracking system for RAC requests and denials.

All providers should develop or adopt a RAC tracking system, which captures when record requests are received by the provider, when requested records are sent to the RAC, when RAC deter-

minations are due to the provider, and when appeals must be filed, if necessary.

## 6. Determine whether outside assistance is necessary.

There is no one-size fits all answer to RAC preparedness or denial management. Depending on your internal resources, the best way to develop a RAC preparedness and response plan may be to contact an outside professional. Health care attorneys are particularly well suited to perform RAC risk assessments and to assist providers in updating their compliance programs. External auditors can give providers accurate and neutral assessments of their exposure risk and areas for targeted improvement.

*Rachel J. Suddarth is an attorney with Hancock, Daniel, Johnson & Nagle, P.C. in Richmond. She advises healthcare providers on a broad range of federal and state regulatory compliance matters, with a particular emphasis on Medicare and Medicaid reimbursement issues.*

# Endnotes

1 Memorandum from Ingram Haley, Virginia Hospital & Healthcare Association, Recovery Audit Contractor - Part B Review to Begin (November 30, 2009).

2 Arizona, California, Florida, Massachusetts, New York and South Carolina.

3 The Medicare Recovery Audit Contractor (RAC) Program: An Evaluation of the 3-Year Demonstration ("Evaluation Report"), June 2008, p. 17.

4 See Section 302 of the Tax Relief and Health Care Act of 2006.

5 Evaluation Report at 14.

6 The RACs may review claims from any provider that is reimbursed under a Medicare fee for service program, including hospitals, physicians, home health agencies, hospice agencies, durable medical equipment (DME) suppliers, and skilled nursing facilities. See Recovery Audit Contractor Statement of Work ("Statement of Work"), p. 11.

7 Of the \$980 Million in identified overpayments, approximately \$828 Million was from inpatient

hospital claims.

8 Statement of Work at 11.

9 Id. at 21.

10 Evaluation Report at 25.

11 Id. at 17-18.

12 Id.

13 Id. at 13.

14 A good summary chart of the appeals process is available on the American Hospital Association website at [www.aha.org/aha/content/2008/pdf/080125-racfaq.pdf](http://www.aha.org/aha/content/2008/pdf/080125-racfaq.pdf).

15 CMS Medicare Program Integrity Manual, Chapter 3, Section 3.6.6.

16 The Medicare Recovery Audit Contractor (RAC) Program: Update to the Evaluation of the 3-Year Demonstration, January 2009, p. 4.

17 A copy of this report is available at <http://www.cms.hhs.gov/RAC/Downloads/RACEvaluationReport.pdf>.

18 A copy of the Statement of Work is available at [https://www.fbo.gov/download/f8f1d845d960c3229301aeec334c7eb4/2\\_J-1RACSOW11-5-07VS2\(3\).doc](https://www.fbo.gov/download/f8f1d845d960c3229301aeec334c7eb4/2_J-1RACSOW11-5-07VS2(3).doc).

Have feedback  
or suggestions?

Let us know what you  
think by sending a  
letter to the editor.  
E-mail Paul Fletcher  
at editor@  
valawyersmedia.com

# Need Help Navigating the Board of Medicine?



Our attorneys routinely represent physicians who are facing investigations or licensing issues at the Board of Medicine. Given the rapid growth of complaints filed against physicians, the Board of Medicine is increasingly active. We can help physicians navigate the investigation process and prepare them for their regulatory hearings at the Board of Medicine. We also provide a wide range of services on other regulatory issues.

- Licensing
- Credentialing
- Self-Referral
- Business Practices
- HPMP (Health Practitioners Monitoring Program)
- Scope of Practice
- Pain Management
- Drug-Control Act
- Record Keeping
- Advertising

Visit us on the web at [www.hdjn.com](http://www.hdjn.com) or call 866.967.9604

**HANCOCK, DANIEL, JOHNSON & NAGLE, P.C.**