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Barrett McNagny LLP
ATTORNEYS AT LAW

INDIANA HEALTHCARE LAW UPDATE

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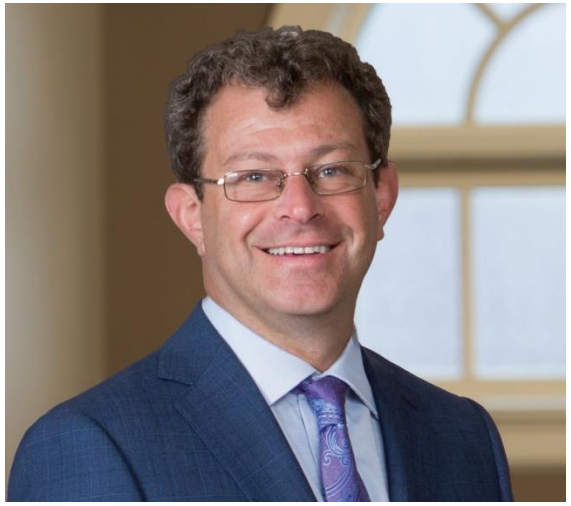

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H. Joseph Cohen works with clients in the areas of labor and employment matters and litigation including insurance defense. Concentrating on health care providers, his practice works with hospitals, physician offices, dentists, and doctors on their employment law needs. He has extensive experience in defending all types of employment claims, including those based on race, sex, national origin, religion, and sexual harassment. His experience also includes handling insurance defense claims.

An AV Preeminent™ rated attorney by Martindale-Hubbell, he was selected for inclusion in the *2021 Best Lawyers in America*® publication in the area of labor law- management and employment law- management. He was appointed in February 2019 to the Indiana University - Fort Wayne School of Nursing External Advisory Board. He has presented more than 100 lectures/seminars to statewide and local audiences on various labor and employment topics.

Practitioner Good Faith Estimates

- A good faith estimate is a reasonable estimate of a price a practitioner anticipates charging for an episode of care for non-emergency healthcare services that is made by a practitioner upon the request of:
  - An individual for whom the non-emergency healthcare services has been ordered or the provider facility in which the non-emergency healthcare services will be provided and is not binding upon the practitioner
  - Non-emergency healthcare service means a discrete service or series of services ordered by a practitioner for an episode of care for the:
    1. Diagnosis
    2. Prevention

3. Treatment
4. Cure
5. Relief

of a physical, mental or behavioral health condition, illness, injury, or disease that is not provided on an emergency or urgent care basis.

- An individual for whom a non-emergency healthcare service has been ordered, scheduled, or referred may request from the practitioner who may provide the non-emergency healthcare service a good faith estimate of the total price the practitioner will charge for providing the non-emergency healthcare service.

- A practitioner who receives a request from a patient shall, not more than five (5) business days after receiving relevant information from the individual, provide to the individual a good faith estimate of the price the practitioner will charge for providing the non-emergency healthcare service.
- A practitioner must ensure that a good faith estimate provided to an individual under this section is accompanied by a notice stating that:

1. An estimate provided is not binding on the practitioner;
2. The price the practitioner charges the individual may vary from the estimate based on the individual's medical needs; and
3. The estimate provided under this section is only valid for thirty (30) days.

- The good faith estimate that the practitioner provides to the individual must be based on the negotiated price to which the practitioner has agreed as an in-network provider.
- A practitioner may provide a good faith estimate to an individual in a writing delivered to the individual, by electronic mail or through a mobile application or other internet web-based method if available.
- A good faith estimate provided by a practitioner to an individual must meet the following requirements:

1. Provides a summary of the services and material items that the good faith estimate is based on.
2. Include:
   A. The price charged for the services and material items that the practitioner will provide and charge the individuals; and
   B. The price that the provider facility in which the healthcare service will be performed charged for:

i. The use of the provider facility to care for the individual for the non-emergency healthcare services;
ii. The services rendered by the staff of the provider facility in connection with the non-emergency healthcare service;
iii. Medication, supplies, equipment and material items to be provided to or used by the individual while the individual is present in the provider facility in connection with the non-emergency healthcare service.

3. Include a total figure that is a sum of the estimate prices referred to above.

- A practitioner that has ordered the individual for a non-emergency healthcare service shall provide to the individual an electronic or paper copy of a written notice that states the following, or words to the same effect: "A patient may at any time ask a healthcare provider for an estimate of the price the healthcare providers and health facility will charge for providing a non-emergency medical service. The law requires that the estimate be provided within 5 business days."

- A practitioner shall ensure that each waiting room of the practitioner's office includes at least one (1) printed notice that is designed, lettered, and positioned within the waiting room so as to be conspicuous to and readable by any individual with normal vision who visits the waiting room; and
- States the following, or words to the same effect: "A patient may ask for an estimate of the amount the patient will be charged for a non-emergency medical service provided in this practitioner office. The law requires that an estimate be provided within 5 business days."

- This same notice shall also be maintained on an internet website if the practitioner maintains an internet website.

Physician Noncompete Agreements

- To be enforceable, a physician noncompete agreement must include all of the following provisions:

1. A provision that requires the employer of the physician to provide the physician with a copy of any notice that:

   A. concerns the physician's departure from the employer; and

   B. was sent to any patient seen or treated by the physician during the two (2) year period preceding the termination of the physician's employment or the expiration of the physician's contract; provided, however, the patient names and contact information be redacted from the copy of the notice provided from the employer of the physician to the physician.

2. A provision that requires the physician's employer to, in good faith provide the physician's last known or current contact and location information to a patient who:

   A. requests updated contact and location information for the physician; and

   B. was seen or treated by the physician during the two (2) year period preceding the termination of the physician's employment or the expiration of the physician's contract.

3. A provision that provides the physician with:

   A. access to; or

   B. copies of;

any medical record associated with the patient described above upon the receipt of the patient's consent.

4. A provision that provides the physician whose employment has terminated or whose contract has expired with the option to purchase a complete and final release from the terms of the enforceable physician non-compete agreement at a reasonable price.

However, in the event the physician elects not to exercise the purchase option, then the option to purchase provision may not be used in any manner to restrict, bar, or otherwise limit the employer's equitable remedies, including the employer's enforcement of the physician noncompete agreement.

5. A provision that prohibits the providing of patient medical records to a requesting physician in a format that materially differs from the format used to create or store the medical record during the routine or ordinary course of business, unless a different format is mutually agreed upon by the parties.

Physician's Patient Information

- If a physician licensed in Indiana leaves the employment of an employer, the following apply:

  1. The employer of the physician must provide the physician with a copy of any notice that:
     A. Concerns the physician's departure from the employer;
     B. Was sent to any patient seen or treated by the physician during the two (2) year period preceding the termination of the physician's employment or the expiration of the physician's contract. However, the patient names and contact information must be redacted from the copy of the notice provided from the employer of the physician to the physician.

2. The physician's employer must, in good faith, provide the physician's last known or current contact and location information to a patient who:
   A. Requests updated contact and location information for the physician; and
   B. Was seen or treated by the physician during the two (2) year period preceding the termination of the physician's employment or the expiration of the physician's contract.

3. The physician's employer must provide the physician with:

   A. access to; or

   B. copies of;

any medical record associated with the patient described above upon receipt of the patient's consent.

4. The physician's employer may not provide patient medical records to a requesting physician in a format that materially differs from the format used to create or store the medical record during the routine or ordinary course of business, unless a different format is mutually agreed upon by the parties.

Medical Malpractice and Telemedicine Update

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William Ramsey represents clients on appeals, defends medical malpractice and general liability claims, and litigates business and commercial matters, including disputes related to copyright and trademark rights. He also represents corporate and professional clients with licensing and compliance issues. He has jury trial experience and has appeared before the Indiana Court of Appeals, Indiana Tax Court, and the Indiana Supreme Court for oral arguments. William is a member of the Allen County Bar Association (ACBA), the Indiana State Bar Association (ISBA), and the Defense Trial Counsel of Indiana.

He also regularly gives presentations on various legal issues. He has been recognized by Martindale-Hubbell as an AV® Preeminent™ rated attorney based on peer review ratings. The *Indiana Super Lawyers*© publication has selected him for inclusion since 2017 in the area of litigation. He has been selected for inclusion in *The Best Lawyers in America*® publication since 2018 the area of Medical Malpractice and Professional Malpractice for defendants.

Overview and Objectives

- **Potential Plaintiffs** – Who might sue you
- **Medical Malpractice vs Ordinary Negligence** – Why you should care and what the Courts did this year
- **Telemedicine** – Refresher and COVID updates

Who can sue you?

- Patients
  - Medical Malpractice
  - Ordinary Negligence (more on that later)
- Visitors on Property
  - Slip and falls
  - Non-medical injuries

Who can sue you?

- *Anonymous Physician v. White*, 2020 Ind. App. LEXIS 318 (July 29, 2020)
  - Claim against physician and group based on physician using his own sperm to artificially inseminate Plaintiff's mother
  - No doctor-patient relationship
  - Court denied motion to dismiss
    - Third-Party Beneficiary to Contract
    - Negligence

Who can sue you?

- Third-Party Beneficiary
- Did the contracting parties show a clear intent to benefit the third party?
- Court in *White* – Plaintiff could potentially show such an intent

Other Potential Third-Party Beneficiaries

- Fathers with respect to prenatal care? (Yes, say Louisiana and California)
- Patients under contracts between groups and health plans? (No, says Virginia)
- Other scenarios?

Who can sue you?

- Negligence
  - 1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns
  - Critical question is whether provider had knowledge that services were being provided, at least in part, for benefit of someone else
  - Court of Appeals in *White* – potential duty existed between doctor and unborn child

Third-parties injured by patients?

- Duty to warn of threatened harm to ascertainable victim
- No duty to general public that would interfere with treatment decisions
- Duty to general public when there is no interference with patient-physician relationship

Medical Malpractice vs. Ordinary Negligence

- Why do we care?
  - Medical review panel
  - Statutory caps on recovery
  - Insurance coverage
  - Control over settlement
  - Differences in statute of limitation

Medical Malpractice vs. Ordinary Negligence

- Does the claim boil down to whether treatment was proper and within the standard of care? –> Malpractice
- Are the acts in question unrelated to the promotion of the plaintiff's health or an exercise of the provider's professional expertise, skill, or judgment? –> Ordinary Negligence

Medical Malpractice v. Ordinary Negligence

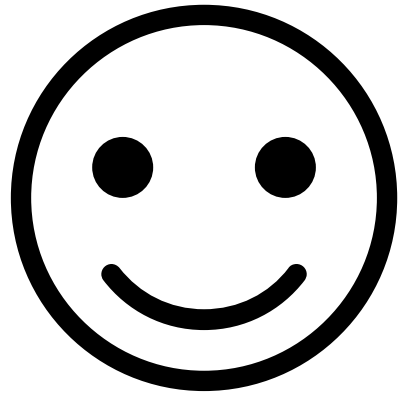
- Case law update
  - Cortez v. Indiana University Health (Ind. Ct. App. July 20, 2020)
    - Claims for intentional alteration of medical records fell within Act
  - Cmty. Health Network, Inc. v. McKenzie (Ind. Ct. App. May 26, 2020)
    - Claims that employee intentionally accessed medical records fell outside Act
  - Martinez v. Oaklawn Psychiatric Ctr., Inc. (Ind. Ct. App. 2019), trans. denied (Ind. 2020)
    - Claims stemming from altercation between patient and employee at group home fell within Act
  - Henry v. Cmty. Healthcare Sys. Cmty. Hosp. (Ind. Ct. App. 2019)
    - Claim that employee disseminated confidential health records stated claim outside Act

Telemedicine

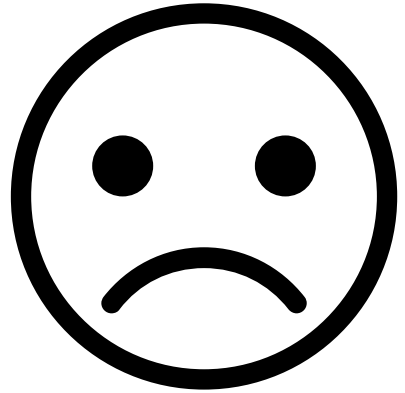
- Expanded options during COVID
  - Billing
  - Platforms
  - Fewer statutory obligations
- Still have rules
- Still have potential liability

Expanded Platforms and HIPAA Relief

- Good
  - Common apps such as Zoom, Microsoft Teams, Skype, Face Time



- Bad
  - TikTok, Facebook Live



https://www.hhs.gov/coronavirus/telehealth/index.html

Can the first visit be via telemedicine?

(1) Obtain the patient's name and contact information and:

> **(A)** a verbal statement or other data from the patient identifying the patient's location; and
>
> **(B)** to the extent reasonably possible, the identity of the requesting patient.

(2) Disclose the prescriber's name and disclose whether the prescriber is a physician, physician assistant, advanced practice registered nurse, optometrist, or podiatrist.

(3) Obtain informed consent from the patient.

(4) Obtain the patient's medical history and other information necessary to establish a diagnosis.

(5) Discuss with the patient the:

> **(A)** diagnosis;
>
> **(B)** evidence for the diagnosis; and
>
> **(C)** risks and benefits of various treatment options, including when it is advisable to seek in-person care.

(6) Create and maintain a medical record for the patient and, subject to the consent of the patient, notify the patient's primary care provider of any prescriptions the prescriber has issued for the patient if the primary care provider's contact information is provided by the patient. The requirements in this subdivision do not apply when any of the following are met:

> **(A)** The prescriber is using an electronic health record system that the patient's primary care provider is authorized to access.
>
> **(B)** The prescriber has established an ongoing provider-patient relationship with the patient by providing care to the patient at least two (2) consecutive times through the use of telemedicine services. If the conditions of this clause are met, the prescriber shall maintain a medical record for the patient and shall notify the patient's primary care provider of any issued prescriptions.

(7) Issue proper instructions for appropriate follow-up care.

(8) Provide a telemedicine visit summary to the patient, including information that indicates any prescription that is being prescribed.

Controlled Substances

- Executive Order 30-12(4)(d)
  - Permitted opioid prescribing via telemedicine for patients who are already established on maintenance therapy for chronic (not acute) conditions.
- Executive Order 30-13(5)(c)
  - Suspends the relevant statute and therefore allows for refills of current patients without an in-person presentation.
  - Still need an audio-visual, real-time telemedicine communication with the patient.
- The DEA Policy Statement
  - Telemedicine may be used, absent a face-to-face consultation, to prescribe controlled substances during the current emergency.
  - https://www.deadiversion.usdoj.gov/coronavirus.html.
  - This policy will remain in effect as long as the Secretary of Health and Human Services' declaration of a national health emergency remains in place.

Controlled Substances

- After Executive Orders Lifted – Can issue prescription for opioids if:

- **(1)** The prescriber maintains a valid controlled substance registration under IC 35-48-3.
- **(2)** The prescriber meets the conditions set forth in 21 U.S.C. 829 et seq.
- **(3)** The patient has been examined in person by a licensed Indiana health care provider and the licensed health care provider has established a treatment plan to assist the prescriber in the diagnosis of the patient.
- **(4)** The prescriber has reviewed and approved the treatment plan described in subdivision (3) and is prescribing for the patient pursuant to the treatment plan.
- **(5)** The prescriber complies with the requirements of the INSPECT program (IC 25-26-24).

Billing Issues

- Private insurance companies
  - Plan by plan basis, but some are encouraging telemedicine usage. https://www.ahip.org/health-insurance-providers-respond-to-coronavirus-covid-19/
- Medicaid
  - Executive Order 20-05 indicates that the FSSA "shall suspend Telehealth restrictions and requirements for face-to-face encounters for healthcare services and prescribing which will permit the increased use of Telehealth for statewide services such as Medicaid-covered services, mental health services, and substance use disorder treatment and prescribing."

Billing Issues

- Medicare
  - Big Picture – Vastly expanded coverage
  - Details
    - https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf
    - https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-06990.pdf

Location of Care

Where is your patient?

Why do you care?

Licensing
Liability
Insurance

Three topics:
1. Patients recording care
2. Patient privacy claims
3. Collection on patient accounts

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Ben is a litigator with a focus on intense litigation and trial work. He has spent his career advocating for people and businesses involved in lawsuits. He represents both plaintiffs and defendants, although certain client relationships preclude his representation against some professionals. He has participated in the presentation of over fifteen trials to a jury, with most of those trials involving the defense of doctors and hospitals in professional negligence cases.

Ben's present client base consisting primarily of professional negligence litigation, including both medical and legal professionals. Ben accepts cases involving professional negligence, business litigation, general litigation, product liability, and insurance services, including coverage disputes, first-party claims, third-party claims, and bad faith. He also accepts cases likely to result in trial and those likely to be interesting or present unusual challenges. He has been selected for inclusion in *The Best Lawyers® in America* publication since 2016.

Patients recording their clinical visits without knowledge of providers.

- Last year we spoke about several cases in which we learned that patients had been recording care.
- This clearly is now common practice.
- Cell phones and tablets tucked in pockets and bags

Patients recording their clinical visits without knowledge of providers.

- There is no Indiana law that prevents a patient from recording a doctor without provider's knowledge.
- There is no Indiana law that creates a privacy right, owned by the provider, that prevents it.

Patients recording their clinical visits without knowledge of providers.

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Patients recording their clinical visits without knowledge of providers.

- The right to privacy in Indiana is narrow: the term "invasion of privacy" is a label used to describe "four distinct injuries: (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) public disclosure of private facts, and (4) false-light publicity."

Patients recording their clinical visits without knowledge of providers.

- Invasion of privacy is under Indiana law:

"The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."

Patients recording their clinical visits without knowledge of providers.

- Your options: incorporate it into your contract for services
- Post policy: “No cell phone use or recording of care.”
- Care will be withheld if patient violates policy

Patients recording their clinical visits without knowledge of providers.

- Actively confirm: “can you confirm that you are not recording care and that recording will disqualify you from future care?”

Patients recording their clinical visits without knowledge of providers.

- Have a medically based and medically sound explanation for policy:
  - Patient privacy
  - Trust and candor inherent in effective provider-patient relationship

Patients recording their clinical visits without knowledge of providers.

- Terminate care if policy is violated.
- Train providers to ask.
- This applies to phone calls as well, and even telehealth visits

Patients recording their clinical visits without knowledge of providers.

- But does posting a policy plant a seed?

Patients recording their clinical visits without knowledge of providers.

Questions?

Defending patient privacy claims

- Last year we discussed a dozen cases involving patient privacy claims.
- Some disclosers were intentional and some were not.
- Today: strategies for defending those claims

Defending patient privacy claims

- As a reminder, HIPAA does not create a private cause of action for patients against health care providers
- So lawyers look for other legal theories: (1) general negligence, (2) breach of contract, and (3) *respondeat superior*

Defending patient privacy claims

- *Respondeat superior* – a party is responsible for the acts of its agents

- So the strategy becomes: how can a patient attribute the employer's conduct to the employer?

Defending patient privacy claims

- Employers are not responsible for acts that are unauthorized, or acts done “on the employee's own initiative, with no intention to perform it as part of or incident to the service for which he is employed.” An employer may still be liable when an employee acts partially in self-interest and partially in the employer's interest. The scope of employment “may include acts that the employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.”

Defending patient privacy claims

- Employers are not responsible for acts that are unauthorized, or acts done “on the employee's own initiative, with no intention to perform it as part of or incident to the service for which he is employed.” An employer may still be liable when an employee acts partially in self-interest and partially in the employer's interest. The scope of employment “may include acts that the employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.”

Defending patient privacy claims

- A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

Defending patient privacy claims

- Negligent hiring and training
- Failure to anticipate and/or prevent through policies and protocols

Defending patient privacy claims

So how do we defend?

Give us evidence that argues that the employer did everything right.

My proposed action plan, as of September 2020:

Defending patient privacy claims

1. Background checks

Defending patient privacy claims

2. Orientation training related to privacy

With documentation – signed attendance and proof of training

Defending patient privacy claims

3. Employee confidentiality agreement at the start of employment, which provides the employee will only access, use (read, add, change, or delete), or disclose information for which the employee has a business reason and is authorized to do so. At no time will the employee access, use, or disclose confidential or sensitive information to any person or third party for a personal, unauthorized, unethical, or illegal reason.

Defending patient privacy claims

4. Periodic training related to privacy

With proof of content and attendance

Defending patient privacy claims

5. Isolate access; need-to-know

Defending patient privacy claims

6. Explicit policies against looking for information, using information, or publishing information

Defending patient privacy claims

7. Zero-tolerance policy

Past occurrences are proof of failure to prevent.

Defending patient privacy claims

8. Immediate action upon notice of breach

- Notice to patient
- Action on the employee
- Containing the breach
- Curing the opportunity for breach

Defending patient privacy claims

9. Verify sufficient insurance by type and amount

Cyber insurance generally not under E and O insurance

$50,000 is standard, but costs eat that amount

Damages could be significant

Coverage under umbrella policy?

Defending patient privacy claims

Questions?

Collecting on patient accounts

Last year, I prepped but didn't discuss.

This is a difficult topic because it's difficult for me to anticipate specific questions. So ask. Now. (Yes, now!) Otherwise I might bore you or annoy you.

Collecting on patient accounts

Patient accounts are traditional contracts: services for pay

Governed by state law

Fair Debt Collection Practices Act does not apply; applies only to consumer debts; applies only to collection agencies

Collecting on patient accounts

The real art: (1) how to avoid breaches and (2) how to cure breaches.

Your job is to collect fees, and that requires a certain nonpunitive mindset.

Collecting on patient accounts

1. Be clear about financial responsibility of patient before services begin
2. Review insurance eligibility
3. Estimate total patient responsibility
4. Implement self-pay policies

Collecting on patient accounts

5. Save credit card info to file

6. Consider patient financing options, including interest rates

7. Handle collections internally for as long as possible

8. Training employees to facilitate resolution

Collecting on patient accounts

A recent report by the ACA International stated that medical practices recover less than $14 for every $100 owed once they turn bad debt over to third-party collection agencies.

ACA International (An association of credit and collection Professionals; the comprehensive, knowledge-based resource for success in the credit and collection industry)

https://www.acainternational.org/publications - Pulse newsletter - Published for ACA healthcare collection agencies to provide current industry information for healthcare providers.

Collecting on patient accounts

Fair Debt Collection Practices Act does not apply, but the public policy of that law should be kept in mind: fair, open, pursuit of account.

Collecting on patient accounts

Collecting a legal judgment is not efficient

Collecting on patient accounts

Develop a culture that supports your objectives.