

# EMS LEGAL BOOTCAMP

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## Introduction

- Partner, Keavney & Streger, LLC
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## Disclaimer

Nothing in this lecture should be considered as “legal advice”

Consult with your legal counsel before making any changes to your practice, policies or your organization

## Objectives

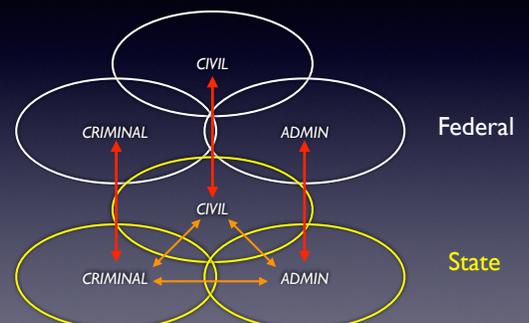
- Federal Anti-Kickback Statute
- EMTALA
- HIPAA
- Federal False Claims Act
- Virginia False Claims Act - VFATA
- Sovereign Immunity
- Employment Laws



## Sources of Law

- Constitutions - Law of the People
- Statutes - Passed by Legislature
- Regulations - Delegated Powers to Agencies
  - Usually **NOT** Private Cause of Action
- Common Law - “Court-Made” Law
  - Interpretations of Other Laws
- Supremacy Clause

## Laws



## Civil Law

- Problems Between People
  - Torts - Negligence
  - Contracts
  - Property
  - Family
  - Other Stuff - IP, Corporate, Environmental

## Criminal Law

- Wrongs Against “The State”
  - Stuff Society Says is BAD
  - Felonies & Misdemeanors

## Administrative Law

- Licensing Boards and Agencies
- Separation of Powers
- Still Provide Some Due Process
- “Court-Lite”

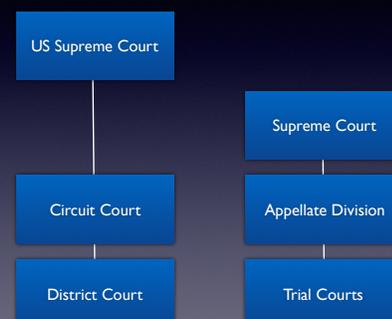
## Federal v. State Law

- Article I, Section 8
  - Naturalization, Money, Post Offices, Copyright, Admiralty, Military, etc.
  - 10th Amendment - Everything Else to the States...?
  - Bankruptcy, Aviation, Labor Unions, Food and Drug...?

## Federal Court Jurisdiction

- Federal Question
- Diversity of Citizenship - \$75,000+
- Supplemental Jurisdiction over Related State Law Claims

## Sovereignties



## Anti-Kickback Statute

- 42 USC 1320-7b
- Prohibits exchange (or offer)
- Of anything of value (cash or kind)
- To induce referral of federal health care business
- WHY?
- Things that are commonly accepted in business

## Anti-Kickback Statute

- Up to \$25,000 per violation
- Up to 5 years in prison per violation
- Mandatory federal healthcare exclusion

## Anti-Kickback Statute

- No private right of action - but FCA
  - Automatic false claim under PPACA
- Must be knowing (or reckless disregard)
  - No specific intent
- “One Purpose” Test

## Civil Monetary Penalties

- 42 USC 1320-7a
- False Claims
- Influencing Patient Discharge
- Kickbacks
- Excluded Entities
- Inducing Referrals
- Diverting Payments

## Anti-Kickback Notes

- Commercially Reasonable
- Fair Market Value
- In Writing
- Rebates, Gifts, Donations, Waivers of Payment

## AKS Safe Harbors

- Space and Equipment
  - One year written lease, FMV, specificity
- Management Services Contracts
  - Similar
- Employee Safe Harbor
  - Not related to value or volume

## Ambulance Safe Harbor

- 42 CFR 1001.952(v)
- Open, Public and Uniform
  - May only restock certain categories
- Documented



## AKS Notes

- Municipal Contracting
  - Explicit, Routine Waiver of Copay
- Restocking Arrangements
- Arrangements with Other Responders, Hospitals SNF's, and Patients
- Check OIG Opinions

BREAK

## EMTALA

- Emergency Medical Treatment and Active Labor Act
  - NOT COBRA - 1986
- Anti-Patient Dumping Act
- Emergency Requirements
- Transfer Requirements

## EMTALA

- Medical Screening Exam
- Regardless of Citizenship, Legal Status or Ability to Pay
- Participating Hospitals - Medicare
- No Provision for Reimbursement



# EMTALA

- Medical Screening Exam (MSE)
  - Cannot delay to inquire about payment
  - To best capabilities of hospital
- Stabilization for Emergency Medical Condition (EMC)
  - Equal level for all patients
  - Labor = Delivery

# EMTALA

- NO obligation to provide non-compensated services beyond MSE if no EMC
- Cannot discharge non-paying patient for paying patient
- Not required to provide post-discharge care or medications

# EMTALA

- Transfer if hospital does not have capabilities to treat patient
- Physical certifies medical necessity in writing
- Receiving hospital accepts patient
  - Bed to Bed, Physician to Physician
  - Accompanied by Medical Records
- Medically-Appropriate Transfer

# EMTALA Notes

- Hospital Property - Campus
  - Presentation for Emergency Care
  - 250 Yard Rule
- 2003 Changes - Hospital-Owned Ambulances are Not Hospital Property
  - IF they are integrated into the EMS system
- NOT RADIO CONTACT

# HIPAA



Health Information Portability and Accountability Act

# HIPAA

- Privacy Rule
- Security Rule
- HITECH Amendments



## HIPAA - Privacy

- Covered Entity
  - Health Plan, Clearinghouse
  - Provider that Transmits PHI Electronically
- Protected Health Information
  - Relates to Medical Condition AND
  - Identifies Individual OR
  - Reasonable Basis to Identify Individual

## HIPAA - Privacy

- Disclosure for
  - Treatment Payment and Operations
  - Consent
  - As Required by Law
- Disclose Minimum Necessary

## HIPAA - Security

- Administrative
  - Written policies, plans
- Physical
  - Computer access, physical limitations
- Technical
  - Computer systems

## HIPAA - HITECH

- Extends all provisions to Business Associates
- Breach Notification Requirements
  - 60 Days
  - Individual Notification
  - Media Notification 500+
  - OCR
- WHAT IS A BREACH???



## HIPAA - Enforcement

- HHS Office of Civil Rights
- Civil and Criminal Penalties
  - Knowingly Disclose or Obtain...?
- NO PRIVATE RIGHT OF ACTION

**BREAK**

## Federal False Claims Act

- 31 USC 3729-3733
- Knowingly presenting a false claim for payment
- “Lincoln Law”
- 1987-2013 - \$38.9 Billion
  - \$27.2 Billion (70%) from Whistleblowers
- TREBLE DAMAGES

## Federal False Claims Act

- Materiality - Natural Tendency to Influence Agency Action
- Knowing - NOT Specific Intent!
  - Actual knowledge
  - Deliberate ignorance of truth or falsity
  - Reckless disregard of the truth

## Federal False Claims Act

- Services not Rendered
- Services not Medically-Necessary
- Fake Patients
- Anti-Kickback Violations
- Unbundling / Upcoming

## Federal False Claims Act

- Qui Tam Actions
- Filed under Seal, Not Served
- Government Investigates and Decides
- Relator Recovers 15-30% of Recovery

## STATE LAWS

## Virginia False Claims Act VFATA

- 2003 Enactment (DRA Requirement)
- Medicaid Fraud Prevention
- Identical Provisions to Federal FCA
- VA Employees may not bring Suit unless they have exhausted internal procedures and VA failed to act in reasonable time

## Sovereign Immunity

- Government typically has absolute immunity unless it consents to suit
- Virginia Tort Claims Act - Partial Waiver
- STATE EMPLOYEES

## Discretionary or Ministerial

- Discretionary = Use of Judgment
- Ministerial = Followed state-prescribed Methods
  - Nature of Function Performed
  - Extent of State Interest
  - Degree of Control Exercised by State
  - Action Involved Discretion and Judgment

## Sovereign Immunity

- Must be Within Proper Scope of Employment
- Must not be Intentional Tort, Gross Negligence or Willful and Wanton Negligence
- Discretionary GETS Immunity
- Independent Contractors Do NOT

## County v. City

- County Employees - Same Discretionary v. Ministerial Test
- City Employees - Governmental v. Proprietary Test
  - Governmental - Directly Tied to Health, Safety and Welfare (trash collection)
  - Proprietary - Performed for Benefit of Municipality (routine maintenance)

## Bosserman v. Hayes (2014)

- VA Code Ann 27-23.6(B)
- County, city or town may provide firefighting or EMS using government or volunteer personnel
- Instrumentality of the county, city or town and exempt from suit for damages INCIDENT TO PROVIDING [services]
- Includes travel while performing operations

## Bosserman v. Hayes (2014)

- Operating emergency vehicle is discretionary
- Simple operation of vehicle in routine traffic is ministerial
- Immunity only applies to judgment necessary to perform government function

## EMS Immunity

- VA Code 8.01-225 - In good faith and without compensation
- Bowen v. Manis - For-profit ambulance transporting patient from clinic to hospital not entitled to immunity
- Irby v. Gill - Decision not to transport in violation of protocol is ministerial not discretionary therefore no immunity

## Employment Laws

- Whistleblower Claims
  - Health and Safety Violations
  - Corporate Fraud against the Commonwealth (VFATA)
- NO protections for reporting private wrongs - NO retaliatory discharge claim

## Employment Laws

- Wrongful Discharge - VA is AT WILL STATE
  - Statutory Right, or
  - Violation of Statutory Protections (if member of class or intended beneficiary), or
  - Refusal to Engage in Criminal Conduct (adultery?)

## Employment Laws

- Virginia Human Rights Act (VHRA)
  - Race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status or disability (physical or mental).

## Conclusions

- Get Legal Help Early
- Know the Rules
- Set Good Policies
- Enforce Them!
- Document, Document, Document

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