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## King & Spalding Are Champions of Justice

BY MICHELLE ALDEN

King & Spalding LLP has generously donated \$40,500, this year's largest donation, to the current Equal Access to Justice Campaign, supporting pro bono efforts in Dallas County. Including this gift, the firm has donated more than \$51,500 to legal aid for low-income people since 2020.

"As the firm expands into Dallas, we are excited to get involved with the Dallas Volunteer Attorney Program and to support the EAJ Campaign. Our firmwide pro bono program is comprised of a mix of national and local opportunities, and we look forward to getting involved and making an impact in Dallas," stated **Josh Toll**, the firm's Pro Bono Partner.

King & Spalding's pro bono program is designed to address the core legal needs of the most vulnerable members of our society, advance civil rights, and promote a more just and equitable world. Their signature pro bono programs include immigration and asylum, death penalty and habeas, assisting survivors of domestic violence and trafficking, representing disabled veterans, helping local non-profit organizations with general corporate needs, impact litigation focusing on civil rights and social justice, and assisting indigent clients with basic civil needs, including family law and eviction defense. In 2024, the firm's lawyers contributed more than 50,000 pro bono hours, while lawyers and staff together contributed more than 60,000 hours of pro bono work.

The firm kicked off its Dallas operation in February 2024 and moved into its Uptown offices last October. King & Spalding is an international law firm that employs more than 1,300 attorneys across its 24 locations in the U.S., Europe, the Middle East, and Asia. The Dallas office is its third in the Lone Star state, after Austin and Houston. The Dallas office focuses on corporate, finance and restructuring, business litigation, government investigations, real estate and investment funds, and product liability and mass tort work for a broad spectrum of clients across the energy, financial services, transportation, healthcare, life sciences, and technology sectors.

The firm described Dallas partner **Veronica Moyé** as an "anchor hire" for the office. Her nationwide practice takes the Dallas native around the country.

"Throughout my career, I have been a supporter of pro bono work through DVAP, and I'm looking forward to getting my new colleagues at King &

Spalding involved in that work as well. It was important for us to support the EAJ Campaign, even in our first year as an office, as a sign of our commitment to supporting civil legal aid throughout the Dallas community," said Moyé.

Low-income residents of Dallas continue to face pressing legal challenges, and King & Spalding's donation will help to support the critical work of DVAP's volunteer attorneys. One such Dallas resident, "Kim," was married for over 20 years to her abusive husband. She left him and came to DVAP three years later for help with a divorce. Volunteer attorney Natalie Fortenberry accepted the case for pro bono representation. Kim had four kids with her husband, and he had not seen them in three years when the divorce was filed. The parties went to mediation twice and did not settle. The case dragged on for three years, but a settlement was finally reached on the eve of trial. Kim was awarded sole custody of the children, child support, and \$8,400 as part of the division of the community estate. Kim looks forward to a brighter future, free of abuse, and with additional safety and security for herself and her children. Kim's story shows the profound difference that wonderful volunteers like Natalie can make, but the reality is that helping people like Kim requires financial support, too.

"Pro bono work has been an important part of my practice, and DVAP is a great pro bono partner to help our neighbors in Dallas. It's an honor to support the EAJ Campaign and the needed work that it funds in our community," added Dallas partner **Sean Royall**.

The problem of access to justice in Dallas County is one that DVAP works to correct every day. In a country based on justice for all and access to our court system, over 25 percent of Dallas County residents live near the poverty level, and 42 percent have a slim hope of affording an attorney. With annual poverty incomes of \$40,187 for a family of four, justice is a luxury for low and moderate-income families.

DVAP is a joint pro bono program of the DBA and Legal Aid of NorthWest Texas, which brings together the volunteer resources of a major metropolitan bar association with the legal aid expertise of the largest and oldest civil legal aid program in North Texas. For more information or to donate, visit [www.dallasvolunteerattorneyprogram.org](http://www.dallasvolunteerattorneyprogram.org).

HN

Michelle Alden is the Director of the Dallas Volunteer Attorney Program. She can be reached at [aldenm@lanwt.org](mailto:aldenm@lanwt.org).

## The Power and Influence of the Law

BY POOJA VASUDEV

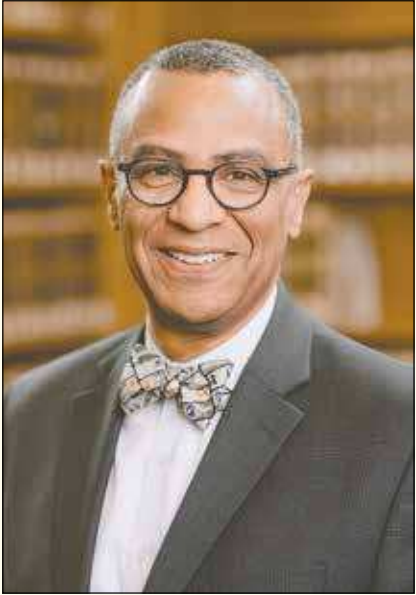
"When you see something that is not right, not fair, not just, you have to speak up. You have to say something; you have to do something." These wise words come from American civil rights activist and politician John Lewis, who spoke on the importance of values including justice, fairness, and integrity in our modern world. In our civilized and structured society, the law comes into play to ideally bolster and uphold these principles. After all, Law Day was created to honor the Rule of Law.

Law Day is held every year in May to celebrate the Rule of the Law in our society and to cultivate a deeper understanding and appreciation of the legal profession. Law is vital and integral to the development of an appropriately functioning society, and the proper administration of the law is crucial to uphold values including equality, equity, and the truth.

This year, the Dallas Bar Association will hold its Law Day Luncheon on May 9, 2025. The Law Day Speaker is Mr. **Carl D. Smallwood**, who is the Executive Director of the Divided Community Project at the Ohio State University's Moritz College of Law. As a 1980 graduate of the Moritz College of Law, this role is particularly fitting for Mr. Smallwood.

When asked about the accomplishments of Mr. Smallwood, Dallas Bar Association President **Vicki Blanton** said: "The Dallas Bar is greatly excited to host Carl Smallwood. He is that rare intellectual who can make a very lofty subject, such as the Rule of Law, an attainable topic of conversation for every understanding. As the champions of the Rule of Law, there cannot be a more befitting topic for the DBA's celebration of Law Day."

Many, including the elite National Conference of Bar Presidents (NCPB) and industry giant LexisNexis, certainly agreed with Vicki Blanton; Mr. Smallwood is set to receive the inaugural 2025 Rule of Law Award which will be presented to him this year by NCPB and LexisNexis. This will be an exciting and well-deserved achievement for Mr. Smallwood.



Carl D. Smallwood

With the leadership of Mr. Smallwood at The Ohio State University, the Divided Community Project (DCP) focuses on addressing and resolving concerns and challenges associated with community unrest and discord in the localities it serves. The DCP also focuses on advancing values including civil rights, racial equity, and conflict resolution and fostering the resilience required for people to cope with these ongoing challenges. DCP's services are provided free of charge and provided upon request to the communities seeking its assistance. The DCP works to bridge the gap between the words of this nation's laws—such as Title VII of the Civil Rights Act which was passed in 1964—and the reality of the human experience to build resilience in the streets of present-day America.

In addition to Mr. Smallwood's role with the Divided Community Project, he currently teaches a related class titled *Resolving Community Civil Rights Disputes* as a Distinguished Practitioner in Residence at The Ohio State University's Moritz College of Law. Additionally, Mr. Smallwood serves as a Chair of the Advisory Commission to the American Bar Association's Task Force on American Democracy, which was formed to garner public trust in the American political system. Mr. Smallwood also received the Distinguished Service Award in conjunction with his role as a founding President of the Law and

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### NEED TO REFER A CASE?

The DBA Lawyer Referral Service Can Help.

Log on to [www.dallasbar.org/lawyerreferralservice](http://www.dallasbar.org/lawyerreferralservice) or call (214) 220-7444.



Calendar April Events

Programs in green are Virtual Only programs. All in person programs are at the Arts District Mansion unless otherwise noted. Visit [www.dallasbar.org](http://www.dallasbar.org) for updates.

WEDNESDAY WORKSHOPS

APRIL 2

Noon

**What Lawyers Don't Know About Property Taxes Can Hurt Them,** John Brusniak and Stephen Brusniak. (MCLE 1.00)\*

APRIL 16

Noon

**When Does Workplace Bullying Qualify as a Hostile Work Environment?** Stephanie Halford. (MCLE 1.00)\*  
*Virtual only*

TUESDAY, APRIL 1

Noon

**Child Welfare & Juvenile Justice Section**  
*The Attorney General's Office and Child Support in Child Welfare Cases,* Electra Watson. (MCLE 1.00)\* *In person only*

**Corporate Counsel Section**  
*Navigating the Trump Administration—From Tariffs to Taxes to Trade—How the New Administration Impacts Texas Companies,* Chris McCannell. (MCLE 1.00)\*

**Tort & Insurance Practice Section**  
*Topic Not Yet Available*

Morris Harrell Professionalism Committee. *In person only*

5:00 p.m.

**Hearsay Speakeasy**  
*Join fellow DBA members for a social hour with drinks and hors d'oeuvres. Password found on page 4.*

5:30 p.m.

Bar None Auditions at Arts District Mansion Questions? Email [martha@marthasnet.com](mailto:martha@marthasnet.com)

6:00 p.m.

DAYL Board of Directors

WEDNESDAY, APRIL 2

Noon

**Employee Benefits & Executive Compensation Law Section**  
*Benefits and Compensation Matters under Trump 2.0,* Marian Fielding and Eric Winwood. (MCLE 1.00)\* *Virtual only*

**Solo & Small Firm Section**  
*Topic Not Yet Available*

**Wednesday Workshop**  
*What Lawyers Don't Know About Property Taxes Can Hurt Them,* John Brusniak and Stephen Brusniak. (MCLE 1.00)\*

Allied Bars Equality Committee. *In person only*

DWLA Board of Directors

4:00 p.m.

LegalLine E-Clinic. *Volunteers needed. Contact [mmejia@dallasbar.org](mailto:mmejia@dallasbar.org).*

THURSDAY, APRIL 3

10:00 a.m.

Membership Committee. *Virtual only*

Noon

**Construction Law Section**  
*Strategies for Cost-Effective E-Discovery in Construction Litigation,* Tony Cronin. (MCLE 1.00)\* *In person only*

Judiciary Committee. *In person only*

FRIDAY, APRIL 4

No DBA event scheduled

MONDAY, APRIL 7

Noon

**Tax Law Section**  
*Treasury Finalizes Long-Awaited Basis Consistency and Reporting Regulations,* Nelson Hunt. (MCLE 1.00)\* *In person only*

**Business Litigation Section**  
*Topic Not Yet Available*

**Immigration Law Section**  
*Topic Not Yet Available*

**Mergers & Acquisitions Section**  
*Winning with Auctions in M&A,* Michael McCourt. (MCLE 1.00)\*

Home Project Committee. *Virtual only*

Legal Ethics Committee

5:00 p.m.

**Hearsay Speakeasy**  
*Join fellow DBA members for a social hour with drinks and hors d'oeuvres. Password found on page 4.*

6:00 p.m.

Dallas LGBT Board of Directors

WEDNESDAY, APRIL 9

Noon

**Family Law Section**  
*Drug Testing in Family Courts,* Chris Deal. (MCLE 1.00, Ethics 0.50)\* *In person only*

Bench Bar Conference Committee

Public Forum Committee. *Virtual only*

Summer Law Intern Program Committee. *Virtual only*

4:00 p.m.

LegalLine E-Clinic. *Volunteers needed. Contact [mmejia@dallasbar.org](mailto:mmejia@dallasbar.org).*

THURSDAY, APRIL 10

Noon

**Alternative Dispute Resolution/ Collaborative Law Sections**  
*Emotional Intelligence for Attorneys Enhancing Relational and Problem-Solving Skills,* Ken Sande. (MCLE 1.00, Ethics 0.50)\*

CLE Committee. *Virtual only*

Publications Committee. *Virtual only*

FRIDAY, APRIL 11

Noon

**Trial Skills Section**  
*Topic Not Yet Available. Virtual only*

MONDAY, APRIL 14

Noon

**Real Property Law Section**  
*Construction Projects: From Contracts to Mechanics' Liens to Close-Out, and Everything in Between,* Jerry Negrete. (MCLE 1.00)\*

Attorney Wellness Committee. *Virtual only*

TUESDAY, APRIL 15

Noon

**Franchise & Distribution Law Section**  
*Watch Where You Step: Common Pitfalls to Look for in FDDs,* Ryan Whitfill. (MCLE 1.00)\* *Virtual only*

**Education Law Section**  
*Navigating the First Amendment: Dress Codes, Title IX and the Texas CROWN Act,* John Janssen. (MCLE 1.00)\* *In person only*

**International Law Section**  
*Sanctions, Export Controls, and Foreign Investment in the Second Trump Administration,* Derrick Kyle. (MCLE 1.00)\*

Community Involvement Committee. *Virtual only*

WEDNESDAY, APRIL 16

Noon

**Energy Law Section**  
*Long-Term Liability Associated with Carbon Capture and Sequestration,* Dr. Felix Mormann. (Ethics 1.00)\* *In person only*

**Health Law Section**  
*Generative AI Traps for the Unwary: Lessons Learned from over 150 Use Cases,* Vince Allen and Rob Taylor. (MCLE 1.00)\* *In person only*

**Wednesday Workshop**  
*When Does Workplace Bullying Qualify as a Hostile Work Environment?* Stephanie Halford. (MCLE 1.00)\* *Virtual only*

Law in the Schools and Community Committee

Pro Bono Activities Committee. *Virtual only*

4:00 p.m.

LegalLine E-Clinic. *Volunteers needed. Contact [mmejia@dallasbar.org](mailto:mmejia@dallasbar.org).*

THURSDAY, APRIL 17

Noon

**Allyship for All Program**  
*Allyship for All: Together We Rise,* Bill Mahomes. (Ethics 1.00)\* *In person only*

**Appellate Law Section**  
*Meet the New Justices of the 5th Court of Appeals,* Hon. J.J. Koch, Hon. Tina Clinton, Hon. Jessica Lewis, Hon. Gino Rossini, Hon. Cynthia Barbare, Hon. Earl Jackson, and Hon. Mike Lee, moderated by Anne Johnson. (MCLE 1.00)\*

3:30 p.m.

DBA Board of Directors

FRIDAY, APRIL 18

DBA offices closed in observance of Good Friday

MONDAY, APRIL 21

Noon

**Government Law Section**  
*Topic Not Yet Available*

**Labor & Employment Law Section**  
*Everything You Wanted to Know about the Texas Business Court but Were Afraid to Ask,* Hon. Bill Whitehill. (MCLE 1.00)\*

TUESDAY, APRIL 22

Noon

**Probate, Trusts & Estates Law Section**  
*Topic Not Yet Available*

4:00 p.m.

LegalLine E-Clinic. *Volunteers needed. Contact [mmejia@dallasbar.org](mailto:mmejia@dallasbar.org).*

THURSDAY, APRIL 24

Noon

**Criminal Law Section**  
*Expunctions and NonDisclosures Nuts and Bolts,* Jessica Trevizo and Shelly Yeatts. (Ethics 1.00)\*

**Environmental Law Section**  
*Topic Not Yet Available*

**Intellectual Property Law Section**  
*The People v. See, e.g., Sealed Schedule A: An Overview of IP Shadow Pleadings,* Danial Martens and Travis Wimberly. (MCLE 1.00)\* *Virtual only*

Minority Participation Committee. *Virtual only*

FRIDAY, APRIL 25

No DBA events scheduled

MONDAY, APRIL 28

Noon

**Science & Technology Law Section**  
*The Changing Legal Landscape of Food Additives: What Attorneys Need to Know,* Suzie Trigg. (MCLE 1.00)\* *Virtual only*

**Securities Section**  
*Securities Compliance and the U.S. EB-5 Program: Understanding Best Practices for Stakeholders and Counsel,* Jason Barnes, Stephen Huschka, and Michael Navarro. (MCLE 1.00, Ethics 0.50)\* *In person only*

Golf Tournament Committee

TUESDAY, APRIL 29

No DBA events scheduled

WEDNESDAY, APRIL 30

No DBA events scheduled

SAVE the DATE

Dallas Bar Association 33<sup>rd</sup> Annual

Golf Tournament

Benefiting Entrepreneurs in Community Lawyering

When: Thursday, May 22, 2025  
Shotgun start at 1:30 PM

Where: Cowboys Golf Club  
1600 Fairway Dr, Grapevine, TX



Contact [rthornton@dallasbar.org](mailto:rthornton@dallasbar.org) for more details or to sponsor.

DallasBar.org

Hearsay

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1st & 2nd Tuesday of each month

5 – 7 pm @ Arts District Mansion

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Find each month's **password** in the President's column. It will also be announced on the 1st & 2nd Tuesday through the DBA app.

The Pursuit of Happiness

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If special arrangements are required for a person with disabilities to attend a particular seminar, please contact Alicia Hernandez at (214) 220-7401 as soon as possible and no later than two business days before the seminar.

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President's Column

Hope Springs Eternal

BY VICKI D. BLANTON

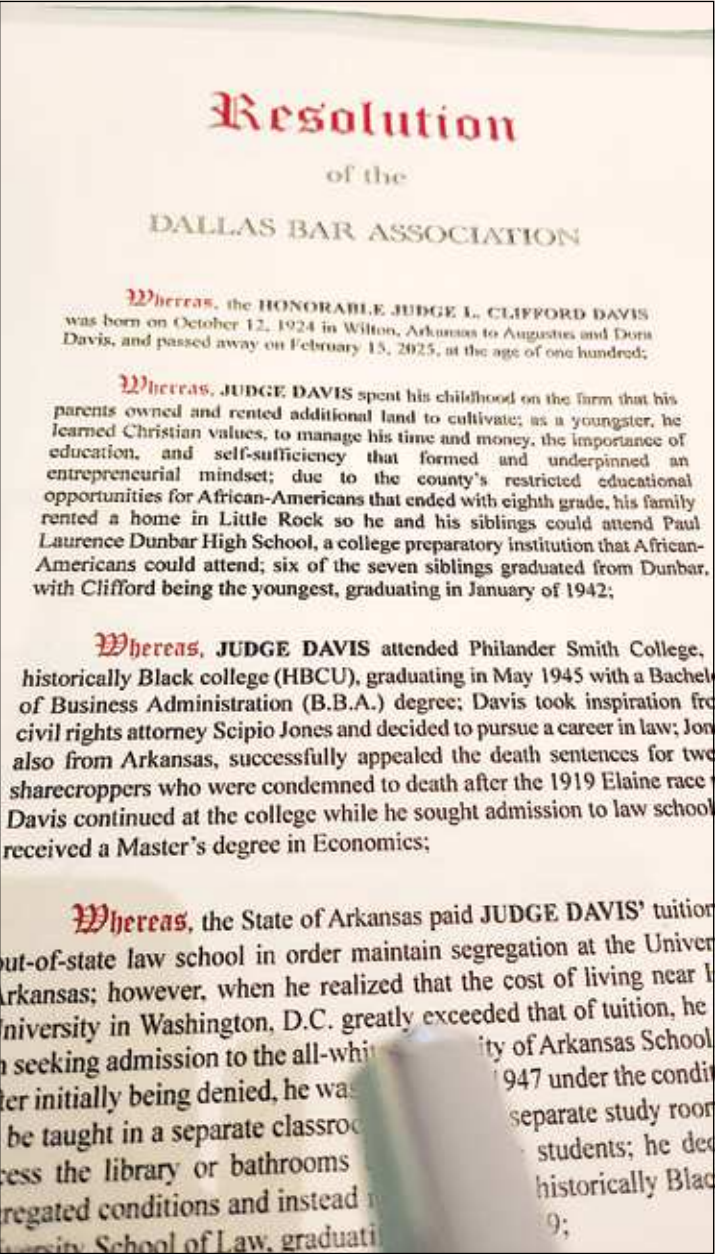
Punxsutawney Phil quite accurately predicted a longer, colder, harsher Winter 2025. For those unfamiliar with the Groundhog Day tradition, in a hamlet about an hour from Pittsburgh, Pennsylvania, the entire town celebrates the ritual of the groundhog named Punxsutawney Phil peeking out of his den on February 2. If he sees his shadow, then he scurries back inside to endure six more weeks of winter. If he doesn't see his shadow, he will roam freely to enjoy an early Spring. In translation, a sunny day is bad, but an overcast day is good.

Thus, true to Punxsutawney Phil's prediction this year, the Dallas area experienced some record setting low temperatures in the remaining weeks of winter. We dripped faucets. We kept blankets out. We continued to sport our winter outerwear. And we covered outside plants, because we also knew Spring would eventually come.

One of my favorite movies, featuring this groundhog custom is named (not surprisingly) "Groundhog Day." I consider it one of the greatest existential expressions in a modern movie, in my opinion. The movie stars Bill Murray, a grumpy Pittsburgh weatherman also named Phil, sent to cover the story of Punxsutawney Phil. In a sequence of events, he keeps waking up to relive the same day, over and over again. Of course, he doesn't believe it at first. He then moves to the elation of no accountability for whatever he does, no matter how horrible. Next, he tries to use the day for his own advantage, because he alone in the town knows exactly what will happen next. Then, he moves to a state of depression, considering himself doomed to this odd state of limbo. In his final stage, he decides to use this automatic do-over setting to better himself, and then ultimately to improve the lives of others and the world around him.

Finally, after having the "perfect" Groundhog Day, fully spent in making it the best day ever for both himself and others, (spoiler alert) the calendar finally turns to February 3. Some estimates suggest that Phil relived the exact same day for more than 33 years! This estimate is based on the common lore that it takes 10,000 hours to master anything. Thus, at the end of the movie, Phil has learned to play the piano, speak French fluently, and ice sculpt. He saves lives and enhances livelihoods. He, himself, becomes the "prize" by the end of the movie, and decides he wants to settle there. Thus, he becomes Punxsutawney Phil, the bellwether by which others will measure if a good or bad season.

So, too, are we, not only for ourselves, but also simultaneously in the lives of others. I watch this movie every Groundhog Day, and I always ponder what if I had to live this day repeatedly. Would I want to relive this day? Would I be proud of what I have accomplished at the end of the day? Have I been the best version of myself? Have I improved the lives of others? Self-assessment is always challenging, but necessary to improve your craft. Thus, in the vein of my elementary school principal, the late Joe Cobb, who constantly stated that the room for improvement is never full, I continue to strive to make my best better, just as Phil did,



with varying degrees of success.

Certainly, I am reminded of the life of the Hon. Judge L. Clifford Davis. The DBA honored him with the MLK Justice award, the last honor he would receive before passing away two weeks later. With the assistance of the Memorial & History Committee Chair **John Goren** and member **Thelma Clardy**, I had the honor to execute a formal Memorial Resolution for Judge Davis, as this tribute is one of the oldest traditions of the Dallas Bar, dating back to 1875. One of Judge Davis's last quotes was "I am a happy old man; I have lived a good life...100 years, 4 months, and 3 days." Judge Davis certainly enhanced the lives of others through his work as a civil rights attorney, with many opportunities of mastery.

The 7th annual campaign of Food from the Bar (FFTB) is another example of an opportunity for selfless contribution. DBA Board Member **Amanda Cottrell** perennially leads FFTBs efforts to support the North Texas Food Bank, which assists the nearly 664,000 North Texans who face hunger daily, including 1 in 5 children. Thus far, 14 law firms and in-house legal departments have registered for FFTB, volunteering to collect donations of both food and funds throughout the month of April. To participate or for more information go to [ntfb.org/foodfromthebar](http://ntfb.org/foodfromthebar).

As we approach Spring, those thoughts in mind of constantly bettering yourself and developing others call for our focus on the Allyship for All pillar of the 2025 Presidential programming. This pillar, chaired by DBA Board member **E. Steve Bolden**, will explore how we can become our best selves while also encouraging others to do the same. Being Simply the Best requires that we develop all to be the best. Thus, we are excited to host **Bill Mahomes**, Chair of the Texas A&M Board of Regents, in a fireside chat about mastering becoming your best self, being an ally for all, which in turn creates opportunity for us all. Join us for this impactful discussion on April 17.

Without a doubt, Winter 2025 has taken its toll. We took shelter from the cold. We moved one step ahead in the long line towards eternity as we lost Judge Davis. Yet, we remained hopeful, positive in knowing that Spring would come. And, with thoughts of developing into our best selves, we emerge from our dens, as Phil did, and declare, "Winter, slumbering in the open air, wears on its smiling face a dream...of Spring. Ciao!"

\*Hearsay Password Punxsutawney Phil

Vicki

HEADNOTES

Published by:  
DALLAS BAR ASSOCIATION

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Focus

Health Law/Employee Benefits & Executive Compensation

# Hot Topics in Fraud for Healthcare Technology Companies

BY JENNIFER KREICK  
AND THOMAS TANABE

Healthcare providers, payors, and healthcare technology companies are seeking innovative alignment strategies and partnerships to reduce costs and provide high quality care, but the healthcare industry is heavily regulated and participants in these arrangements should be mindful of healthcare fraud and abuse laws when structuring and implementing such arrangements. Navigating this complex healthcare regulatory landscape involves a thorough understanding of state and federal laws and regulations, such as anti-kickback statutes, fee splitting laws, false claims act statutes, self-referral laws, and beneficiary inducement laws.

Failure to comply with healthcare fraud and abuse regulations can lead to significant consequences, as demonstrated by various enforcement actions by the U.S. Department of Justice (“DOJ”) against electronic health records (“EHR”) software companies. For example, a health information technology developer paid \$145 million to resolve

criminal and civil investigations related to its arrangement with a sponsoring pharmaceutical manufacturer. The arrangement involved creating and embedding an alert in the EHR software that suggested certain treatments to clinicians, including opioids manufactured by the sponsor. The DOJ alleged that the purpose of the alert was to increase sales of the sponsor’s products, based on certain factors including that (i) the decision-support tool suggested treatments that were not consistent with evidence-based medical guidelines from the U.S. Department of Health and Human Services and other agencies, (ii) the tool was sold to the sponsor based on anticipated return on investment (“ROI”) calculations, and (iii) the payment was financed by and designed with input from the sponsor’s marketing department.

Another line of enforcement action against EHR companies involves the exchange of “referral payments” (e.g., service credits, cash bonuses, gift cards, and/or percentage-based success payments) to existing customers or industry influencers to recommend the software to prospective customers

that could receive certain federal incentive program payments related to the use of the EHR. The DOJ has scrutinized arrangements where the EHR vendor required the existing customer to enter into a written agreement prohibiting them from providing negative information to the prospective customer, and the prospective customer was not told about the financial arrangement or the non-disclosure contract.

Regulatory agencies have also issued guidance that is helpful in evaluating and structuring financial arrangements that do not fit clearly within a “safe harbor” or other exception under fraud and abuse laws. For example, in Advisory Opinion No. 23-04, the Office of Inspector General (“OIG”) addressed a healthcare technology company’s online directory platform that allowed users to search for and book medical appointments with healthcare providers. Participating providers paid per-booking fees for each new patient scheduled through the platform (with the option to set spending caps) and could also pay per-impression and per-click fees for sponsored ads. Historically, the OIG has held that per patient and other volume-based fees can implicate the federal Anti-Kickback Statute, which generally prohibits offering or receiving anything of value in return for generating federal healthcare program business. However, the OIG issued a favorable opinion, finding that the arrangement posed a sufficiently low risk of fraud and abuse due to several key factors including: (1) fees being set in advance and consistent with fair market value; (2) clear disclosures about the appearance of spend-capped providers and paid advertisements to enhance transparency; (3) nothing of value given to users to induce them to use the platform or influence their choice of provider (other

than free use of the platform); and (4) the amount paid by the provider not affecting the frequency of listing or resulting in more favorable placement for the provider.

In contrast to the recent EHR enforcement actions, in Advisory Opinion No. 23-15, the OIG found that a consulting company’s proposal to provide gift cards to current physician practice customers for referring new physician customers would not even implicate the federal Anti-Kickback Statute, despite the consulting services involving activities related to the Medicare Merit-Based Incentive Payment System (“MIPS”). While the company acknowledged that its services could lead to higher MIPS reimbursements for its customers, the OIG determined that the services the company furnished were not paid for by any federal healthcare program. Importantly, the company certified that its fees were not tied to the reimbursement amounts its customers would receive (i.e., no “success fee”), it would not provide any items or services outside of this arrangement that were reimbursed by federal healthcare programs, and it did not have an ownership or investment interest in any other entity that provides items or services that were paid for by a federal healthcare program.

Healthcare technology partnerships hold vast potential, but their success depends on careful structuring and implementation. When no safe harbor is available, transparency, fair market value arrangements, and other safeguards to reduce risk are essential to avoid regulatory pitfalls.

HN

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Focus

Health Law/Employee Benefits & Executive Compensation

# Take On Benefits Issues So They Don't Take Down Your Deal

BY JEREMY HAYS

Employee benefits are rarely, if ever, the reason a transaction happens, but they can be the reason one falls apart. Unforeseen benefits problems can arise, sometimes at the last minute, and force the parties to delay—or even call off—closing. With some planning and strategy, buyers and sellers can anticipate and head off these issues before they threaten a deal, and they can help set up the post-transaction company for success.

## 1. Identify Plans and Pinpoint Problems Early

The first step is to identify benefits issues early. Thorough diligence involves a comprehensive review of the existing compensation and benefits programs of both the acquiring and target companies. Key areas to assess include:

- **Retirement Plans.** Examine the types of retirement plans offered (e.g., 401(k) plans, pension plans), funding status, and any potential liabilities.

- **Health and Welfare Plans.** Evaluate the structure, costs, and compliance status of health, dental, vision, and other welfare plans.
- **Non-Qualified Deferred Compensation Plans.** Assess any non-qualified plans for potential liabilities and compliance with Section 409A of the Internal Revenue Code.
- **Equity Compensation.** Review stock options, restricted stock units, and other equity-based compensation to understand the impact of the transaction on those interests.

For each plan, it is critical to identify the parties' goals and reconcile those goals to align the terms of the deal with the intended result. It is important to consider liability that may be triggered by operation of law, such as under successor employer principles, and proactively address those concerns.

## 2. Plan for the Future

Once the plans have been identified, the next question is what will happen to each plan

after closing? The parties will want to consider any pitfalls identified during diligence and decide how to address them in the most effective way to serve their overall goals. For example, will the target's plans be terminated prior to closing, or will the buyer take them on? If there are compliance issues, how will they be resolved, and by whom? Is the buyer's payroll system ready to take on plan administration immediately, or will there be a gap?

The big-ticket item is usually the seller's 401(k) plan. Often, the buyer will not want to take on the target's plan, but this plays out differently in stock and asset deals. In stock purchases, the buyer may want to terminate the target's plan before closing. In an asset purchase, the buyer often leaves the target's plan behind. Each approach has important considerations. For example: What will happen to outstanding plan loans? How and when will compliance issues in the target's plan be addressed? Are there operational failures that might cause ongoing headaches for the buyer or "infect" the buyer's plan if the target's plan is acquired and merged? What benefits must be protected?

This is not the end of the story, however. There are a number of rules the parties must keep in mind to prevent unintended consequences. For instance, if the buyer in stock acquisition does not intend to take on the seller's 401(k) plan, then the seller should take action to terminate the plan prior to closing. Often this requires a board resolution to be adopted no later than the day before closing.

Health and welfare plans will need some attention, too. The parties must decide whether the target's plans will be continued, or whether the buyer will replace them with their own plans or new ones. For mid-year closings, it's important to consider how

transfer or crediting of flexible spending accounts and annual accumulators such as deductibles and out-of-pocket maximums will be addressed. And answering these questions may raise more. If the plans will be continued, how long will the buyer maintain them after closing? If employees are moving to the buyer's plans, which employees will be eligible for which plans, and when? Will there be any gaps in coverage?

## 3. There's Life After Closing

Answers to these questions are critical not only to the company's employees who participate in the plans, but also to those responsible for integrating the new workforce members after the transaction closes. For them, closing is just the beginning. Integration of benefit plans requires careful advance consideration of a wide array of issues, including changes in plan sponsorship, adoption of plan amendments, review of plan governance authority and processes, filing of final Form 5500s and other required reporting, and updates to compliance under ERISA, HIPAA, the Affordable Care Act, and the other laws that govern benefit plans.

## Conclusion

No one can anticipate every issue that may arise during the course of a transaction. However, by anticipating and working through potential benefits issues early in the deal's life cycle, attorneys can help ensure those issues don't become unwelcome surprises that jeopardize the success of the transaction.

HN

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Focus

Health Law/Employee Benefits & Executive Compensation

# AI Governance for Healthcare

BY DANIEL E. VENGLARIK

Artificial intelligence (AI) is reshaping healthcare—and every provider organization needs comprehensive AI governance. Just as information security can no longer be siloed within IT, AI governance requires active engagement by executive management.

The transformative impact of AI on healthcare is manifest. An outdated OpenAI model, when tried on the very challenging differential diagnoses test promulgated by the *New England Journal of Medicine* Clinicopathological Conferences (CPCs), answered correctly roughly 80 percent of the time—whereas practicing clinicians scored approximately 30 percent on the same test. According to a study recently published in *The Lancet*, “AI contributes to the early detection of clinically relevant breast cancer and reduces screen-reading workload without increasing false positives” when AI is used as the second reader in mammography screening. Even prosaic AI applications, such as improving treatment workflow and documentation efficiency through natural language processing, automated speech recognition, and AI summarization, are accelerating rapidly. However, these and other AI benchmarks in healthcare will inevitably be obsolete within months, if not days.

Even those benchmarks, however, signal a compelling need for AI governance in healthcare enterprises. In general, “governance” is the set of management responsibilities and practices ensuring that risks are managed appro-

priately, resources are used responsibly, and strategic objectives are achieved. Within every governance framework, the core components include policies, procedures, and reporting practices. The following sections outline the AI governance priorities with AI-specific considerations.

**Risk Management and Safety:** Periodic risk assessments and compliance audits, essential to mitigating risks and preventing misuse in all areas of risk management, pose singular issues in the AI context. For instance, unauthorized AI use by employees risks patient safety—and management must be cognizant that web interfaces to AI models such as ChatGPT and DeepSeek are currently free and available to employees on their personal mobile devices. Reliance on AI models may require elevated importance of contractual downtime requirements under the information security trinity of data confidentiality, integrity, and availability.

**Data Privacy and Security:** Rigorous protection of all patient data is non-negotiable. In addition to compliance with HIPAA data privacy and security requirements, other data protection regulations, such as Europe’s General Data Protection Regulation and California’s Consumer Privacy Act, should be considered. Mere use by employees of Protected Health Information/ Personally Identifiable Information (PHI/PII) in an AI model prompt carries potential liability. Healthcare organizations face special challenges when functionally anonymizing the large volumes of patient

data necessary for model training or fine-tuning, particularly when seeking to identify comorbidities.

**Bias Mitigation:** Proactive identification of biases in AI models ensures defensible outcomes for all patients. Some instances of bias—like that in the breast cancer study described above—may actually be beneficial. Regular performance reviews of model updates should be performed to identify model or data drift. Guardrails regarding clinician interpretation of seemingly unbiased AI model results, or overreliance on such results, should be a governance consideration.

**Transparency and Accountability:** AI systems and their usage should be clearly documented to later explain how decisions were made. Each healthcare professional must be responsible for understanding the AI tools used after receiving appropriate training and guidelines. Moreover, faster, more accurate diagnoses available through AI use may require informed patient consent—which includes the ability of employees to explain the technology, its capabilities, and its limitations. The evolving nature of legal frameworks around AI use in healthcare creates uncertainty about specific consent requirements.

**Compliance with Ethical Standards:** Adherence to legal, regulatory, and ethical guidelines must be effective but also aligned with core ethical values and societal responsibilities. Ethical standards generally implicate each of the above-identified factors—but also qualities of provider-patient interaction (bedside manner) such as

respectful, non-condescending communication, avoidance of dismissive or impatient behaviors, clarity and use of medical jargon, cultural awareness and sensitivity, and the like. Governance offers an opportunity to reinforce ethical standards through training and feedback on AI prompt engineering techniques and communicating AI model results to patients.

**Continuous Learning and Improvement:** The present pace of AI development is frenetic. Providers need to stay informed about new developments in healthcare-related AI technology, with governance serving a key role. Ongoing training and interdisciplinary collaboration are essential to keeping systems reliable and current. The AI governance framework itself may require more frequent revision than other risk management frameworks to account for emerging technological and regulatory trends.

AI agents probably will not replace human providers in the foreseeable future, but AI-assisted providers will likely edge out traditional providers who shun AI tools, regardless of motive. AI governance is a foundational aspect of smoothly transitioning to an AI-assisted practice. In contrast to cybersecurity, where the view of governance as an executive responsibility followed decades of compliance-driven or risk-based management with minimal board oversight, AI governance is likely to rapidly escalate to the C suite—and arguably has already arrived. **HN**

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401(k) Forfeitures — New Lawsuits Address Permissible Uses

BY JIM GRIFFIN

Several new Employee Retirement Income Security Act (“ERISA”) lawsuits were filed in late 2023 challenging the use of 401(k) plan forfeitures. Before those filings, the law on the use of forfeitures was considered to be settled for more than 50 years. A forfeiture is an unvested amount in a 401(k) plan from the employer’s matching or profit-sharing contributions. Employee contributions are always 100 percent vested and so do not result in forfeitures. Over the past year, 401(k) forfeiture cases have increased in number and spread across the U.S.

Employees in a plan—called participants—earn a vested interest in employer contributions through continued employment. ERISA permits “cliff vesting” and “graded vesting,” which are both measured over the length of a participant’s employment. If that employment ends before the participant earns a 100 percent vested interest, the unvested part of the participant’s account will eventually become a forfeiture.

When a forfeiture occurs, the forfeiture amount is removed from the terminated participant’s account and is transferred to a separate account inside the 401(k) plan. Until recently, it was accepted that forfeitures may be used to pay plan administrative expenses, to offset the cost of current plan contributions, or to provide additional benefits to participants. The plan document may specify one of these permissible uses or it may allow that decision to be made by the plan administrator. Forfeitures should not be allowed to accumulate and should be used before the end of the year after the forfeiture first occurs.

Not all plans have forfeitures, and not all forfeitures arise from unvested accounts. Some plans, such as so-called “safe harbor” plans, provide that employer contributions are always 100 percent vested. Forfeitures are usually from unvested accounts but may also be from accounts of missing participants, testing adjustments, uncashed distribution checks, and other similar sources.

For 401(k) plans of very large employers, forfeitures can be millions

of dollars each year. So far, it is those very large employers that are named in the forfeiture lawsuits.

The new 401(k) forfeiture lawsuits are not as numerous as the 401(k) lawsuits alleging poor investment performance and excessive recordkeeping fees. But like those lawsuits, the forfeiture lawsuits all seek class action status. In some existing investment performance and recordkeeping fee lawsuits, pleadings have been amended to add forfeiture allegations. Plaintiffs seek the recovery of all improperly used forfeitures, along with interest, attorneys’ fees and other relief.

None of the forfeiture lawsuits have gone to trial yet. A small number of decisions have been handed down on motions to dismiss. Some decisions on similar facts have favored participants and others have favored employers. The suits involve a tension between the ERISA fiduciary duty to administer a plan solely in the interest of participants and a fiduciary’s decision to use forfeitures to pay the cost of contributions due to the plan by the employer. They ask the courts to address whether the ERISA fiduciary duty of loyalty is satisfied when forfeitures are used to pay employer contributions instead of using those funds for the benefit of participants in the plan.

how to use forfeitures are “settlor” decisions and not “fiduciary” decisions. Employers then urge courts to consider whether ERISA’s fiduciary duties always require a fiduciary to select the option that is most beneficial to participants.

Plaintiffs also typically allege that use of forfeitures violates ERISA’s rule that plan assets may never benefit the employer. To satisfy this anti-inurement rule, plan assets must be held for the exclusive purpose of providing benefits to participants and defraying administrative expenses of the plan. Employers argue that the anti-inurement rule is satisfied because forfeitures always remain in the plan and are never paid to the employer.

Finally, complaints allege that using forfeitures to benefit employers is an ERISA prohibited transaction. Such a transaction occurs because forfeitures are used by, or for the benefit of, a plan’s party in interest. Another kind of prohibited transaction is alleged to occur where use of forfeitures is viewed as the fiduciary dealing with plan assets for the fiduciary’s own interest. Employers argue that forfeitures never leave the plan and that any use of forfeitures is not a “transaction.”

Until a body of law is developed on these issues, it is likely that more lawsuits will be filed. Employers, especially large employers, should consult their counsel to explore ways to avoid the uncertainty and expense of the new 401(k) forfeiture lawsuits. **HN**

Complaints include allegations of breach of ERISA’s fiduciary duty of prudence. Plaintiffs allege that prudence requires fiduciaries to engage in a reasoned and impartial decision-making process to determine how to use forfeitures.

Employers argue that decisions on



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Focus

Health Law/Employee Benefits & Executive Compensation

# The “E” in ERISA Stands For Everyone

BY BETH ALLEN

Well, the “E” actually stands for “Employee”, but the title reflects the thought that is the focus of this article. The Employee Retirement Income Security Act of 1974 (“ERISA”) regulates private sector retirement and health and welfare benefits. Additional laws applicable to plans have been incorporated into the law over its 50-year existence. (Note that throughout the rest of this article, this entire body of employee benefit law will be referred to as “ERISA”).

Given that ERISA is an area practiced by so few lawyers, it’s easy for those outside of this practice area to think that the law isn’t something with which they need to familiarize themselves. However, as the title of this article suggests, every lawyer would benefit from learning about employee benefits laws, whether in their position as practitioners, plan sponsors, or plan participants.

## Lawyers as Practitioners

While it is obvious that ERISA attorneys need to know the ins and outs of the law, practitioners in other spaces can also benefit from understanding basic ERISA principles. As a few basic examples:

- Employment law practitioners may or may not actually have much knowledge of ERISA but often run into issues where ERISA is implicated. Even in dealing with wage or employee leave situations, practitioners may have to consider the impact of certain business decisions on plan benefits.
- Family law practitioners with clients who have retirement plan assets likely need to understand the rules around Qualified Domestic Relations Orders and the differences inherent in defined contribution versus defined benefit (pension) plans. Health plan rules on eligibility, providing notice to the plan in the

event of a divorce, or even coordination of benefits between two plans are also issues that likely need to be explained to clients as decisions are made.

- Merger and acquisition practitioners are almost always dealing with clients that sponsor employee benefit plans. Because the transaction is generally front and center, employee benefits issues are not always addressed adequately. In an ideal situation, the process should include robust due diligence on plans (hopefully by an ERISA attorney) and the opportunity for service providers to weigh in on the transaction’s impact to plan benefits *before* the transaction occurs.
- Any practitioner whose client has or impacts an employee benefits plan would benefit from a primer on ERISA. Certain violations of ERISA can be considered criminal. Securities laws can impact plans due to investments. Tax and the Internal Revenue Code (IRC) go hand in hand with ERISA on plans. Practitioners in each of those spaces would benefit from knowing a bit about ERISA.

cepts that apply to plan sponsors and lawyers alike. The requirement to meet these fiduciary obligations is not based on size, either; so even the small law firm or solo practitioner has plan sponsor responsibilities.

Too often, lawyers and law firms leave the administration and compliance of their benefits plans squarely in the hands of the firm’s human resources professional and/or service providers (i.e. brokers, retirement advisors, third party administrators, etc.). While those individuals or businesses are often qualified professionals, they are not always fiduciaries. And even when they are, the plan sponsor is never off the hook from having to serve as a prudent fiduciary by monitoring said service providers or employees. As such, lawyers should ensure that they are at least aware of their legal and compliance obligations to the plans they sponsor.

## Lawyers as Plan Participants

Lastly, as employed individuals, lawyers are generally plan participants themselves. ERISA provides a full set of rights to plan participants and beneficiaries. Knowledgeable plan participants are in the best position to ring the alarm if something goes awry with the plan or its administration. Even knowing that you can likely call the U.S. Department of Labor, Employee Benefits Security Administration with questions about your benefits plan is valuable information.

Sure, ERISA is an obscure niche. But given the fact that employee benefits impact everyone, lawyers would benefit from learning the basics or reaching out to competent ERISA counsel when warranted. **HN**

Beth Allen is a solo ERISA practitioner at Allen Benefits Law. She can be reached at [beth@alleneblaw.com](mailto:beth@alleneblaw.com).

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## Lawyers as Plan Sponsors

Even if a lawyer is never in the position to practice ERISA, law firms and solo practitioners who sponsor employee benefit plans should also familiarize themselves with the law because plan sponsors are fiduciaries of their plans. The concept of being a fiduciary is one with which lawyers are intimately familiar. Interestingly, ERISA’s fiduciary duties are very similar to those imposed on lawyers: acting in the plan participants’ best interest, avoiding and/or disclosing conflicts of interest, following the law and plan terms, and acting with care (prudence) are all con-

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# Navigating the Complexities of the Federal Arbitration Act

BY JEFFREY FORD

Enacted in 1925, the Federal Arbitration Act, 9 U.S.C.A Ch 1 (FAA) was designed to ensure the enforceability of arbitration agreements and to promote the use of arbitration as an efficient and effective means of resolving disputes. During the ensuing 100 years interpretations and applications of the FAA have spun a web of legal nuances. This article will explore just a few of those.

Despite being a federal statute, the FAA does not grant jurisdiction for a federal court to hear a petition authorized by the FAA. Petitioners must demonstrate there is diversity or federal question jurisdiction apart from the FAA. In considering a petition to compel arbitration a federal court is empowered to “look through,” to the underlying dispute and if the court otherwise would have jurisdiction over the underlying dispute “save for” the arbitration agreement, it has jurisdiction. It may seem logical that a similar analysis would apply to other petitions such as petitions for confirmation or vacatur, but that is not the case as the Supreme Court clarified in *Badgerow v Walters*, 596 U.S 12 (2022). For those petitions and perhaps others under the FAA there is no “look

through” meaning a federal court that may have jurisdiction to compel arbitration may not have jurisdiction to confirm or vacate an award in the same case. The result is that a party will have to file such an application in state court.

In an arbitration governed exclusively by the FAA arbitrators do not have the authority to compel discovery such as depositions and document production. The parties might adopt rules that give arbitrators such authority, but that will not bind third parties from whom discovery might be sought. Under the FAA an arbitrator may only compel testimony and document production “before them.” This means the arbitrator must call a hearing and be present for the “discovery”. This is neither efficient nor effective. If made applicable, the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code Section 171.001, *et seq.* (TAA) can remedy that situation, since it authorizes arbitrators to order discovery, including third party discovery, which is enforceable by the court.

What law applies to an agreement to arbitrate? The FAA has very broad application as it applies to the arbitration of any dispute arising from a transaction “involv-

ing interstate commerce.” The FAA does not have to be mentioned in the contract or arbitration provision for it to apply. The Supreme Court has recognized that parties may add portions of a state’s arbitration act or opt out of FAA provisions altogether (but not enforcement of the arbitration agreement). A general choice of law provision in a contract is not effective to make TAA applicable or opt out of the FAA. The intent for the TAA to apply or supplant the FAA should be clearly expressed in the arbitration provision itself.

Texas (like many other states) has a statute that makes provisions in a construction contract for a project in Texas subject to another state’s laws and/or provide for venue in another state voidable by the party obligated to perform the work. Most court decisions hold that the FAA preempts such statutes (ones which do not apply to all contracts), and arbitration agreements must be enforced as written.

The statutory grounds for vacating an arbitration award under both the TAA and FAA are limited. The arbitration award will be final and binding even if an arbitrator has incorrectly applied the law unless one of the other enumerated statutory grounds for

modifying or vacating an award exists. Some parties have sought to address this by including in the arbitration agreement provision for judicial review of the award. Such a provision may be enforceable under the TAA (see *Nafta Traders, Inc. v Quinn* 339 S.W. 3d 84 (Tex 2016)) but is not enforceable under the FAA (see *Hall Street Associates, LLC vs Mattel, Inc.* 522 U.S. 576 2008). In *Hall Street* the Supreme Court held that parties could not contract for an expanded judicial review of the arbitration award. But in *Nafta Traders* the Texas Supreme Court upheld under the TAA a provision that tied expanded judicial review to contractual limitations on the arbitrator’s power (i.e. the arbitrator does not have authority to render a decision which contains reversible error of law).

To secure this judicial review, the contract must state the arbitration will be conducted under the TAA, structure the judicial review portion of the agreement as a limitation on the arbitrator’s authority and be specific and clear about what will be subject to judicial review.

**HN**

Jeffrey Ford is a Mediator and Arbitrator at Ford ADR and may be reached at [jeff@fordadr.com](mailto:jeff@fordadr.com).


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## EMMA JONES

Emma Jones is of counsel at O'Melveny & Myers.

**How did you first get involved in pro bono?**  
I first got involved with pro bono when I transitioned to private practice following my service as a judicial law clerk for the U.S. Bankruptcy Court, Northern District of Texas. I particularly enjoy participating in DVAP's clinics because every individual in need of legal aid I've interviewed has a different story to tell, and a different legal issue she or he needs assistance with.

**Describe your most compelling pro bono case.**  
While I have not yet taken on individual pro bono case, one of my most memorable DVAP clinic interviews involved a grandmother who owned a home and wanted to ensure that asset was bequeathed to, and divided properly among, her children and grandchildren.


**Why do you do pro bono?**  
I do pro bono in an effort to make a tangible difference in individuals' lives. Pro bono work also gives me the opportunity to work on a variety of legal issues that I do not encounter in my everyday legal practice.

**What impact has pro bono service had on your career?**  
Pro bono service has had a tremendously positive impact on my career. It makes me appreciate why I became a lawyer: To help individuals in need get access to legal relief.

**5. What is the most unexpected benefit you have received from doing pro bono?**  
The most unexpected benefit I've received from pro bono work is working alongside other talented attorneys and law student volunteers who dedicate their time to DVAP's clinics.

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Focus | Health Law/Employee Benefits & Executive Compensation

Is Your Physician Practicing Telemedicine Without a License?

BY KARIN ZANER

Telemedicine raises novel legal questions, including a critical one: where does the practice of telemedicine occur? The answer remains the same as with traditional medical practice—the physical location of the patient at the time of clinical care. Thus, a Texas physician may see and treat patients in person in their Texas clinic or office, at a Texas hospital, or at Texas surgery center, all without issue. However, telemedicine technology now allows for a new scenario—a physician may, from time to time, clinically treat a patient who is at the time located outside the state of Texas. This raises a serious issue—might this physician be inadvertently practicing medicine in another state without a license?

The Federation of State Medical Boards has clearly spoken on this

issue, stating that a “physician must be licensed, or appropriately authorized by, the medical board in the state where the patient is located. The practice of medicine occurs where the patient is located at the time the telemedicine technologies are used.” This will likely surprise physicians, who might not even think to raise this issue. Many physicians might also point to the fact that patients routinely make telephone calls or otherwise communicate with physicians regarding their care (by email, patient portal, etc.) when not physically present in a physician’s office. Responding to such inquiries even when the patient is out of the state is routine. But the telemedicine appointment itself is a clinical visit, which is the key distinction that causes the concern.

Given this, what can a physician do to prevent the inadvertent unlicensed

practice of medicine in this situation? Knowing the current telemedicine laws in each state in which a patient might be located is a good first step. Some websites independently confirm the specific telemedicine laws that currently are in effect. See, for example [www.bakerlaw.com/us-telehealth-law-map/](http://www.bakerlaw.com/us-telehealth-law-map/). After reviewing applicable laws, a physician may then determine whether full medical licensure in each relevant state is prudent.

Also, various states may offer physicians the ability to obtain specific authorization that falls short of full medical licensure. For example, the Texas Medical Board (TMB) offers to physicians outside of Texas the convenient solution of paying a fee to do “episodic consultations” for patients located in Texas. Other states may offer Texas physicians this type of limited license for patients in their states. However, this approach may lead to an unwieldy patchwork of medical licenses/authorizations in other states—hardly an ideal solution.

Perhaps a more practical solution involves obtaining licenses in multiple states through the Interstate Medical License Compact (IMLC), which is a unified process for physician licensing in multiple states. Texas joined the IMLC in 2022 and now a total of 37 states participate. Eligible physicians need only complete one application and receive separate licenses from each state where they intend to practice. But if a physician has anything less than spotless licensing, criminal, and DEA records and is also not “subject to investigation,” they may not be eligible. Moreover, not all states participate at this point in time.

One commentator has recently sug-

gested that the various state medical boards should rethink medical licensing, especially as it relates to telemedicine. This opinion highlights two recently filed lawsuits claiming that various state “medical boards’ prohibitions on telehealth consultations or follow-ups with out-of-state licensed physicians violate the U.S. Constitution.” The legal theories in these lawsuits include arguments that such prohibitions violate protected free speech (as they are “at their core, conveyances of information”) as well as guarantees to interstate commerce (as they “erect[] protectionist measures and impede[] the development of a national market for goods and services”). *Id.* See also *McDonald et al v. Sabando*, Case 3:23-cv-23044 (D.N.J. 2023) and *McBride v. Hawkins*, Case 2:24-cv-01394 (E.D. Cal. 2024). This opinion concludes “[i]nstead of requiring every out-of-state physician who communicates with in-state residents to require an in-state license, medical boards should pursue reforms that streamline access to care, [such as allowing] all licensed physicians, regardless of their home state, to provide certain categories of telehealth, such as follow-up care or specialized consultations.”

Portability of medical licensure still has a long way to go and the various practical solutions mentioned above remain less than ideal. However, the first step is raising awareness of this issue so that physicians can properly license as necessary and avoid being accused of the unauthorized practice of medicine, which has serious legal and professional consequences for both the physician and their practice. **HN**

Karin Zaner may be reached at [karin@zaner.law](mailto:karin@zaner.law).

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Focus

Health Law/Employee Benefits & Executive Compensation

# Emerging Issues in Offshoring Patient Information

BY MICHAEL D. SUTTON  
AND MEGAN MILLER

Participants in the health care space are increasingly relying on offshore vendors and resources to operate such functions as claims processing, call center staffing, and technical support. Such arrangements can be appealing, as offshore contractors frequently provide cost savings and other efficiencies that may be critical to offerings and pricing models. Opponents of offshoring typically cite increased security vulnerabilities in foreign networks as a real risk, particularly as offshore services frequently involve access to large amounts of patient information. It is vital that the parties considering an offshore arrangement carefully navigate the interplay of laws, regulations, and guidance, which are complex and often inconsistent, to ensure compliance.

## HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations are a centerpiece of health care privacy discussions. Interestingly, HIPAA does not explicitly prohibit offshoring of patient data; however, it does require that regulated parties implement reasonable and appropriate administrative, physical, and technical safeguards to ensure the privacy and security of protected health information and that business associate agreements are executed where appropriate, among several other compliance measures. As a

result, regulated parties must take steps to ensure compliance with HIPAA, particularly when using offshore resources which may present unique privacy and security considerations.

## Medicare Authorities

The Centers for Medicare and Medicaid Services (CMS) issued guidance to Medicare Advantage organizations and prescription drug plan sponsors requiring execution of “extraordinary measures” to ensure that offshore relationships appropriately safeguard patient data. In particular, the guidance requires completion of an attestation that must address: (1) the identity and function of the offshore subcontractor; (2) a description of any protected health information that will be accessible by the offshore subcontractor; and (3) the safeguards adopted by the offshore subcontractor to safeguard protected health information. In addition to the attestation, the regulated parties must take steps to audit the offshore subcontractor. It is important to note that the guidance does not prohibit offshoring of patient data, but it imposes a number of hurdles to such arrangements.

## Medicaid Authorities

Although the Affordable Care Act prohibits states from making payments for items or services provided under a state plan (or a corresponding waiver) to a financial institution or entity located outside of the United States, CMS clarified that tasks that support administration of the plan, which may

require payments to parties located outside of the United States, may be permitted. In light of this clarification, payments exclusively for administrative functions are permitted for financial institutions or entities located outside of the United States. Building on the foundation established by federal law, it is important to consider state laws and regulations specific to Medicaid, as offshoring limitations vary across jurisdictions and are often addressed in frequently revised manuals. For example, Texas authorities prohibit managed care organizations and their subcontractors from allowing certain confidential information they receive on behalf of the Texas Health and Human Services Commission (the Commission) to be moved outside of the United States by any means. In addition, managed care organizations and their subcontractors are prohibited from permitting remote access to the Commission’s information, systems, or deliverables from a location outside of the United States. It is important to examine Medicaid-specific authorities adopted by the pertinent states to determine whether they impose independent limitations or requirements on the use of offshore resources.

## State Authorities

Beyond Medicaid-specific authorities, several states have taken steps to limit or prohibit offshoring of patient data. For example, the Florida Legislature amended the Florida Electronic Health Records Exchange Act in 2023 to prohibit certain health

care providers from storing qualified electronic health records outside of the United States, its territories, or Canada. Similarly, some governors have issued executive orders prohibiting offshoring of certain activities which are paid for by state agencies, such as Executive Order 2011-12 and Executive Order 2019-12D in Ohio, which prohibit state agencies from entering into any contract that uses any funds within such agency’s control to purchase services outside of the United States.

## Contractual Authorities

Contracts with payors, Medicare Advantage organizations, state Medicaid agencies, and a broad array of other parties also may incorporate restrictions or requirements associated with offshoring. This is significant as contracts may limit or prohibit offshoring even where federal or state laws and regulations would not prohibit it. As a result, a best practice is for health care organizations to review their agreements to assess whether any specific contractual requirements or limitations are associated with offshoring.

Looking ahead, parties with existing offshore arrangements, or who may be considering offshore arrangements, must carefully consider the many hurdles discussed above to ensure compliant operations.

Michael D. Sutton and Megan Miller are Associates at Sheppard Mullin Richter & Hampton LLP. They can be reached at msutton@sheppardmullin.com and memiller@sheppardmullin.com, respectively.

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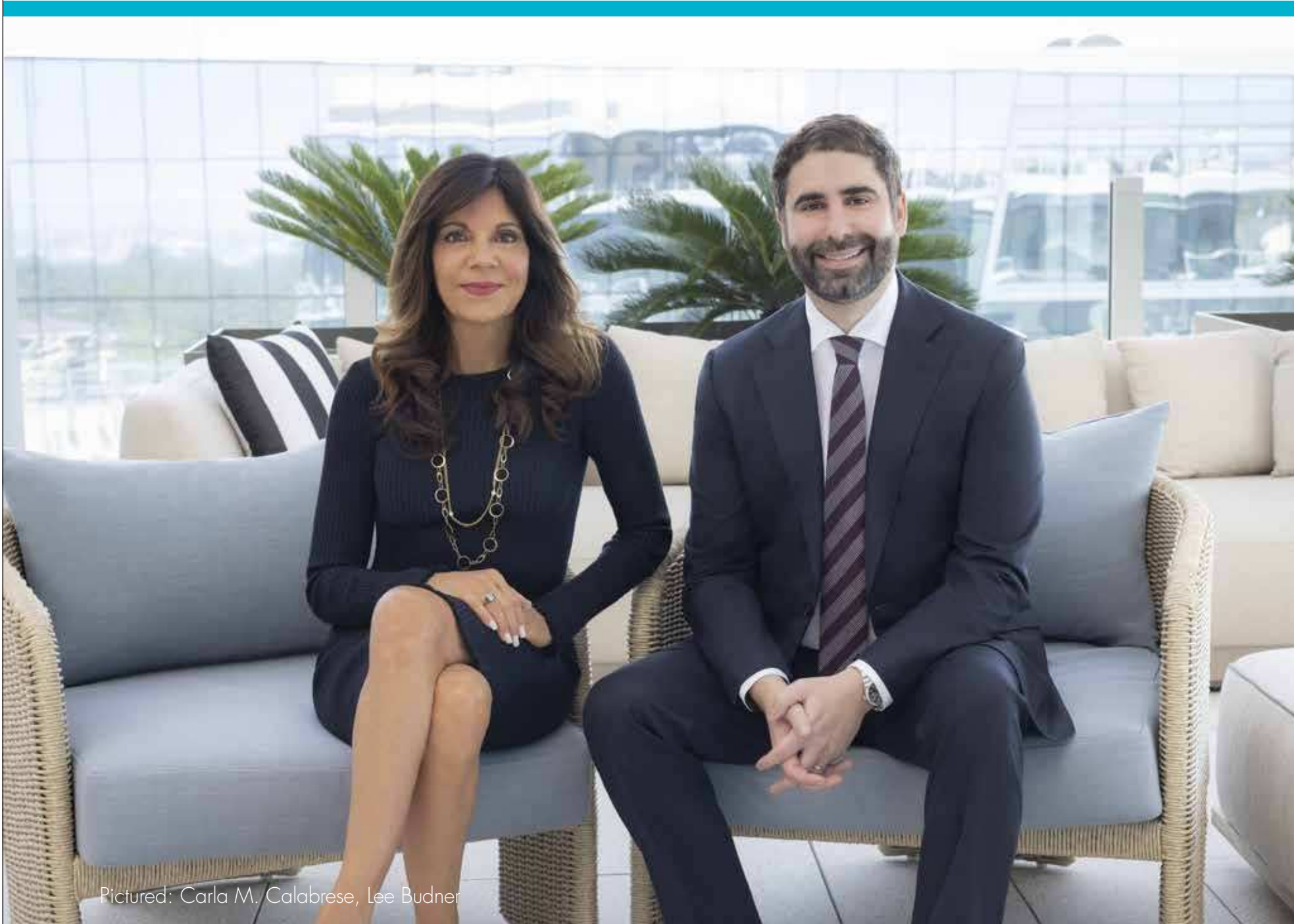
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# Texas High School Mock Trial: More Than Just a Competition

## STAFF REPORT

The Texas High School Mock Trial Program is more than a student club, it highlights the talents of high school students and helps elevate them to the next level in their education and often, in their future career. Program alums have gone on to become everything from attorneys to state senators, doctors, and teachers—many now coaching mock trial!

These students study hypothetical case files and details for months, practice with their teams as advocates, witnesses, artists, and more to prepare for the local-, regional- and state-level competitions.

The Dallas Bar Association has spearheaded the program since its inception in the late 1970s. At that time, a citywide competition was sponsored by the DBA's Law in a Changing Society Committee and the Dallas ISD. That competition received such a positive response that in June of 1980, the DBA organized a "statewide" competition that included four teams. The winner of that competition was Woodrow Wilson High School, and former DBA President **Al Ellis** was the coach of that team. This was the first such competition in the nation.

In 1982, the DBA opened an office for a statewide program at the DBA headquarters and installed former classroom teacher **Judy Yarbro** as the Coordinator of the program. Texas was at the forefront of mock trial and the competition grew from four teams in 1980 to 17 teams in 1981 and the program received the State Bar of Texas Award of Merit.

In the late 80s and early 90s, the competition continued to grow and improve. The decision was made to mirror the National Competition and increase the team size from six students to 10, with three lawyers and three witnesses on each side. Success followed the Texas team as teams from Texas placed second in 1991 and 1992 (Richard King High School) and third in 1999 (Kerrville Tivy High School). In 1997, Lake Highlands High School completed an undefeated record at Nationals and also finished third. The coach of that team was **Steve Russell**, who would become a Vice Chair of the DBA's Texas High School Mock Trial Committee and serve in that role for more than 20 years.

Year after year, DBA members generously donate hundreds of hours of their time to judge the locally held competitions. Committee members tend to stick around to help advance the program, including Committee Chair **Steve Gwinn** who has led this program for more than 20 years. The current Committee officers, including Co-Chair **Taylor Robertson**, help write



Frisco Career and Technical Education Center won the Texas High School Mock State Championship.



DBA members presided over, and served, as "jurors" for the final competition on March 8. Back row (L to R): Jim Young, Ralph 'Red Dog' Jones, Michelle Kaihani, Andy Kim, and Ben Ewald. Front row (L to R): Hope Thompson, Megan David, Retired Justice Lana Myers, Dennis Saumier, and Ian Ross Phillips. A big Thank You to all the DBA members who volunteered their time.

the case for each year's competition, as well as volunteer as coaches and judges during the competitions, which are run by Texas High School Mock Trial & Law Related Education Director **Melissa Perez**.

This year's 46th annual State Championship was held in Dallas on March 8. The winning team was from Frisco Career and Technical Education Center from Frisco. The competition included more than 20 high school teams from around the state. Frisco Career and

Technical Education Center will represent the State of Texas at the 2025 National High School Mock Trial Competition in Phoenix, Arizona, May 7-10.

"High school mock trial changed my life forever in too many ways that I can count. I attended summer mock trial camps in high school, coached high school teams both while in college and in law school. I have judged competitions. But most importantly, I have been honored to touch other students' lives as much as my coaches

touched mine years ago. I have now written recommendation letters to students and have gone on to achieve great things as a prosecutor. I am passionate about my work and will always feel like I have the job of my dreams. I can only hope to inspire others the same way," said Dallas attorney **Laura Andrade**, 2004–2007 program alumna.

To become involved, or for more information on the Texas High School Mock Trial Program, log on to [texashighschoolmocktrial.com](http://texashighschoolmocktrial.com).

HN

# Summer Santa

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# Good Things are Happening at the DBA!

The DBA started 2025 with a bang! We hosted the first of The Privilege series with David McAtee and Jeff McElfresh, of AT&T, kicked off the 2025 DBA We Lead program, and served Coffee at the Courthouse, in addition to the numerous CLEs and webinars. Find your next DBA event at [www.dallasbar.org](http://www.dallasbar.org).



The DBA Judiciary Committee hosted Coffee at the Courthouse in Judge Brantley Starr's courtroom. It was a chance to meet and mingle with judges and members.



The Allied Bars and the Allied Bars Equality Committee hosted a judicial mixer to network with local judges.



David McAtee and Jeff McElfresh, of AT&T, conducted a fireside chat as Session 1 of DBA President Vicki Blanton's The Privilege series.



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# Don't Get Left Behind!



The DBA We Lead class of 2025.



The DBA hosted the investiture of Judge Jennifer Balido, of Criminal District Court No. 1.



The DBA Family Law Section held their Bench Bar Conference in February with a variety of speakers, including Chris Meuse and Spencer Page.



The Allied Bars Equality Committee hosted a viewing of the documentary "A Law Unto Themselves," produced by JLTLA and DWLA.

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# Simply the Best

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# Ethics at the Initial Interview

BY LAWRENCE J. PRAEGER

Maintaining good client relations is essential to a successful law practice and a lawyer's wellness. Managing the client relationship is arguably as important as a lawyer's legal skills. A poor relationship with a client can lead to being fired, a grievance, or possibly a malpractice claim, and unnecessary stress and anxiety for the lawyer. Client dissatisfaction is often blamed on "unrealistic expectations." These may include the client's idea of the merits and the value of their claim, the amount of attorney's fees and expenses necessary to prepare and prosecute their case, the amount of time required from the beginning to the end of the case, and the client's expectation of what the lawyer should be doing for them. Many of us have had potential clients come into our office and say that their prior counsel "was not in my corner." Avoiding the not-in-my-corner accusation takes effort, skill, and a little diplomacy.

## The Practice of Law is an Art

A significant part of this art is ensuring that the client understands what the attorney can and cannot do. How and when do we begin this process? The answer can be found in Lewis Carroll's *Alice's Adventures*

in *Wonderland*, when Alice asked the king, "Where should we begin?" And the king gravely replies, "Begin at the beginning, and go on till you come to the end: then stop." The beginning should be at the first contact with a potential client. Ask the client if they have ever previously hired or had an attorney appointed to represent them. This should be the first client introduction to the ethics of lawyering. Diplomatically inform the potential client that we are zealous advocates, will protect their confidentiality, and advance their case, but also explain that there are limits to zeal and confidentiality, and that attorneys have an equally important duty to the court or tribunal and to the integrity of the profession.

## Duties and Obligations

Duties and obligations can be found in mandatory reporting statutes and the Texas Disciplinary Rules of Professional Conduct, which, among other things, require a lawyer to reveal otherwise confidential information. For example, a lawyer must report abuse of a child, elderly, or disabled person—and report information that would prevent a fraud on the court or when the lawyer believes it is necessary to prevent a client from committing any criminal or fraudulent

act. Also, it is wise to advise the client that these statutory requirements and disciplinary rules are mandatory. As a criminal lawyer friend of mine explained to me, often the most difficult part of representation is making sure that the client understands that I am counsel, not a co-conspirator. Once these duties and obligations are explained, it is wise to periodically refresh the client's recollection as situations arise; for example, a client wants to omit documents from a response to a request for production, fails to disclose the existence of a bank account or other item requested, or suggests they or one of their witnesses will not testify truthfully.

Following the king's advice, in order to keep your client happy, or at a minimum, to prevent a grievance, be sure to periodically memorialize that, from the beginning, through the course of the litigation, to the very end, you educated the client on your

ethical obligations. The reminder should include the consequences of a violation, which, at a minimum, is your withdrawal as their counsel. It is also wise to make sure that non-party witnesses understand these rules and obligations as well. The client may believe that all these obligations are conflicting, so a simple and clear explanation from the beginning to the end is essential.

## Conclusion

Making sure your potential client understands your duty to them and to others, and the consequences of a violation, will result in better lawyer mental health and a smoother client relationship during a very difficult period of their life.

HN

Larry Praeger, of the Law Office of Lawrence J. Praeger P.C., is board-certified in family law and can be reached at [lpraeger@praegerlaw.com](mailto:lpraeger@praegerlaw.com).

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Focus

Health Law/Employee Benefits & Executive Compensation

# Navigating Marketing Arrangements in Health Care

BY RACHEL POYNTER  
AND KRISTI HARBORD

In most industries, marketing arrangements are a standard part of doing business. Referral fees, commissions, and incentive-based compensation are strategies implemented to generate business and reward performance. But in health care, these same arrangements can trigger significant legal risks. Potential risks arise when a client works in the health sector, is affiliated with a health organization, or conducts business with health care providers. Understanding these risks is crucial for compliance with federal and state regulations.

The federal Anti-Kickback Statute (the AKS) is a criminal statute that prohibits offering, paying, soliciting, or receiving remuneration to induce or reward the referral of business (or other generation of business) reimbursed by federal health care programs. 42 U.S.C. § 1320a-7b. *Remuneration* encompasses any transfer of value, including not only the transfer of money, gifts, and discounts, but also free services or services below fair market value (FMV).

Offering incentives to potential patients or referral sources increases the risk of perceived remuneration for referrals. It is important to note that potential referral sources under the AKS include not only health care providers in a position to directly refer patients to receive specific items or services, but also laboratories, suppliers of medical equipment or pharmaceuticals, and marketing agencies and sales representatives who promote health care services or otherwise gener-

ate business for providers or facilities. To balance its broad nature, the AKS also contains several regulatory safe harbors. While not mandatory (*i.e.*, an arrangement not meeting a safe harbor is not per se illegal), structuring arrangements to fit within a safe harbor minimizes risk. The personal services and management contracts and outcomes-based payment arrangements (the Personal Services Safe Harbor) could protect marketing payments if all requirements are met. The Personal Services Safe Harbor requirements include that the methodology for determining compensation is set in advance, is consistent with FMV, and is not determined in a manner that takes into account the volume or value of referrals. See 42 C.F.R. § 1001.952(d). Another potentially applicable safe harbor is the employment safe harbor (the Employment Safe Harbor), which protects any amount paid by an employer to an employee for employment in the furnishing items or services reimbursable under federal health care programs. See 42 CFR 1001.952(i). Notably, the Employment Safe Harbor does not place parameters around how compensation is structured. Meanwhile, the federal Eliminating Kickbacks in Recovery Act (EKRA) has restrictions that are similar to the AKS. However, EKRA specifically targets referrals to clinical treatment facilities, recovery homes, and laboratories. EKRA also expands the AKS to apply broadly to any payor, whether a government health care program or commercial third-party payor. See 18 U.S.C. § 220(b)(2). EKRA provides an exception for arrangements

that comply with the Personal Services Safe Harbor; however, under EKRA, compensation cannot be based on the volume or value of referrals or revenue generated from marketing, regardless of whether the individual is an employee or independent contractor. In other words, an arrangement that complies with the Employment Safe Harbor might not comply with EKRA. In addition, many states have laws similar to the AKS. Texas has several such laws, including prohibitions related to patient referrals, commercial bribery, and statutes targeting state health care programs and licensed health care providers and facilities. Additionally, federal authorities have utilized the Travel Act to prosecute cases involving private insurance claims and violations of Texas commercial bribery statutes, highlighting the creativity of the federal government when it comes to enforcement of arrangements that would not otherwise come within the federal government's enforcement scope. In the context of marketing arrangements, federal enforcement authorities have made clear that percentage-based compensation and commission-based payment structures can be problematic because compensation fluctuates based on the success of referrals, creating a direct link between compensation and referral activity. Paying an employee

percentage- or commission-based compensation may be acceptable in certain situations, provided that EKRA is not implicated, but paying an independent contractor percentage- or commission-based compensation cannot qualify for safe harbor protection and carries significantly more risk. The Office of Inspector General has also identified suspect characteristics that indicate an arrangement may be higher risk, including compensation based on a percentage of sales, success fees, use of health care professionals as sales agents, direct billing to federal health programs, direct contact with physicians or beneficiaries, marketing of separately reimbursable items, and any potentially coercive marketing activities. Considering the unique risks, health care marketing arrangements should be closely analyzed and structured to satisfy a safe harbor, particularly when federal payors are involved. Even if federal payors are not part of the equation, it is important to consider state law equivalents and the federal government's creative enforcement techniques. When in doubt, a qualified health care attorney can provide guidance and assist with mitigating potential risks.

HN

Rachel Poynter and Kristi Harbord are Associates at Gray Reed. They can be reached at [rpoynter@grayreed.com](mailto:rpoynter@grayreed.com) and [khARBORD@grayreed.com](mailto:khARBORD@grayreed.com), respectively.



LegalLine

Volunteer Spotlight

DAWN FOWLER



**Q: How long have you practiced law and what is your primary practice area?**  
**DF:** 40 years. I have been Board Certified in Family Law since 1985, and that is still my primary practice area. I also practice probate law on a regular basis, and enjoy serving as an ad litem in heirship and guardianship matters.

**Q: Why do you volunteer with LegalLine?**  
**DF:** It is always an enjoyable experience, and it is challenging to determine how to best help someone in a short period of time (without giving legal advice). When LegalLine was held at the ADM, it was a wonderful opportunity to connect with kindred spirits from other practice areas.

**Q: What impact has the LegalLine service had on your career?**  
**DF:** Through my work on LegalLine, I got to know my fellow volunteers. A referral from one of the other LegalLine volunteers turned out to be one of the largest cases in my career, and led to many other referrals.

**Q: What is the most unexpected benefit you have received from volunteering for LegalLine?**  
**DF:** Long-term connections with other attorneys. I was a co-chair many years ago, and have maintained a great working relationship with two of the other co-chairs and committee members.

**Q: What is your advice to someone who has never volunteered for LegalLine?**  
**DF:** Sign up! You will be hooked. It is a minimal commitment of time provided from the comfort of your home. The majority of the people will be genuinely appreciative of your time and guidance. The questions and situations can be interesting. LegalLine is a great way to provide a valuable and needed service while nourishing your own soul.

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Focus

Health Law/Employee Benefits & Executive Compensation

# HIPAA’s Hot, Forthcoming Changes to the Security Rule

BY RACHEL V. ROSE

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is coming in hot! Landing three enforcement actions for HIPAA violations involving ransomware attacks, the absence of a risk analysis and deleting electronic protected health information (ePHI) the U.S. Department of Health and Human Services—Office for Civil Rights (HHS-OCR) announced within the first week of 2025.

More than just providers are involved in the health care sector through the HIPAA definitions of covered entities and business associates. The number of persons impacted by HIPAA and the related Privacy, Security and Breach Notification Rules (collectively, the Rules) compliance is significant because of what health care constitutes as a percentage of U.S. Gross Domestic Product (GDP). It is equally important to appreciate that not every person involved in the Cybersecurity and Infrastructure Security Agency (CISA) critical infrastructure sector Healthcare and Public Health (HPH) falls under HIPAA’s umbrella. This is where the Federal Trade Commission (FTC) comes into play to protect consumers’ rights related to their individ-

ually identifiable health information (IIHI). Between the umbrella covering persons beholden to HIPAA or to the FTC’s jurisdiction, there are items in the recent changes to the Privacy Rule and the HIPAA Security Rule Notice of Proposed Rule Making (90 Fed. Reg. 898 (Jan. 6, 2025) with public comments due to HHS-OCR by March 7, 2025) (NPRM) that can and should be evaluated and adopted by any person who creates, receives, maintains or transmits any form of IIHI or ePHI.

Recent changes to the Privacy Rule and proposed changes to the Security Rule will impact lawyers and clients alike. The Privacy Rule changes emphasize changes to HIPAA’s law enforcement exception (42 CFR §164.512). On April 22, 2024, the U.S. Department of Health and Human Services (HHS) issued a Final Rule with a compliance date for most of the items by December 23, 2024 - *HIPAA Privacy Rule to Support Reproductive Health Care Privacy* - which “prohibit[s] the disclosure of protected health information [PHI] related to lawful reproductive health care in certain circumstances.” Key definitions to appreciate are “person,” “public health,” and “reproductive health care.” A new attestation

requirement was also added and this final rule emphasis the United States Constitution, lawful reproductive health care in the state in which the care was provided, and the circumstances under which the reproductive health care was provided. Hence, it comports with *Dobbs* and reinforces Justice Kavanaugh’s concurring opinion.

This brings us to the broader application of the HIPAA Security Rule NPRM. The impetus was to strengthen cybersecurity safeguards to ensure that the confidentiality, integrity and availability of ePHI remains intact given the emerging technologies, such as artificial intelligence (AI) and quantum computing. These changes also align with CISA’s recommendations for HPH. Key areas to consider now, despite not knowing what the final rule language will yield, include: Security Standards, Administrative Safeguards, Physical Safeguards, Technical Safeguards, and Emerging and New Technologies.

Persons should already have the following annual items in place: (1) cybersecurity training; (2) comprehensive policies and procedures; (3) data encryption; (4) an annual risk analysis (aka non-HIPAA risk assessment or cybersecurity audit) that evaluates safeguards; and (5) appropriate data agreements such as a business associate agreement or a data privacy and security agreement. The NPRM builds

on these items and either clarifies, modifies or adds language and/or requirements such as mandated multifactor authentication (MFA). The evaluation of new technologies is also proposed as being included in an annual risk evaluation.

Two items should be incorporated into an evaluation of AI—whether for their own practice or when advising clients. The first is the White House Office of Science and Technology’s *Blueprint for an AI Bill of Rights*, which identifies five (5) key elements: (1) safety and effectiveness; (2) algorithmic discrimination protections; (3) data privacy; (4) notice and explanation; and (5) human alternatives, consideration and feedback. The second is the American Bar Association’s *Advisory Opinion 512* (July 29, 2024), which underscores the aforementioned AI Bill of Rights and integrates these principles into what attorneys’ need to consider from professional responsibility and ethical vantage points. Areas for attorneys to consider are attorney-client privilege, marketing, billable hours, duty of candor to a tribunal, and supervision of other attorneys and staff.

In sum, failing to act can lead to legal, financial and reputational harm. **HN**

Rachel V. Rose, JD, MBA, is the Founder of Rachel V. Rose—Attorney at Law, PLLC. She can be reached at [rvrose@rvrose.com](mailto:rvrose@rvrose.com).

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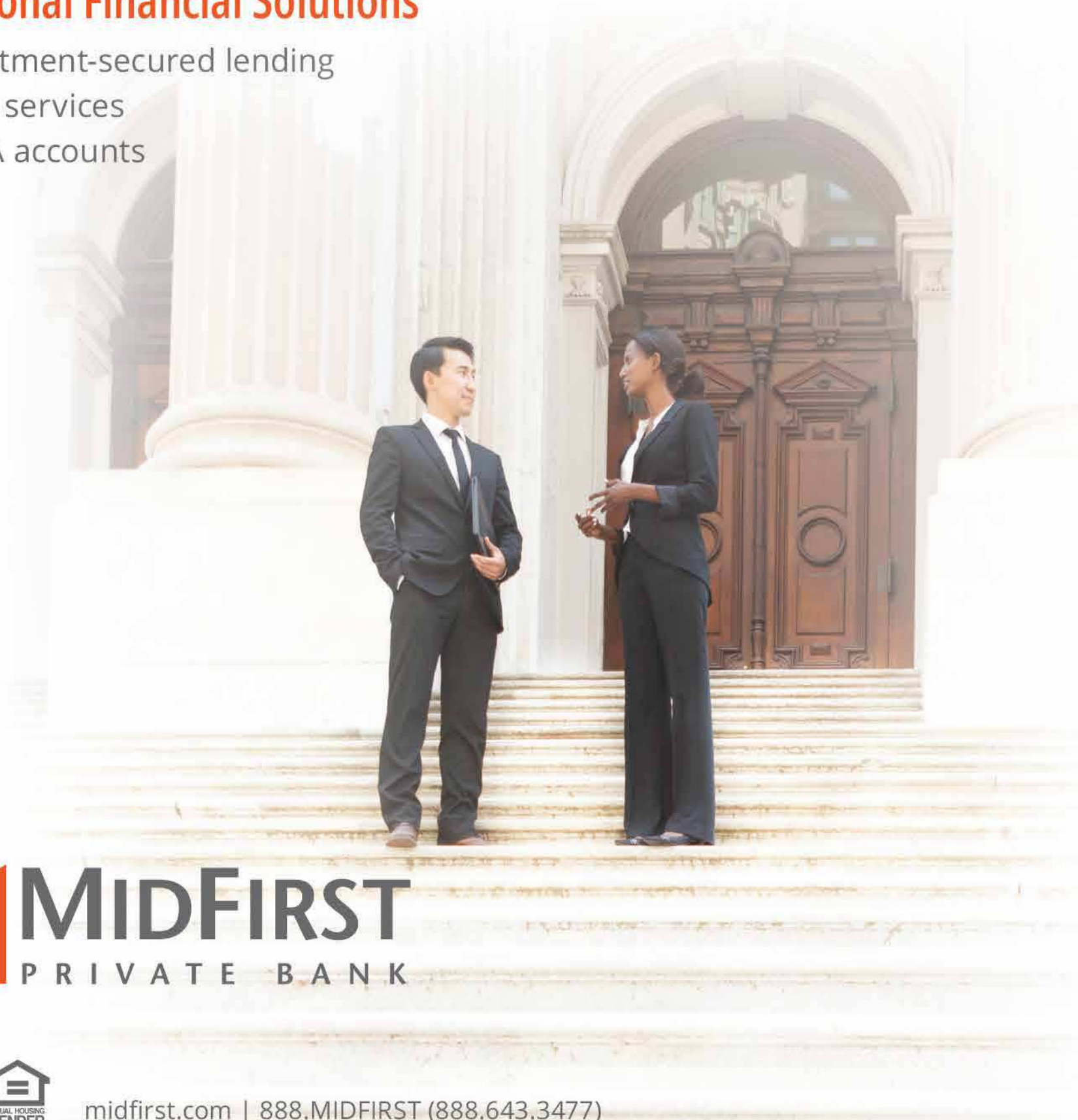


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Focus

Health Law/Employee Benefits & Executive Compensation

# First-Person Consent in Donation After Circulatory Death

BY FIBBENS KORANTENG

Human-to-human organ transplants are only possible because of the selfless gifts of those who say “yes” to donation. While transplant attempts have been documented as far back as 1933, the first successful deceased donor transplant did not occur until 1962. Since then, over 1.1 million organs have been authorized for donation and successfully transplanted from deceased donors in the U.S., saving millions of lives.

At the foundation of organ donation is the concept of authorization, grounded in gift law as an express approval for donation of a deceased donor’s organs. The Texas Revised Uniform Anatomical Gift Act (TRUAGA) is the primary authority for who can authorize donation, and how authorization can be granted, amended, or revoked. Authorization can be granted by the potential donor (PD) prior to death (First Person Authorization or FPA) or by a surrogate decision-maker authorized by law to do so. FPA is a legal document of gift, which includes (i) a state driver’s license or identification card containing a statement or symbol indicating donor status, (ii) a will, (iii) certain witnessed records, or (iv) registration with an online registry. Tex. Health & Safety Code § 692A.004, 692A.005. A 2023 amendment to the TRUAGA emphasizes a PD’s autonomy to make an FPA and reiterates a donor’s FPA as legal consent for donation that is binding and irrevocable after the

donor’s death. *Id.* § 692A.005(b-1).

Naturally, deceased donor donations occur after a donor’s death. A person is dead when it is determined that there is an irreversible cessation of all spontaneous brain functions (BD) or there is an irreversible cessation of all spontaneous respiratory and circulatory functions (CD). *Id.* § 671.001. While organ donation may follow either form of determination of death, the pathway for donation differs in each context.

In cases of donation following BD, conversations about donation and coordination of the donation process, including recovery and transplant procedures, commence only after a determination of brain death has been made and the donor is pronounced dead.

In cases of donation following CD, donation conversations do not commence until a qualified physician has determined that a potential donor (PD), who is dependent on ventilator support, has no chance of a meaningful recovery from the injury/illness resulting in hospitalization and the PD’s legal next of kin (LNOK) has decided to withdraw ventilator support. Where there is authorization for donation under the TRUAGA, withdrawal of support is coordinated between the designated organ procurement organization (OPO), the healthcare team and LNOK to occur at a time, place and in a manner that allows donation to proceed if, following withdrawal, the potential donor’s circulatory and respiratory functions cease irreversibly and the potential donor is pronounced

dead within a timeframe conducive to donation.

The TRUAGA does not distinguish between application of FPA in donation following BD and donation following CD cases. Application of FPA in the donation following BD context is often straightforward because the donor has already been pronounced dead. In other words, at the time of a donation conversation, the event necessary to give effect to the FPA—death—has already occurred and, thus, the FPA has become fully effective, legally binding and irrevocable. Declaration of death permits the OPO to take all reasonably necessary measures (including invasive procedures, such as placing lines and administering medications to preserve the viability of organs for transplant) to recover donated organs. Tex. Health & Safety Code § 692A.014(c), (h). This allows for a clear, simple and smooth donation process, with all stakeholders often aligned and in support of honoring the donor’s wishes.

Application of FPA in the donation following CD context does not lend itself to the same fluidity. In this scenario, the PD has not yet been declared dead, though his/her treating physician has determined that the PD has no chance of surviving the injury/illness that resulted in hospitalization and the LNOK has decided to withdraw ventilator support. In such cases, the donor’s FPA, while legally binding as a donation decision, is, technically, not effective until, following withdrawal of support, the PD is pronounced dead by his/her healthcare provider.

There is no question that a PD’s FPA is valid, binding and irrevocable, *postmortem*, in both donation following BD and donation following CD cases. However, in donation following CD cases, the FPA goes into effect later than in donation following BD cases. Nonetheless, the TRUAGA requires hospitals and OPOs to work together to maintain appropriate medical treatment of the PD while the OPO determines medical suitability for donation and placement of donated organs. This often requires a delicate and sensitive balance between the legal obligations of the hospital and OPO, the PD’s FPA and the needs of the PD’s family. A truly collaborative conversation between the hospital, OPO and the PD’s LNOK on the donation following CD process, including timing, often proves effective in aligning the interests of all parties involved to make donation possible in honor of the donor’s wishes.

HN

Fibbens Koranteng is the General Counsel for Southwest Transplant Alliance. He can be reached at fibbens.koranteng@organ.org.

2025

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# ECL: Growing the Legal Profession While Giving Back

## STAFF REPORT

Since its inception in 2019, Entrepreneurs in Community Lawyering (ECL) has been dedicated to supporting lawyers in launching and sustaining their own law firms. More than 40 attorneys have participated in the program, receiving invaluable guidance and mentorship as they build practices that serve their communities. ECL's impact extends beyond business success—our participants have collectively contributed over 9,000 hours of pro bono legal services, demonstrating their commitment to access to justice. ECL is thankful for the support of the community, including the attorneys who have donated their time to share their knowledge and expertise with ECL during bootcamp and other presentations throughout the year. We appreciate the mentors who repeatedly share their expertise, including **Alexandra Geczi**, who shares her marketing wisdom with ECL cohorts; **Mike Howard**, who provides guidance on starting a small firm; and **Kandace Walter**, who shares her tips for switching to solo practice. Through their generosity, and that of the many other mentors, participants have benefited from presentations on essential topics, law firm administration, and real-world experience. One shining example of ECL's success is **Michael Butz**, an ECL alumnus who has been named to *Super Lawyers Rising Stars* from 2023 to 2025. "ECL has provided me with a strong foundation in the day-to-day operations of running a business," said Butz. "It also helped me tailor my marketing strategy to better understand my target demographic and how to utilize



ECL Class of 2025

my marketing budget to target my ideal demographic." His recognition reflects the caliber of professionals emerging from our program and the dedication they bring to their legal work. "After taking a hiatus prior to joining the ECL and reentering the legal community, the program was helpful in providing me guidance on practice management and establishing my network," said **Tu Nguyen**, an alumnus of the program. "As an introvert, I gained confidence with being able to take on more client matters and became more comfortable returning calls for new opportunities. The ECL program was the seed that helped me develop into the attorney I am today. Additionally, volunteering with Dallas Volunteer

Attorney Program and getting assistance from their mentors has helped me gain a wealth of knowledge." Former ECL alumna **Brenda Hard-Wilson** has also continued growing her practice and building her reputation in the community. "Rather than relying on social media, I prefer in-person networking. I joined the Richardson Chamber of Commerce and the Richardson Woman's Club. Both are fantastic organizations that are heavily involved in the community. I am also the Vice-Chair of the City of Richardson Bicycle and Pedestrian Advisory Committee, with a goal to encourage more active transportation in the city. Being involved in this way, I feel that I am not only networking and market-

ing my firm, but I am also helping my community and its residents," Hard-Wilson said. "I am really grateful to the Dallas Bar Association Entrepreneurs in Community Lawyering program for the assistance and guidance it gave me in starting my own solo practice. Otherwise, I feel I would have never had the courage." ECL alumni and the current cohort practice in a diverse range of legal fields, including family law, estate planning, employment law, immigration, criminal defense, and business law, among others. **Stephanie Walker**, director of ECL, shares her gratitude for the program's origins and ongoing impact: "As a former participant in the program, I am deeply grateful to 2019 DBA President **Laura Benítez Geisler** for her vision and dedication in establishing ECL. The program continues to make a significant impact on the community, and I am honored to build upon the foundation laid by Benítez Geisler and former director **Saedra Pinkerton**." We encourage attorneys with an overflow of cases or those unable to offer reduced-fee services to consider referring clients to ECL attorneys. Together, we can strengthen the legal profession while expanding access to high-quality legal representation for those who need it most. For more information about ECL or to discuss referrals, please reach out to [ECL@dallasbar.org](mailto:ECL@dallasbar.org). We appreciate the continued support of our legal community in empowering the next generation of entrepreneurial attorneys. You can also support the program by signing up for the DBA's Golf Tournament on May 22 at Cowboys Golf Club. Register at [dallasbar.org](http://dallasbar.org). **HN**



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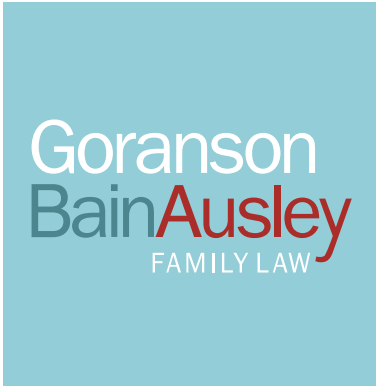
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## BY BAILLEE PERKINS

In this guide, we will provide an overview of some common questions and answers about data security .

Cloud computing allows you to store and access data online rather than on physical servers. This enables law firms to securely access files from anywhere with an internet connection. Examples of cloud storage tools include Google Drive and online banking services.

Cloud computing offers:

- **Affordability:** Eliminates the need for costly onsite servers and IT departments
- **Convenience and Mobility:** Access your case files anytime, anywhere
- **Security:** Protects electronic data better than physical paperwork

Amazon Web Services (AWS) is a cloud computing platform trusted by leading corporations and government agencies. AWS provides robust security measures, including strict access controls and physical protection for its servers.

To further enhance security, your platform should enforce network restrictions that ensure data communication remains inaccessible to other AWS customers. It should also encrypt all confidential information during transmission, whether within its own systems or with external partners such as payment providers and underwriting systems.

Your platform should be Payment Card Industry Data Security Standard (PCI DSS) compliant, meaning it should meet the highest security requirements for handling payment information.

It should conduct regular internal and third-party security audits to identify and mitigate vulnerabilities. Normally, a security team continuously monitors emerging threats and updates systems to stay ahead of potential risks.

All data transmitted to and from your platform should be encrypted using Transport Layer Security (TLS), the same level of encryption used in banking and healthcare. This ensures that sensitive client and financial data remains protected from unauthorized access.

Multi-factor authentication (MFA) adds an extra layer of security by requiring users to verify their identity with a one-time code sent to a registered device before accessing an account. This significantly reduces the risk of unauthorized access, even if login credentials are compromised.

In addition to the security measures already mentioned, other security features to consider include:

- PCI Compliance: Meets ABA regulations with an easy-to-use compliance

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- Session Tracking: Monitors account activity for suspicious behavior
- Automatic Logout: Signs out inactive users or those logged in on multiple devices
- Customizable Payment Pages and a Card Vault: Prevents the need for manually handling sensitive payment information
- Access Controls: Allows firms to set user permissions to control access to data

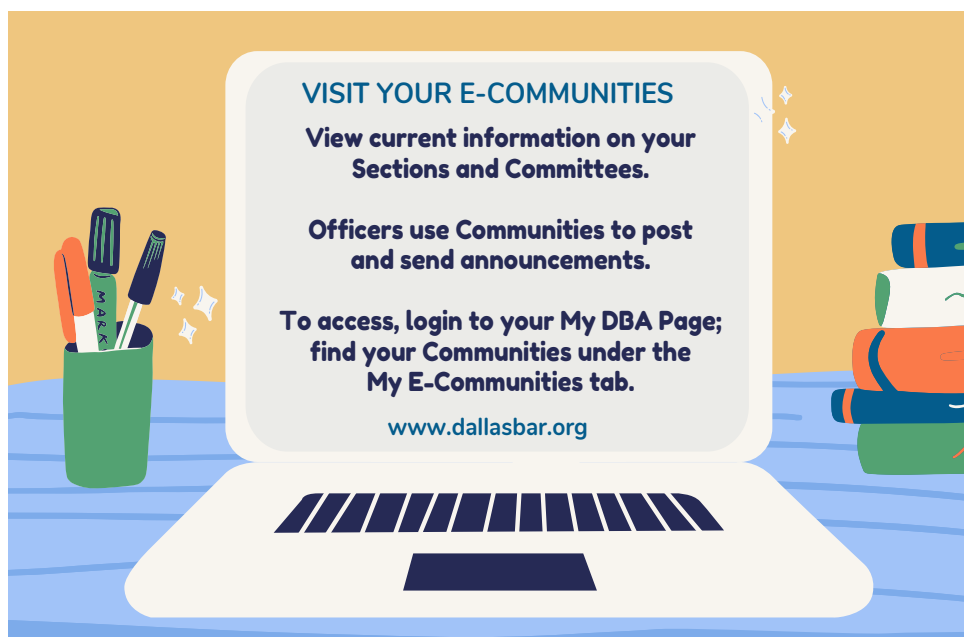
One of the most common causes of data loss is human error. Here are some tips and tricks to keep your accounts secure:

- Enable MFA on your email address to increase security.
- Never share your passwords.
- Use a unique password for your platform that differs from other accounts.
- Create strong passwords with at least 10 characters, including a number, special symbol, and capital letter, or use a password manager like 1Password.

If you ever feel that your account has been compromised, contact your provider immediately. They can freeze your account and lock out all users until confirmation that everything is secure.

HN

Baillee Perkins is the Content Writer for LawPay. She is based in Austin.



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Focus | Health Law/Employee Benefits & Executive Compensation

Retaining Key Employees in the M&A Context

BY JAMES A. DEETS  
AND MATTHEW PORTER

In today's service-intensive economy, M&A activity routinely targets businesses whose value is not stored in brick and mortar or inventory, but rather, in key employees of the business. Buyers of service-intensive businesses often wish to preserve their investment by ensuring that key employees remain with the business. This is sometimes accomplished through ordinary retention agreements. However, when one or more of the key employees are also shareholders in the business, which is quite common, buyers often use a "holdback" or "earnout" to ensure the retention of these key employees.

When continued employment is a factor impacting eligibility to receive an earnout, the earnout may be treated either as compensation for services or as a deferred payment of the purchase price for the business itself, depending on the facts and circumstances. The tax treatment has important tax consequences for both the buyer and the seller. If the payment is treated as compensation, the earnout will be taxed as ordinary income to the seller and the buyer will generally be entitled to a deduction for compensation expenses when paid. Additionally, the payment will be subject to employment taxes, including under the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA), and income tax withholding. For employee equity-holders, purchase price treatment is more beneficial, as they typically pay less in taxes under that approach (capital gains rates vs. ordinary income rates). On the other hand, the seller would not

receive an immediate deduction for the payments, but rather, the payments would be capitalized as part of the buyer's acquisition cost. Increasing its tax basis.

Courts have applied several factors to determine whether an earnout payment should be treated as compensation or additional purchase consideration, and no one factor is determinative. The factors considered historically in relevant case law include the following: (i) whether the payments are tied to the shareholder's employment or the shareholder's performance of future services for the company; (ii) whether the value of the earnout payments is proportionate to the amount of equity owned at the time of the transaction; (iii) whether the value of the consideration exceeds the value of the services provided by the employee, or whether the employee is already receiving reasonable compensation for the services provided without regard to the contingent payment; and (iv) whether the intent of the parties, the historical treatment of the consideration in negotiations, or its treatment for accounting purposes, indicates that the consideration was viewed as wages in other contexts.

There are some practical considerations that indicate whether the earnout should be treated as a part of the purchase price or compensation for services. Purchase price treatment is more likely to be found when the link between continued employment and entitlement to the payment is broken. One indicator would be if the payment is retained if the employee-seller's employment terminates due to death, disability, involuntary termination without cause, or voluntarily for good reason. In this manner, payment

may still be made without regard to continued employment.

Similarly, if continued employment alone would not result in payment, this may also weigh in favor of purchase price treatment. For example, if in addition to continued employment, payment is also contingent on attrition being less than a specified percentage, or the retention of a specified number of key employees, or financial or other metrics, this may point towards purchase price treatment. When other requirements are present, the link between continued employment is weakened, because the seller-employee may not receive the payment despite continued employment.


Another important factor is whether the payment is proportionate to stock ownership. For example, taking the earnout payments into account, if the seller-employees still receive the same consideration for their equity as non-employee

sellers, this would indicate purchase price treatment. Finally, while not dispositive, the parties' intention to treat the payment as either compensation or purchase price, as stated in the purchase agreement, is also given consideration.

While earnout payments tied solely to continued employment are unlikely to be treated as part of the purchase price, courts may find that other elements weigh in favor of purchase price treatment even if continued employment is included as a factor in determining eligibility to receive the earnout. A clear understanding of the factors that influence the classification of the earnout can help practitioners understand the potential tax treatment and ensure compliance with tax regulations. **HN**

James A. Deets and Matthew Porter are Senior Directors at Alvarez & Marsal Tax. They can be reached at [jdeets@alvarezandmarsal.com](mailto:jdeets@alvarezandmarsal.com) and [mporter@alvarezandmarsal.com](mailto:mporter@alvarezandmarsal.com), respectively.

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In The News

KUDOS

**Samuel Fubara**, of Fox Brown, has been promoted to Partner. **Morgan Buller** and **Alan Carrillo**, of the firm, have been promoted to Senior Associate.

**Chase Hilton**, of Burns Charest LLP has been promoted to Partner.

**Dena DeNooyer Stroh**, of NTTA, received the 2024 DFW Corporate Counsel Award for General Counsel of the Year for a Governmental/Nonprofit Legal Department.

**Gregory Smith**, of Vela Wood Staley Young P.C., has been promoted to Partner.

**Vienna Anaya** and **Brady Cox**, of Jackson Walker, have been promoted to Partner.

**Michael D. McKinley, II**, of Shackelford, McKinley & Norton, LLP, has been promoted to Equity Partner. **Kara Hargrove**, of the firm, has been promoted to Non-Equity Partner.

**Erin Nowell** had joined Carter Law Group as Partner.

**M. Collin Quigley** joined Rogge Dunn Group as Partner and Labor and Employment Practice Area Leader.

**Chris Ponder** joined Kelly Hart as Partner.

ON THE MOVE

**Michael Baum** joined Fox Brown's Dallas office as Partner.

**Gene Besen** and **Elisha Kobre** have joined Sheppard, Mullin, Richter & Hampton as Partners; **Stephen**

**Moulton** joined as Special Counsel, and **Rebecca James** and **Courtlyn Ward** joined as Associates.

**Lexie Alexander**, **Stephen McCluskey**, and **Taylor E. Scott** joined Bradley Arant Boulton Cummings LLP as Associates.

**Gemma Descoteaux**, **Robert LeBlanc**, and **Drew Slone** joined Greenberg Traurig, LLP as Shareholders.

**Kyle Davis** joined O'Melveny & Myer LLP as Partner.

**Amanda Brown** joined Fisher & Phillips LLP as Partner. **Liz Drumm**, **Jonathan Elifson**, and **Lauren McDonald** joined as Of Counsel, and **Sarah In** and **Alen Samuel** joined as Associates.

**Neil R. Burger** joined The Law Offices of Thomas E. Shaw, P.C. as Of Counsel.

**John Collins III** joined Katten Muchin Rosenman LLP as Partner.

**Chad Nichols** joined Akin Gump Strauss Hauer & Feld LLP as Partner.

**Kamal Jafarnia** joined Vise AI Advisors, LCC as Chief Legal Officer and General Counsel

**Shannon Turner Hays** joined the firm of Durham, Pittard & Spalding, LLP as Of Counsel.

**Ramon Hernandez** joined the Fort Worth office of Shackelford, McKinley & Norton, LLP as Associate.

*News items regarding current members of the Dallas Bar Association are included in Headnotes as space permits. Please send your announcements to Judi Smalling at [jsmalling@dallasbar.org](mailto:jsmalling@dallasbar.org)*



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The Power and Influence of the Law

CONTINUED FROM PAGE 1

Leadership Institute LLC. The Law and Leadership Institute was created to help further the advancement of underprivileged students via an educational pipeline that begins in high school.

Earlier in his career, Mr. Smallwood spent nearly four decades in private practice as a partner at a highly recognized Ohio law firm. In addition, Mr. Smallwood has served as a Past President of the Columbus Bar Association and the National Conference of Bar Presidents.

The Dallas Bar Association is privileged to have a Law Day speaker who is accomplished, distinguished, and charitable as Carl Smallwood.

Please join us in person for the Dallas Bar Association's Law Day Luncheon on Friday, May 9, 2025, noon at the Arts District Mansion. You may register at [www.dallasbar.org](http://www.dallasbar.org). For more information, contact Araceli Rodriguez at [arodriguez@dallasbar.org](mailto:arodriguez@dallasbar.org).

**HN**

*Pooja Vasudev is a Solo Practitioner with PV Law, PLLC. She may be reached at [pooja@pvlawoffice.com](mailto:pooja@pvlawoffice.com).*

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Focus | Health Law/Employee Benefits & Executive Compensation

Legal Issues in Health Care Transactions

BY RICHARD Y. CHENG

Many private equity groups (PEGs) have inserted themselves into the health care industry in the last decade, particularly from 2019 through today. While the market saw a drop, leading to less deal flows in 2022 and 2023, last year PEG-driven transactions in health care experienced a surge and ample deals were made.

PEGs will consider ownership in a myriad of health care sectors—physician practices, home and community providers (e.g., hospices, home health care agencies) health care technology companies, nursing facilities, mental health treatment facilities, medical spas, dental offices and veterinarian clinics. It is common for PEGs to purchase assets with an intent to sell at a profit within a specific time period (e.g., three to five years). Because of ongoing demand and consumer appetite for health care services, assuming there are proper strategies, adequate scaling and a strong management team, PEGs find their health care investments to be lucrative and a smart investment.

Corporate Ownership and Investments in Health Care

The corporate practice of medicine doctrine (CPOM) mandates that only licensed health care professionals (e.g., physicians, dentists, optometrists, etc.), or entities wholly owned by licensed professionals, may practice clinical professions, or employ other licensed health care professionals. In Texas, the CPOM doctrine relies on the current

statutory form of the Medical Practice Act, the Texas Medical Boards’s administrative rules relating to CPOM and the application of case law. To comply with the CPOM doctrine, PEGs create multiple contractual relationships using a management services organization (MSO) with an entity owned by a licensed health care professional, usually a professional entity, or commonly known as the “Friendly PC.” However, there is recent litigation focused on its permissibility, particularly involving improper transfer of a clinical profession’s ownership to a third party without consent or transferring the equity of the professional provider entity to a non-licensed individual to have broad discretion and authority to control ownership of the professional provider entity.

Review and Approvals of Health Care Transactions

PEGs are now burdened with state health care transaction review laws more than ever before. Before considering a health care transaction, such as a merger, acquisition, restructuring, or specific debt arrangements, PEGs will need to understand and be aware of state reporting requirements. Almost a third of the states have health care transaction review laws, each with unique mandates. Often, these laws require pre-closing submission of detailed filings to state attorneys general or governmental agencies to seek regulatory approval. PEGs and the target must wait for a notice period to expire or receive approval before

closing the transaction. Transactions can either receive full approval status or conditional approval. The review and approval process should be prepared early because the process can be lengthy, requiring several months. If the approval is conditional, then additional conditions must be met. Parties submitting for approval should be aware that any information provided is considered public information and confidentiality is not preserved. More states are expected to create similar laws and existing regulatory demands will broaden, allowing state agencies to request more disclosures.

Centers for Medicare and Medicaid Services Disclosure

The Centers for Medicare and Medicaid Services (CMS) has made it clear they want ownership transparency, especially with institutional health care providers. This follows the requirement for disclosure of PEGs and real estate investment trust (REIT) entities with five percent or more ownership interest or control over the provider. Moreover, in October 2024, CMS revised Form CMS-855A to impose more detailed ownership disclosure requirements on skilled nursing facilities (SNFs). SNFs are required to disclose governing members and additional disclosable parties, regardless of their ownership percentage. This includes management groups who provide management services or have control of operations and finances.

Last Year’s Scrutiny by the FTC

In recent years, the Federal Trade Commission (FTC) has scrutinized PEGs, particularly in the health care sector. Last year, the FTC openly expressed its concerns regarding private equity in health care and their investment strategies, along with its financial objectives, used by PEGs. By May 2024, the FTC joined forces with the U.S. Department of Justice to inquire about investment approaches used by PEGs in an effort to identify private equity transactions and arrangements that mitigate competition in the market. With changes in FTC leadership, specifically with Andrew Ferguson at the helm, regulatory policies and practices may shift, but it is still too early to make that determination.



What to Expect

Significant changes in health care policy are anticipated with this new administration. While it is possible the FTC and certain states will create additional regulations impacting PEGs and health care transactions, the Trump administration is expected to lean towards deregulation and a free-market philosophy. This would limit disclosure requirements, allowing for more PEG-driven health care transactions through consolidations and strategic acquisitions. However, making that prediction is no more reliable than looking into a crystal ball.

HN

Richard Y. Cheng is a Managing Member at Ritter Spencer Cheng PLLC. He can be reached at rcheng@ritterspencercheng.com.

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Case Dismissed at Tex. Med. Bd. Show Cause Hearing  
**Houston Doctor Accused of Kickbacks (2024)**

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