Critical Law Basics All Public Health Professionals Should Know

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These **practice-oriented**, **interactive** workshops are designed to help attendees gain an understanding of how to work with the law in their public health positions.

Topics covered:

1. **Contracts in Healthcare** - Why they are important and how they work	**Monday, June 5, 12:30-2:00pm**
2. **Healthcare Licensure** - Legal issues in getting it and keeping it	**Monday, June 12, 12:30-2:00pm**
3. **Privacy and Public Health Surveillance** - Beware embedded data pixels!	**Monday, June 19, 12:30-2:00pm**
4. **Professional Negligence** - How these cases arise and are handled	**Monday, June 26, 12:30-2:00pm**
5. **Access to Care** - Emergency care and public health benefit programs	**Monday, July 10, 12:30-2:00pm**

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Healthcare Contracts

A Brief Look

Basic elements of a contract:

- The formation of a contract requires the following elements:
- **offer,**
- **the acceptance of the offer,**
- **consideration,**
- **performance.**
- The contract must not be for an illegal activity (if so, it would be void as against public policy)

- These elements are legally required, under the law of contract, in order to form a contract that will be recognized as legally enforceable.

Examples of types of contracts that are entered into in the healthcare field:

- provider network contracts, such as when a healthcare system enters contracts with physician group practices;
- service contracts for outsourcing certain administrative tasks to a third party, such as a management company that provides medical coding and patient billing services;
- care transfer contracts are also utilized in the healthcare field for the purpose of patient transfer from one level of care to another (such as from a hospital to a skilled nursing facility);
- affiliation agreements between two or more healthcare entities which often provide for the joint performance of certain healthcare tasks.

Healthcare contracts (cont.)

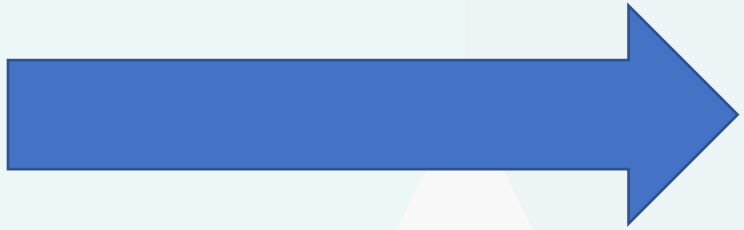
- Healthcare contracts explain the relationship between the parties to the contract and spell out each party's duties and obligations, the duration of the agreed-upon arrangement covered by the contract's terms, and other important points that concern the parties' performance obligations and achieving the purpose of the contract.
- But healthcare contracting, in particular, typically will require reference to law (state and/or federal laws and regulations) which may require that certain provisions be incorporated in the contract aimed at facilitating patient care and protecting patients.

Operation of restrictive covenants (noncompete agreements) in healthcare employment contracts:

- In general, a non-compete clause in a contract between an employer and an employee would prevent the employee from working for a competing employer, or starting a competing business, typically within a certain geographic area and would extend for period of time after their employment relationship ends. From a policy perspective, non-compete clauses prevent employees who subject to them from leaving jobs and tend to decrease competition.
- In healthcare in particular, noncompete agreements in healthcare contracts affect more than just the immediate parties to the contract. For example, a concern raised during the COVID-19 pandemic was how to address staffing shortages and whether physicians could provide care outside of a non-compete agreement or restrictive covenant: for example, when a physician, under such an agreement, was asked to help out in a competing hospital's emergency department. As a legal matter, in normal circumstances, this situation might result in violation of the physician's noncompete agreement.

The FTC Proposed Rule

- The FTC has interpreted noncompete agreements as constituting an unfair method of competition and therefore that they violate Section 5 of the Federal Trade Commission Act.
- On January 5, 2023, the FTC issued a proposed regulation which would prohibit inclusion of non-compete provisions in contracts, including between healthcare entities and healthcare workers whom they employ -



[Non-Compete Clause Rulemaking | Federal Trade Commission (ftc.gov)]

The case of Mary K. Brown

State of Wisconsin v. Mary K. Brown

Case citation:

STATE OF WISCONSIN **CIRCUIT COURT** **PIERCE COUNTY**

STATE OF WISCONSIN
Plaintiff,

vs.

MARY K. BROWN
E5647 - 10th Ave.
Durand, WI 54736
DOB: 08/17/1984
Sex/Race: F/W
Eye Color: Brown
Hair Color: Brown
Height: 4'11"
Weight: 260 lbs.
Defendant.

DA Case No.: 2022PI000902
Assigned DA/ADA: Halle E. Hatch
Agency Case No.: 22-6888
Court Case No.:
ATN:

CRIMINAL COMPLAINT

Count 1 in the complaint:

Count 1: PHYSICAL ABUSE OF AN ELDER PERSON - INTENTIONALLY CAUSE GREAT BODILY HARM, INCREASED PENALTY FOR ELDER PERSON VICTIM

The above-named defendant on Friday, May 27, 2022, in the Village of Spring Valley, Pierce County, Wisconsin, did intentionally cause great bodily harm to VICTIM, DOB 01/19/1960, an elder person who is 60 years of age or older, contrary to sec. 940.198(2)(a), 939.623(2)(c) Wis. Stats., a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

And further, invoking the provisions of sec. 939.623(2)(c) Wis. Stats., because the crime victim is an elder person, the maximum term of imprisonment of more than 10 years prescribed by law for the underlying crime may be increased by not more than 6 years.

Count 2 in the complaint:

Count 2: MAYHEM, INCREASED PENALTY FOR ELDER PERSON VICTIM

The above-named defendant on Friday, May 27, 2022, in the Village of Spring Valley, Pierce County, Wisconsin, with the intent to disfigure VICTIM, did cut the limb of VICTIM, contrary to sec. 940.21, 939.623(2)(c) Wis. Stats., a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

And further, invoking the provisions of sec. 939.623(2)(c) Wis. Stats., because the crime victim is an elder person, the maximum term of imprisonment of more than 10 years prescribed by law for the underlying crime may be increased by not more than 6 years.

Background - Excerpt from complaint:

VICTIM was at the nursing home because he had previously fallen in his residence and the heat went out, causing VICTIM to have severe frostbite on both of his feet. His feet were necrotic. VICTIM was placed in the nursing home in March 2022. ME Worsing reviewed the medical chart, which indicated that a nurse had amputated his right foot on May 27, 2022.

According to the complaint, Mary Brown is a CNA (Certified Nurse Aide).
From the Wisconsin Department of Health Services website - Nurse Aide Program: Becoming a CNA in Wisconsin | Wisconsin Department of Health Services

- In Wisconsin, each CNA must work for pay at least 8 hours during each 24-month certification period. An RN (registered nurse) or LPN (licensed practical nurse) must supervise the work. The work must be done in one of these settings:
- Federally certified (Medicare and/or Medicaid certified) nursing home
- Hospice
- Home health agency
- Intermediate care facility for individuals with intellectual disabilities
- State-licensed hospital
- Facility for people with developmental disabilities
- Rural medical center that provides one or more of these services
- Working in a private duty or unregulated setting doesn't meet the requirements for renewing.

Nurse Aide Program: Becoming a CNA in Wisconsin | Wisconsin Department of Health Services

- **Nurse Aide Program: Becoming a CNA in Wisconsin**
- We include every CNA (certified nurse aide) in our state on the Wisconsin Nurse Aide Registry. This meets state and federal regulations. We include a nurse aide in the registry after they successfully complete both:
- A nurse aide training program, or basic nursing course for professional nurses or licensed practical nurses.
- A competency evaluation program.
- The state of Wisconsin must approve both programs.
- A person can transfer from another state registry if that person meets all requirements of the Wisconsin Nurse Aide Registry.

Nurse Aide Program: Training and Registry | Wisconsin Department of Health Services

- Nurse aides perform important work caring for Wisconsin residents. CNAs (certified nurse aides) work under the direct supervision of an LPN (licensed practical nurse) or RN (registered nurse). CNAs:
- Assist residents with activities of daily living, such as bathing, dressing, and eating.
- Perform procedures that are within the scope of practice for a CNA.

Excerpt from complaint regarding investigational interview of Mary Brown:

When asked about her scope of practice, Brown admitted she should have gotten a doctor's order and called a doctor first. Because of the state of his feet, she thought that the doctor would just tell her to leave it alone. She stated that there was only one tendon and a little piece of skin but the main thing was the tendon that was keeping the foot intact. She stated that there was no bleeding and no life left in the foot. She stated she was trying to make the quality of life better for him. When she is thinking of herself in his condition, she would have wanted it off. She admitted that VICTIM never asked her to remove his foot. She described VICTIM's feet as mummy feet. She acknowledged it was outside her scope and she did not have a doctor's order.

PRIVACY OF HEALTHCARE INFORMATION

Recent developments

The “Jelly Bean” Settlement - website [JELLY BEAN HEALTHCARE CYBERSECURITY FAILURE - SETTLEMENT AGREEMENT-USDOJ.pdf]

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, March 14, 2023

Jelly Bean Communications Design and its Manager Settle False Claims Act Liability for Cybersecurity Failures on Florida Medicaid Enrollment Website

Jelly Bean Communications Design LLC (Jelly Bean) and Jeremy Spinks have agreed to pay $293,771 to resolve False Claims Act allegations that they failed to secure personal information on a federally funded Florida children’s health insurance website, which Jelly Bean created, hosted, and maintained.

Excerpt from DOJ announcement:

Background:

The Florida Healthy Kids Corporation (FHKC) is a state-created entity that offers health and dental insurance for Florida children ages five through 18. FHKC receives federal Medicaid funds as well as state funds to provide children's health insurance programs. On Oct. 31, 2013, FHKC contracted with Jelly Bean for "website design, programming and hosting services." The agreement required that Jelly Bean provide a fully functional hosting environment that complied with the protections for personal information imposed by the Health Insurance Portability and Accountability Act of 1996, and Jelly Bean agreed to adapt, modify, and create the necessary code on the webserver to support the secure communication of data. Jeremy Spinks, the company's manager, 50% owner, and sole employee, signed the agreement. Under its contracts with FHKC, between 2013 and 2020, Jelly Bean created, hosted, and maintained the website HealthyKids.org for FHKC, including the online application into which parents and others entered data to apply for state Medicaid insurance coverage for children.

Excerpt from DOJ announcement:

The settlement announced today resolves allegations that from January 1, 2014, through Dec. 14, 2020, contrary to its representations in agreements and invoices, Jelly Bean did not provide secure hosting of applicants' personal information and instead knowingly failed to properly maintain, patch, and update the software systems underlying HealthyKids.org and its related websites, leaving the site and the data Jelly Bean collected from applicants vulnerable to attack. In or around early December 2020, more than 500,000 applications submitted on HealthyKids.org were revealed to have been hacked, potentially exposing the applicants' personal identifying information and other data. The United States alleged that Jelly Bean was running multiple outdated and vulnerable applications, including some software that Jelly Bean had not updated or patched since November 2013. In response to this data breach and Jelly Bean's cybersecurity failures, FHKC shut down the website's application portal in December 2020.

The Case of the Wrong Leg

Implications in Negligence - Medical Malpractice

Excerpt from Tampa Bay Times (03/10/1995):

- **Tampa Bay Times - March 10, 1995**

Willie King first realized something was terribly wrong in the recovery room of University Community Hospital when he was awakened by a surgeon asking how his leg felt.

"That's when I discovered it," King said. "I said, "doctor, that's the wrong leg.' "

The surgeon was speechless.

Excerpt from New York Times (05/12/1995):

- **New York Times - May 12, 1995**

A botched amputation that cost a diabetic his leg has ended up costing a mistake-plagued hospital and one of its surgeons more than $1 million.

University Community Hospital's $900,000 settlement with the diabetic, Willie King, became public in state records on Wednesday. A $250,000 settlement with the surgeon, Rolando Sanchez, was disclosed earlier, bringing the total to $1.15 million.

Mr. King, 51, a heavy-equipment operator with a diabetes-related circulatory disease, was to have his right leg cut off below the knee on Feb. 20. But the left one was removed instead following a series of mistakes. Mr. King's remaining lower leg was later amputated at another hospital. He is learning to walk using artificial legs.

New York Times excerpt (09/17/1995):

The New York Times | https://www.nytimes.com/1995/09/17/us/doctor-who-cut-off-wrong-leg-is-defended-by-colleagues.html

Doctor Who Cut Off Wrong Leg Is Defended by Colleagues

Sept. 17, 1995

See the article in its original context from
September 17, 1995, Section 1, Page 28 Buy Reprints

Excerpt from New York Times article (cont.):

A Tampa surgeon who has been widely vilified and ridiculed for mistakenly amputating the wrong leg of a patient on Feb. 20 sought this week to regain both his license to practice medicine and a measure of his once-solid reputation.

In a three-day hearing before the state official who will make recommendations on his professional future, the surgeon, Dr. Rolando R. Sanchez, and his lawyer, Michael Blazicek, publicly presented their side of the story for the first time.

They said that a series of errors by other hospital personnel and the severely diseased condition of both legs led Dr. Sanchez to believe that he was operating on the correct leg.

The blackboard to which surgeons refer in the operating room at University Community Hospital in Tampa listed the wrong leg for amputation, as did the operating room schedule and the hospital computer system, testimony revealed. By the time Dr. Sanchez entered the operating room, the wrong leg had been sterilized and draped for surgery.

Some doctors who appeared as witnesses said that the leg Dr. Sanchez removed was in such poor shape that it would probably have been amputated in the future.

EMTALA - Emergency Medical Treatment & Labor Act

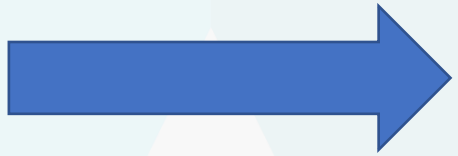
Act and Regulations – For discussion of select terms

In 1986, Congress enacted the Emergency Medical Treatment & Labor Act (EMTALA) to ensure public access to emergency services regardless of ability to pay.

- Section 1867 of the Social Security Act imposes specific obligations on Medicare-participating hospitals that offer *emergency services* to provide a medical screening examination (MSE) when a request is made for examination or treatment for an emergency medical condition (EMC), including active labor, *regardless of an individual's ability to pay.*
- Hospitals are then required to provide stabilizing treatment for patients with EMCs. If a hospital is unable to stabilize a patient within its capability, or if the patient requests, an appropriate transfer should be implemented.

42 U.S. Code § 1395dd

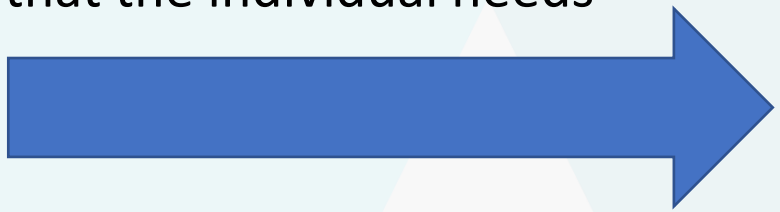
- **(a)MEDICAL SCREENING REQUIREMENT**
- In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) *comes to the emergency department* and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.



- **(b)NECESSARY STABILIZING TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND LABOR(1)**
- **IN GENERAL** If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—
  (A)within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
- **(B)**for transfer of the individual to another medical facility in accordance with subsection (c).

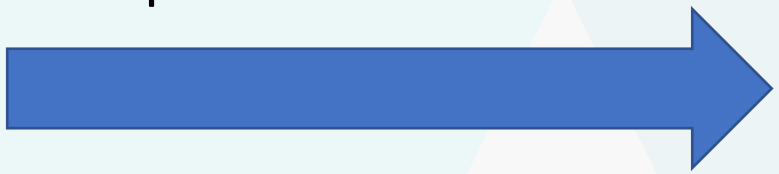
42 CFR 489.24(b) “Comes to the emergency department”

- with respect to an individual who is not a patient (as defined in this section), the individual -
- (1) Has presented at a hospital's dedicated emergency department, as defined in this section, and requests examination or treatment for a medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs examination or treatment for a medical condition;
- (2) Has presented **on hospital property, as defined in this section, other than the dedicated emergency department,** and requests examination or treatment for what may be an emergency medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs emergency examination or treatment;



42 CFR 489.24(b) “Comes to the emergency department” (continued)

- (3) Is in a ground or air ambulance owned and operated by the hospital for purposes of examination and treatment for a medical condition at a hospital's dedicated emergency department, even if the ambulance is not on hospital grounds. However, an individual in an ambulance owned and operated by the hospital is not considered to have “come to the hospital's emergency department” if -
- (i) The ambulance is operated under communitywide emergency medical service (EMS) protocols that direct it to transport the individual to a hospital other than the hospital that owns the ambulance; for example, to the closest appropriate facility. In this case, the individual is considered to have come to the emergency department of the hospital to which the individual is transported, at the time the individual is brought onto hospital property;
- (ii) The ambulance is operated at the direction of a physician who is not employed or otherwise affiliated with the hospital that owns the ambulance; or



42 CFR 489.24(b) “Comes to the emergency department” (continued)

- 4) Is in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment. The hospital may direct the ambulance to another facility if it is in “diversionary status,” that is, it does not have the staff or facilities to accept any additional emergency patients. If, however, the ambulance staff disregards the hospital's diversion instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.

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