

## Health Care Hot Topics (July 2009)

July 30, 2009

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### **Ohio Supreme Court Rules on “Discoverability” of Third Party Medical Records in a Private Civil Action**

The Ohio Supreme Court recently held that non-party medical records are not discoverable in a private lawsuit, even if personally identifiable information has been redacted. *Roe v. Planned Parenthood Southwest Ohio Region*, No. 2009-Ohio-2973, slip op. at 2 (Ohio 2009). Alleging that Planned Parenthood illegally performed an abortion on their fourteen year old daughter, plaintiffs attempted to discover Planned Parenthood medical records of other nonparty minors. Planned Parenthood refused to produce the nonparty medical records on the basis of physician-patient privilege. Plaintiffs argued that a 1999 Ohio Supreme Court ruling provided a right of discovery when the “disclosure is necessary to protect or further a countervailing interest that outweighs the patient’s interest in confidentiality” (quoting *Biddle v. Warren General Hospital*, 715 N.E.2d 518 (Ohio 1999)). The current Ohio Supreme Court held that the *Biddle* holding may only be used as a defense to the tort of unauthorized disclosure of a confidential medical record, and may not be used to discover non-party medical records in a private civil suit. The Court went on to state that redaction of personally identifiable information from a medical record does not defeat a record's privileged nature.

### **Public Comments on Proposed New Rules Due August 31st**

The 2010 Medicare Physician Fee Schedule (PFS) published on July 13th includes several important proposed rules:

1. CMS proposes to eliminate the use of all consultation codes which are typically billed by specialists and are paid at a higher rate than equivalent evaluation and management (E/M) services. If this elimination becomes a final rule, practitioners would use existing E/M service codes when providing consultation services.
2. CMS proposes to mandate accreditation for any provider of the technical component of imaging services beginning January 1, 2012.

If you disagree with any portion of the proposed rules, comments to CMS must be received by August 31, 2009. You may submit electronic comments to <http://www.regulations.gov/>. Follow the instructions under the “More Search Options” tab. You may mail written comments to the following address: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1413-P, P.O. Box 8013, Baltimore, MD 21244-8013. Please allow sufficient time for mailed comments to be received before the close of the comment period.

### **Red Flags Rule’s Effective Date Postponed Until November**

The Federal Trade Commission (FTC) announced on July 29th that it will again delay enforcement of the

second section of the Red Flags Rule (16 C.F.R. § 681.2) which will require many health care providers to implement programs that identify and respond to indicators of potential identity theft ("Red Flags"). The enforcement deadline of August 1, 2009 has been extended to November 1, 2009. The FTC delayed enforcement of the Red Flags Rule to give creditors and financial institutions three more months to develop and implement written identity theft prevention programs.

### **The Medicaid Integrity Program**

Medicaid has established a program, the Medicaid Integrity Program (MIP), similar to Medicare's Recovery Audit Contractors (RAC) to combat fraud, waste and abuse in the Medicaid program. CMS will enter into contracts with Medicaid Integrity Contractors (MICs) to review Medicaid provider actions, audit provider claims and identify overpayments, and educate providers and others on Medicaid program integrity issues. MICs will utilize audit protocols to conduct satisfactory provider reviews and audits. Protocols have been developed and reviewed by the HHS-OIG for individual fee-for-service practitioners, other fee-for-service providers, institutional providers, pharmacies, and hospitals and nursing home cost reports.

The MIP has established five field offices. The Ohio field office is located in the Chicago. Stay tuned for more information on the Medicaid Integrity Program from Dinsmore & Shohl LLP.