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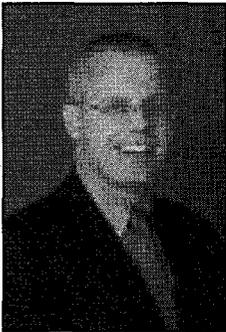
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The Importance of Health Law Attorneys in the U.S. Army

*Joseph Baar Topinka, J.D., LL.M.**

I. BACKGROUND



As the country goes through the process of reforming healthcare, changes are equally occurring within Army medicine. Assisting with this change is a very hardworking and sophisticated group of fellow Army civilian and military attorneys who advise medical leaders every day. Issues vary as these leaders address ever increasing needs and responsibilities of a world-class healthcare system for soldiers, their families, retirees, and other beneficiaries.

II. CHANGING TIMES

In 2009, in response to these needs and responsibilities, the four Army regional medical commands within the continental United States transformed into three, aligning with the TRICARE continental healthcare network regions to provide greater services and efficiencies. The TRICARE program is the U.S. military's healthcare system which manages Defense Health Program (DHP) funding. TRICARE's goals are to improve access to care and to ensure a high-quality, consistent health care benefit for the Department of Defense's (DoD) 1.7 million active-duty and 6.6 million non-active duty beneficiaries. As a result of this transformation, the current eight Army medical centers (Walter Reed in Washington, D.C.; Womack at Fort Bragg, North Carolina; Dwight D. Eisenhower at Fort Gordon, Georgia; Brooke at Fort Sam Houston, Texas; William Beaumont at Fort Bliss, Texas; Madigan at Fort Lewis, Washington; Tripler in Honolulu,

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Hawaii; and Landstuhl in the Republic of Germany) and numerous Army community hospitals and clinics throughout the world have been realigned under five regional medical commands. Army attorneys and supporting legal personnel specializing in health law are located at both the regional and medical center level.

III. CURRENT LEGAL ISSUES OF INTEREST

The legal issues handled by Army health attorneys vary and often have no civilian counterpart. The issues can be very specialized and unfamiliar even to legal counsel elsewhere in the Army and within the DoD who do not specialize in health law. This article will address eight of the most significant areas that have attracted more visibility in recent years.

1. **Standards of Ethical Conduct.** Army attorneys advise medical leaders and personnel to help them avoid violating federal ethical rules and criminal provisions under the United States Code and the Joint Ethics Regulation (JER). Frequent ethics issues include post-government employment, off-duty employment, relationships with contractors, and travel payments made by non-federal entities to the government under 31 U.S.C. § 1353.¹ In the last few years, overwhelming public support for soldiers returning from Iraq and Afghanistan has resulted in unprecedented gift giving, which has become one of the most visible and most misunderstood issue facing Army attorneys. Army attorneys in the health law practice have been very innovative in finding ways to apply archaic rules and laws to ensure that gifts are accepted properly and used in appropriate venues especially in support of soldiers wounded in service.

2. **Health Insurance Portability and Accountability Act of 1996 (HIPAA).** Army health lawyers advise military personnel on the rules for protecting patient confidentiality under HIPAA.² The DoD health information privacy instruction establishes policy and assigns responsibilities for the implementation of HIPAA within the Department of Defense.³ As in the civilian context, a patient's healthcare information is confidential and will be not released to anyone without informed written authorization from the patient or next of kin (NOK) if the patient is incapacitated without an exception to HIPAA. In the Army, however, military commanders and their designees have a specific exception to receive protected health information (PHI) on their personnel that others do

1. 31 U.S.C. § 1353.

2. Pub. L. No. 104-191, 110 Stat. 1936.

3. Dep't. of Defense Instruction. 6025.18 (2009), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/602518p.pdf>.

not. This exception is limited and does not automatically mean unrestricted access to a soldier's PHI. Army health attorneys often have to advise both medical leaders and non-medical commanders regarding the extent of this exception. There are boundaries to the exception and sometimes those boundaries can be blurred requiring legal interpretation.

3. **Quality Assurance.** Activities carried out by the DoD as part of a medical Quality Assurance (QA) program are confidential and privileged under 10 U.S.C. § 1102.⁴ This prohibits disclosure of any QA records, findings, recommendations, evaluations, opinions, or actions to any person or entity, except in certain limited, statutorily defined circumstances. A QA program is any activity by or for the DoD to assess the quality of medical care. This includes activities such as credentials, infection control, patient care assessment, medical records, health resources management review, and identification and prevention of medical or dental incidents and risks (Risk Management, Patient Safety, and Incident Reports). Only The Surgeon General of the Army may authorize release of Army QA documents outside of the DoD. Army healthcare attorneys advise medical leaders on every aspect of operational hospital law, much of which involves QA activities. They provide guidance on procedures involving health provider misconduct and malpractice that affect privileging and credentialing physicians, dentists and nurses. Army health attorneys were instrumental in developing procedures for applying QA programs to deployed healthcare providers.

4. **Military Support to Declared Public Health Emergencies.** The U.S. Army provides support to declared public health emergencies arising from disease, such as pandemic influenza. Following such a declaration, the President may direct any federal agency to use its authorities and resources in support of state and local assistance efforts. The DoD and Department of the Army have developed response plans, in coordination with the Department of Health and Human Services and the Centers for Disease Control, in the event of such an outbreak of disease. Current strategy for an Avian Flu Pandemic may involve isolation and quarantine. Isolation refers to the separation and the restriction of movement of people who have a specific infectious illness from healthy people in order to stop the spread of that illness. Quarantine refers to the separation and restriction of movement of people who are not yet ill, but who have been exposed to an infectious agent and are therefore potentially infectious. Army attorneys are providing guidance to Army medical leaders and planners on when, where, and to what extent the military role will be in such an event.

4. 10 U.S.C. § 1102 (2004).

5. **Resource Sharing Agreements.** Federal agencies have had the ability to cost share for years under the Economy Act.⁵ Thus, sharing of resources between the DoD and the Department of Veterans Affairs is not a new concept. Before 1982, the Department of Defense and the Department of Veterans Affairs facilities generally operated independently of each other. Then in 1982, Congress passed the Veterans Administration and Department of Defense Health Resources and Emergency Operations Act.⁶ This Act allows the Secretary of the Department of Veterans Affairs and the Secretaries of the military departments to enter into health-care resource sharing agreements pursuant to guidelines established jointly by the Secretary of the Department of Veterans Affairs and the Secretary of Defense. Under these guidelines, heads of individual medical facilities can enter into local agreements. In the future, especially in the face of growing costs, sharing agreements between the Army and the Department of Veterans Affairs will only increase in an effort to build better efficiencies. These sharing agreements will undoubtedly lead to efforts at building joint facilities and more compatible electronic medical record systems; Army health law attorneys will be involved in drafting, reviewing, and coordinating these agreements.

6. **Training Agreements.** Army medical treatment facilities operate professional education programs to train military healthcare professionals in various areas of expertise much like their civilian counterparts. These facilities often enter into gratuitous training and affiliation agreements with civilian healthcare institutions under the authority of 10 U.S.C. § 4301.⁷ The primary legal issue for these training agreements is liability coverage. The Department of Justice requires military treatment facilities to use language in the training agreement that would either require the civilian training institutions to provide liability coverage for the Army provider or include language that would imply the provider is a borrowed servant of the institution. Army health law attorneys face a growing desire by civilian training institutions to reject the Department of Justice language and insist that the Army carries liability for its providers.

7. **Human Subjects Research.** The Surgeon General of the Army oversees all human subject research within the Army. Army health law attorneys advise the local Institutional Review Boards, which oversee research projects at regional medical commands and medical centers. Army attorneys are ever vigilant for the rights of patient subjects, consent forms

5. 31 U.S.C. § 1535 (1982).

6. 38 U.S.C. § 8111 (1982).

7. 10 U.S.C. § 4301 (2006).

that are difficult to understand for participants and protocols which violate bioethical standards. If a research proposal is funded by the DoD and the research involves human subjects, human anatomical substances, or privileged or protected health information, a research protocol must be submitted to the Human Subjects Research Review Board (HSRRB) for review and approval. HSRRB approval must be obtained prior to initiation of the research protocol.

8. **Obligation and Expenditure of Appropriated Funds.** Fiscal concerns are significant within Army Medicine. Funding for military healthcare is appropriated by Congress. The funds come in various “colors”⁸ and various periods of “availability” for new obligations. Depending on the service required to be funded, the funds required to do so may vary depending on the nature and structure of the activity, the authority for the activity, the magnitude of the activity, the timing of the activity, and the actions previously taken by others with regard to the activity. Only one color can be correct. Some funding actions raise little or no issue, while color, timing, and availability of funds may make others problematic. Army health law attorneys are often called upon by medical leaders to sort through these issues along with military comptrollers to identify the fiscal rules applicable to the activity and the funding needed for patient care.

IV. CONCLUDING COMMENTS

Army health law attorneys are critical members of the military healthcare organization. Army medical leaders utilize their health law attorneys in traditional and innovative ways by including them as a member of their team as they deal with a full spectrum of subjects. Unfortunately, there is no specific track that Army health law attorneys can follow to develop a specialty in healthcare law. A few are able to obtain an advanced law degree in health law from such distinguished schools as the Beazley Institute for Health Law and Policy at the Loyola School of Law in Chicago. Others come from a background in providing healthcare or healthcare administration. Most just acquire an interest in the field and develop an expertise. Many, including the author, develop a passion for health law because it has such a significant impact on patient care. Whatever their path, Army health law attorneys are some of the most hardworking and intelligent people whose healthcare legal advice, in support of Army Medicine, is second-to-none. They provide value-added advice and support; possess a unique macro and micro perspective; and

8. The term “color” or money is often used in the practice of fiscal law within the federal government. It refers to the type of appropriation. Money appropriated for one purpose cannot be used for a different purpose.

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have access to legal channels within the military and with their civilian counterparts that can be beneficial to the medical leader and his or her organization. In sum, they provide very specialized assistance which Army medical leaders cannot afford to overlook.