

# Laws Every Idaho Hospital Board Member Should Know



KIM C. STANGER  
IHA Convention  
(10-23)

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# Types of Hospitals



## Public (govt owned)

- Subject to laws re state entities (e.g., open meeting, public records, public finance, elections, etc.).
- Govt immunity.
- Board must act per statutory obligations.



## Private nonprofit

- Exempt from some taxes.
- Operate for charitable purpose, not private benefit or for profit.
- Comply with IRS 501(c)(3) and 501(r).



## Private for profit

- Greater flexibility.
- Subject to taxes.
- Must comply with corporate laws.
- Board must act for benefit of shareholders.

# 501(c)(3) Hospitals

- Community benefit, not private benefit.
- Open emergency room.
- Community board.
- Open medical staff policy.
- Charity care.
- Surplus funds for charitable purpose.
- Comply with 501(r)
  - Community health needs assessment
  - Financial Assistance Policy
  - Limitation on charges
  - Billing and collections
- File form 990

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## Charitable Hospitals - General Requirements for Tax-Exemption Under Section 501(c)(3)

**Individuals**

**Businesses and Self-Employed**

**Charities and Nonprofits**

Exempt Organization Types

Lifecycle of an Exempt Organization

Annual Filing and Forms

Charitable Contributions

Search for Charities

Education Sessions

**International Taxpayers**

Governmental Liaisons

Charitable hospitals must meet the general requirements for tax exemption under Internal Revenue Code (IRC) Section 501(c)(3) and [Revenue Ruling 69-545](#) [PDF]. These general requirements are in addition to the [four additional requirements](#) imposed under IRC Section 501(r)(1).

### Organizational and Operational Tests

Section 501(c)(3) organizations must be organized and operated exclusively for specific tax-exempt purposes to be exempt from federal income tax. In addition to being a type of organization that is specifically described within Section 501(c)(3), these organizations must also have the following characteristics:

- No part of their net earnings is allowed to inure to the benefit of any private shareholder or individual.
- No substantial part of their activities can consist of carrying on propaganda or otherwise attempting to influence legislation, and
- The organization should not participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office.

Charitable hospital organizations typically apply for and receive recognition from the IRS as being exempt from taxation as organizations described in Section 501(c)(3). The regulations under 501(c)(3) outline the various exemption requirements and state that an organization must meet both an organizational test and an operational test to qualify for exemption under Section 501(c)(3).

### Organizational Test

<https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3>

# Public Hospitals

## **COUNTY HOSPITALS IC 31-3601 et seq.**

- Board appointment, terms, etc.
- Officers
- Meetings
- Duties and powers
- Acquisition and disposal of property
- Relation to Commissioners
- Finances, taxes and levies
- Acquisition and disposal of property
- Other.

## **HOSPITAL DISTRICTS IC 39-1318 et seq.**

- Board elections, terms, qualifications
- Officers
- Meetings
- Duties and powers
- Finances, taxes, and levies
- Acquisition and disposal of property
- Dissolution and changes
- Other

# Public Hospitals

## PUBLIC RECORDS ACT IC 74-101 ET SEQ.

Office of the  
Attorney General

### Idaho Public Records Law Manual

Idaho Code §§ 74-101 through 74-127



**JANUARY 2023**

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## OPEN MEETING LAW IC 74-201 ET SEQ.

Office of the  
Attorney General

### Idaho Open Meeting Law Manual

Idaho Code §§ 74-201 through 74-208



**January 2023**

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# Public Hospitals

**ETHICS IN GOVERNMENT ACT  
IC 74-401 ET SEQ.**

**PROHIBITIONS AGAINST  
CONTRACTS WITH OFFICERS,  
IC 74-501 ET SEQ.**

**Office of the  
Attorney General**

## **Idaho Ethics In Government Manual**



**January 2023**

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# Public Hospitals

Idaho Constitution Art. VIII Section 3C

- allows public hospital to engage in financial transactions that would otherwise be limited under public finance statutes so long as:
  - No taxes are used.
  - Secured by the operating funds, not taxes.

# Some Key Laws Affecting All Hospitals

## FEDERAL LAWS

- Medicare laws and regs (“Conditions of Participation”)
- Fraud and abuse laws
- HIPAA
- EMTALA
- Antitrust
- Price Transparency
- No Surprise Billing Rules
- Discrimination Laws
- Others

## STATE LAWS

- Licensure laws and regs
  - Credentialing stds
- Medicaid laws and regs
- State fraud and abuse laws
- Others

# Laws Affecting Hospitals: Idaho Regulations

- “[G]overning body ... has ultimate authority and responsibility for the operation of hospital.”
- Governing body must:
  - Hire and supervise the CEO.
  - **Appoint and reappoint medical staff members.**
  - The CEO shall serve as liaison between the governing body, medical staff and the nursing staff, and all other departments of the hospital.
  - Implement bylaws governing board operations.
  - Review and approve medical staff bylaws.

(IDAPA 16.03.14.200)

# Laws Affecting Hospitals: Idaho Regulations

- Governing body must, **through the CEO:**
  - Provide appropriate physical facilities and personnel required to meet needs of patients and community.
  - Provide for institutional planning by committee composed of members of the governing body, admin, and med staff.
  - Through admin and med, ensure there is an effective, hospital-wide quality assurance program.
  - **Be responsible for meeting all applicable laws and regulations pertaining to hospitals, and acting promptly upon reports and reviews of regulatory and inspecting agencies.**

(IDAPA 16.03.14.200)

# Laws Affecting Hospitals: Hospital COPs

- “The hospital must have an **effective** governing body legally responsible for the conduct of the hospital....”
- Governing body must:
  - Appoint a CEO who is responsible for managing the hospital.
  - **Appoint medical staff members.**
  - **Ensure the med staff is accountable to the governing body.**
  - Ensure that care is provided through licensed and qualified practitioners.
  - Ensure the hospital has a budget.
  - Others.

(42 CFR 481.20; see 42 CFR 485.627)

# Appointing Med Staff



# Appointing Med Staff

- Governing body may make such rules, regulations, standards or qualification for med staff or those with privileges as it deems advisable.
- Med staff appointments and reappointments must be made by the governing body upon the recommendation of the active med staff.
- Appointments must include a delineation of privileges as recommended by the med staff. The same procedure shall apply to nonphysician practitioners who are granted clinical privileges.
- Reappointments must be made biennially.

(IC 39-1392g and 39-1395; IDAPA 16.03.14.200 and -.250)

# Appointing Med Staff

- Privileges are granted on basis of education, training, experience, competence, and the limits of the hospital's capabilities for providing qualified support staff and equipment.
- Medical staff membership or privileges cannot be withdrawn, revoked, suspended or limited because:
  - The practitioner holds an ownership interest in or is affiliated with a competing health care organizations;
  - The practitioner is a competitor of another med staff member.

(IC 39-1392g and 39-1395; IDAPA 16.03.14.200 and -.250)

# Appointing Med Staff

- The **process for appointments shall provide due process**, including a formal appeal and hearing mechanism, for practitioners who are denied privileges or whose privileges are reduced.

(IC 39-1395; IDAPA 16.03.200 and .250)

- Review
  - Medical staff bylaws
  - Credentialing and corrective action
  - “Fair hearing” process

# Appointing Med Staff: Follow the Bylaws

- Courts usually do not second guess board's decision if:
  - Followed standards in statutes, bylaws and policies.
  - Based on legitimate, documented reasons
    - Patient care or facility operations
    - NOT arbitrary or capricious
    - NOT improper motive, e.g., discrimination, anti-competition, retaliation, etc.
- From legal liability standpoint, the process is more important than the decision.

*Board: check these!*

# *Miller v. St. Alphonsus* (Idaho 2004)



- *Facts:* St. Als denied med staff privileges due to physician's alleged history of disruptive behavior.
- *Held:* Court upheld St. Als' decision.
  - Bylaws do not constitute a contract.
  - Hospital must comply with statutes and bylaws that required bylaws and hearing process.
  - Hospital gave the process due in statute and bylaws.
- *Lesson: Follow bylaws process.*

# Health Care Quality Improvement Act (HCQIA)

- HCQIA provides immunity for most claims arising from credentialing action against physician if the action is taken:
  - In reasonable belief that action furthered quality care,
  - After reasonable effort to obtain facts,
  - After adequate notice and hearing procedures, and
  - In reasonable belief that action warranted by the facts.
- Hospital process is deemed to be fair if:
  - Proper notice given,
  - Hearing before a fair-minded officer or panel,
  - Physician has right to present evidence, and
  - Physician receives written recommendation.

*Ensure med  
staff bylaws  
process  
complies*

(42 USC 11101 *et seq.*)

# Laurino v. Syringa Hospital (Idaho 2005)



- *Facts:* Physician with provisional staff membership denied privileges following fair hearing process involving independent hearing officer. Physician sued hospital, trustees, and chief of staff for \$2,000,000.
- *Held:* Court dismissed all claims on summary judgment.
  - HCQIA barred all claims except violation of due process.
  - Hospital's hearing satisfied due process.
  - Hospital awarded \$120,000 in attorneys fees.
- *Lesson:* document legitimate reasons and fair hearing process.

# Idaho Peer Review Immunity

- “**Immunity from civil liability.** The furnishing of information or provision of opinions to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief.”

(IC 39-1392c)

- Does protect participants (including board members).
- Does not protect ultimate credentialing decision by hospital.

(*Harrison v. Binnion* (Idaho 2009))

# Idaho Peer Review Privilege

- “Records confidential and privileged.... [A]ll peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever.”

(IC 39-1392b)

- “A hospital, in-hospital medical staff committee, ... and maker of a confidential communication [relating to peer review] has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.”

(Idaho R. Evid. 519(b))

# Idaho Peer Review Privilege

- Idaho courts have consistently enforced the privilege. (*See, e.g., Montalbano v. St. Als* (Idaho 2011); *Verska v. St. Als* (Idaho 2011); *Nightengale v. Timmel* (Idaho 2011); *Murphy v. Wood* (Idaho App. 1983))
- Practical result: severely limits a practitioner from successfully suing based on actions taken in credentialing, corrective action or peer review proceeding.
  - Can't obtain discovery of relevant facts.
  - Can't introduce documents, witnesses or facts from peer review proceeding.
- ***Maintain confidentiality of credentialing actions at all costs.***

# Key Fraud and Abuse Laws



- False Claims Act
- Anti-Kickback Statute (AKS)
- Eliminating Kickbacks in Referrals Statute (EKRA)
- Ethics in Physician Referrals Act (Stark)
- Civil Monetary Penalties Law (CMPL)
- Idaho state statutes

# False Claims Act (FCA)

- Cannot knowingly submit a false claim for payment to the federal govt, e.g.,
  - Not provided as claimed
  - Substandard care
  - Failure to comply with applicable regulations
- Must report and repay an overpayment within the later of 60 days or date cost report is due.

(31 USC 3729; 42 USC 1320a-7a(a); 42 CFR 1003.200)

## Penalties

- Repayment plus interest
- Civil monetary penalties of \$11,803\* to \$23,607\* per claim
- Admin penalty \$22,427\* per claim failed to return
- 3x damages
- Exclusion from Medicare/Medicaid  
(42 USC 1320a-7a(a); 42 CFR 1003.210; 45 CFR 102.3; 86 FR 70740)
- Potential *qui tam* lawsuits

# False Claims Act: Penalties



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# False Claims Act Settlements and Judgments Exceed \$2 Billion in Fiscal Year 2022

Tuesday, February 7, 2023

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## Second-Highest Number of Settlements in History

Settlements and judgments under the False Claims Act exceeded \$2.2 billion in the fiscal year

# False Claims Act: Self-Reporting

 An official website of the United States government [Here's how you know](#) ▾

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9-1.000 - Department Of Justice Policy And Responsibilities

9-2.000 - Authority Of The U.S. Attorney In Criminal Division Matters/Prior Approvals

9-3.000 - Organization Of The Criminal Division

## 9-28.000 - PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS

9-28.010 Foundational Principles of Corporate Prosecution

“[A]bsent aggravating factors, the Department will not seek a guilty plea where a corporation is determined to have met the requirements of the applicable voluntary self-disclosure policy, fully cooperated, and timely and appropriately remediated the criminal conduct.”

9-28.750 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By

# Idaho Medicaid Fraud Law

## Prohibits:

- Submitting false claim.
- Claiming medically unnecessary service.
- Failing to provide access to DHW.
- Failing to comply with Medicaid rules or provider agreement.
- Failing to repay any amount obtained contrary to statute, rule, regulation or provider agreement.

(IC 56-209h)

## Penalties

- Denial of payment.
- Repayment.
- Termination of Medicaid provider agreement.
- Exclusion from Medicaid.
- Criminal penalties.
- Civil penalties, e.g.,
  - 3x damages
  - \$1000 per violation

(IC 56-227, 56-227A to 56-227B; IC 56-209h; IDAPA16.05.07)

# Anti-Kickback Statute ("AKS")

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by govt program unless transaction fits within a regulatory safe harbor.

(42 USC 1320a-7b(b); 42 CFR 1003.300(d))

- "One purpose" test.  
(*US v. Greber* (1985))

## Penalties

- Felony
- 10 years in prison
- \$100,000 criminal fine
- \$112,131\* civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid  
(42 USC 1320a-7b(b); 42 CFR 1003.310; 45 CFR 102.3)
- Automatic FCA violation  
(42 USC 1320a-7a(a)(7))
- Minimum \$100,000 settlement

# Anti-Kickback Statute

Applies to any form of remuneration to anyone to induce or reward referrals for federal program business.

- Money.
- Free or discounted items or services (e.g., perks, gifts, courtesies, space, equipment, meals, insurance, trips, CME, etc.).
- Overpayments or underpayments (e.g., not fair market value).
- Payments for items or services that are not provided.
- Payments for items or services that are not necessary.
- Professional courtesies.
- Waivers of copays or deductibles.
- Low interest loans or subsidies.
- Business opportunities that are not commercially reasonable.
- Anything else of value...

# Anti-Kickback Statute: Penalties



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**PRESS RELEASE**

## Covenant Healthcare System and Physicians Pay Over \$69 Million to Resolve False Claims Act Allegations Related to Improper Financial Relationships

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# Anti-Kickback Statute

**Remuneration  
+ Intent to induce  
referrals for items  
payable by federal  
programs  
AKS violation;  
“One purpose” test**

- ✓ **Safe Harbor, e.g.,**
  - **Employment**
  - **Personal services**
  - **Leases**
  - **Group practice**
  - **Others**
- ✓ **Advisory Opinion**

# Eliminating Kickback in Recovery Act (EKRA)

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery home or clinical treatment facility unless arrangement fits within statutory or regulatory exception.

(18 USC 220(a))

## Penalties

- \$200,000 criminal fine
  - 10 years in prison
- (18 USC 220(a))

# Idaho Anti-Kickback Statute

Service provider (including providers of healthcare services) cannot:

- Pay another person, or other person cannot accept payment, for a referral.
- Provide services knowing the claimant was referred in exchange for payment.
- Engage in regular practice of waiving, rebating, giving or paying claimant's deductible for health insurance.

(IC 41-348)

## Penalties

- \$5000 fine by Department of Insurance (IC 41-327 and -348)

# Ethics in Patient Referrals Act (Stark)

- If physician (or family member) has financial relationship with entity:
    - Physician may not refer patients to the entity for designated health services (“DHS”), and
    - Entity may not bill Medicare or Medicaid for such DHS unless arrangement fits within a regulatory exception (safe harbor).
- (42 USC 1395nn; 42 CFR 411.353 and 1003.300)

## Penalties

- No payment for services provided per improper referral.
  - Repayment w/in 60 days.
  - Civil penalties.
    - \$27,750\* per claim
    - \$174,172\* per scheme
- (42 CFR 411.353, 1003.310; 45 CFR 102.3)
- Likely FCA violation
  - Likely AKS violation

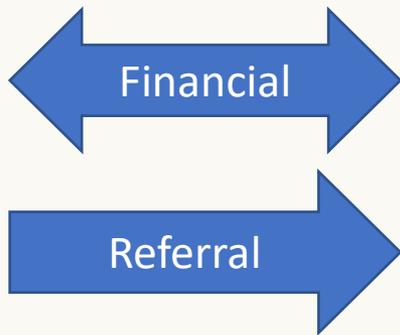
# Stark

## Only applies if:

### Physician

- MD
- DO
- Dentist
- Oral surgeon
- Podiatrist
- Optometrist
- Chiropractor

(42 CFR 411.351 and 411.353)



### Designated Health Service (“DHS”)

- Inpatient/outpatient hospital services
- Outpatient prescription drugs
- Radiology and certain imaging services
- Radiation therapy and supplies
- Clinical laboratory services
- Physical, occupational, or speech therapy
- Home health services
- Durable medical equipment and supplies
- Prosthetics and orthotics
- Parenteral and enteral nutrients, equipment, and supplies

# Stark: Penalties



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# United States Resolves \$237 Million False Claims Act Judgment against South Carolina Hospital that Made Illegal Payments to Referring Physicians

# Stark

**Financial arrangement  
with physician or  
family member  
+ Referrals for DHS  
Stark violation**

- ✓ **Safe Harbor, e.g.,**
  - **Employment**
  - **Personal services**
  - **Leases**
  - **Group practice**
  - **Others**
- ✓ **Advisory Opinion**

# Civil Monetary Penalties Law (CMPL)

Prohibits certain specified conduct, e.g.:

- Submitting false or fraudulent claims, misrepresenting facts relevant to services, or engaging in other fraudulent practices.
- Violating Anti-Kickback Statute or Stark law.
- Violating EMTALA.
- Failing to report and repay an overpayment.
- Failing to grant timely access.
- Failing to report adverse action against providers.
- Contracting with or submitting claims for services ordered by an excluded entity.
- **Offering inducements to program beneficiaries.**
- **Offering inducements to physicians to limit services.**

(42 USC 1320a-7a; 42 CFR 1003.200-1100)

# CMPL: Patient Inducements

- Prohibits offering remuneration to a Medicare/Medicaid beneficiary if know or should know that it is likely to influence such beneficiary to order or receive services from a particular provider or supplier.

(42 USC 1320a-7a(5); 42 CFR 1003.1000(a))

## Penalties

- \$22,427\* per violation.
- Exclusion from Medicare and Medicaid (42 CFR 1003.1010(a); 45 CFR 102.3)
- Likely also an Anti-Kickback Statute violation

# CMPL: Physician Inducements

- Hospital or CAH cannot knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit medically necessary services provided to Medicare or Medicaid beneficiaries who are under the direct care of the physician.

(42 USC 1320a-7a(b))

## Penalties

- \$5,606\* per violation.
  - Exclusion from Medicare and Medicaid  
(42 CFR 1003.1010(a); 45 CFR 102.3)
- *Beware gainsharing arrangements.*

# Other Federal Fraud and Abuse Statutes

- Health Care Fraud, 18 USC 1347
- False Statements Relating to Health Care Matters, 18 USC 1035
- Mail and Wire Fraud, 18 USC 1341 and 1343
- Theft or Embezzlement in Connection with Health Care, 18 USC 669
- Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961-1968
- Travel Act, 18 USC 1952
- Others?

*(See OIG Compliance Program for Individual and Small Group Physician Practices, 65 FR 49448 et seq.)*

# Fraud and Abuse Laws: Summary

Ensure you comply!

- Ensure arrangements with providers, patients, and other referral sources comply with applicable laws and safe harbors.
- Beware free or discounted items to referring providers.
- Have appropriate written contracts.
- Pay fair market value for only needed items or services.
- Do not condition payments on referrals.
- Ensure marketing initiatives comply with applicable laws.
- Require reports and respond immediately to possible problems.
- Report and repay as necessary.

# Health Insurance Portability and Accountability Act (HIPAA)



# HIPAA Privacy and Security Rules

## PRIVACY RULE

- May not access, use or disclose protected health info (PHI) unless:
  - Patient's authorization.
  - HIPAA exception.
- Implement safeguards.
- Give patient rights to PHI.
- Mitigate any breaches.

(45 CFR 164.501 et seq.)

## SECURITY RULE

- Perform periodic risk assessments.
- Must protect and secure e-PHI:
  - Administrative safeguards
  - Technical safeguards
  - Physical safeguards

(45 CFR 164.301 et seq.)

# Cyberattack on Mountain View Hospital still ongoing after two weeks

🕒 Published at 9:00 am, June 10, 2023 | Updated at 9:17 am, June 10, 2023



Logan Ramsey, EastIdahoNews.com

**Why you need to  
comply with  
Security Rule**



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## Cyberattack forces Idaho hospital to send ambulances elsewhere

By Sean Lyngaas, CNN  
Published 5:33 PM EDT, Wed May 31, 2023

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# HIPAA Civil Penalties

Conduct	Penalty
Did not know and should not have known of violation	<ul style="list-style-type: none"><li>• \$127* to \$63,973* per violation</li><li>• Up to \$1,919,173* per type per year</li><li>• <b>No penalty if correct w/in 30 days</b></li><li>• OCR may waive or reduce penalty</li></ul>
Violation due to reasonable cause	<ul style="list-style-type: none"><li>• \$1,280* to \$63,973* per violation</li><li>• Up to \$1,919,173* per type per year</li><li>• <b>No penalty if correct w/in 30 days</b></li><li>• OCR may waive or reduce penalty</li></ul>
<b>Willful neglect,</b> but correct w/in 30 days	<ul style="list-style-type: none"><li>• \$12,794* to \$63,973* per violation</li><li>• Up to \$1,919,173* per type per year</li><li>• <b>Penalty is mandatory</b></li></ul>
<b>Willful neglect,</b> but do not correct w/in 30 days	<ul style="list-style-type: none"><li>• \$63,973 to \$1,919,173* per violation</li><li>• Up to \$1,919,173* per type per year</li><li>• <b>Penalty is mandatory</b></li></ul>

(45 CFR 102.3, 160.404; 85 FR 2879)

# HIPAA Enforcement

- Must self-report breaches of unsecured protected health info
  - To affected individuals.
  - To HHS.
  - To media if breach involves > 500 persons.
- **In future, individuals may recover portion of penalties or settlement.**
- Must sanction employees who violate HIPAA.
- Possible lawsuits by affected individuals or others.
- State attorney general can bring lawsuit.
  - \$25,000 fine per violation + fees and costs

# HIPAA Criminal Penalties

Applies if individuals obtain or disclose PHI from covered entity without authorization.

Conduct	Penalty
Knowingly obtain info in violation of the law	\$50,000 fine 1 year in prison
Committed under false pretenses	100,000 fine 5 years in prison
Intent to sell, transfer, or use for commercial gain, personal gain, or malicious harm	\$250,000 fine 10 years in prison



## Little Rock Division

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Eastern District of Arkansas

(501) 340-2600

LITTLE ROCK—Jane W. Duke, United States Attorney for the Eastern District of Arkansas, along with Thomas J. Browne, Special-Agent-in-Charge of the Little Rock Division of the Federal Bureau of Investigation, announced today the guilty pleas of Dr. Jay Holland, age 56, of Little Rock, Arkansas; Sarah Elizabeth Miller, age 28, of England, Arkansas; and Candida Griffin, age 34 of Little Rock, Arkansas. Each pled to a misdemeanor violation of the health information privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA) based on their accessing a patient's record without any legitimate purpose. The pleas were accepted by United States Magistrate Judge Henry L. Jones, Jr.

Dr. Holland, Medical Director of Select Specialty Hospital, located on the 6th floor of the St. Vincent Infirmiry Medical Center (SVIMC), admitted that after watching news reports on television, he logged on to the SVIMC patient records from his computer at home and accessed a patient's files to determine if the news reports were accurate. He stated he then logged off the computer admitting that it was inappropriate for him to be looking at the file. He admitted he accessed the file because he was curious. Dr. Holland stated that he had had HIPAA training and that he understood he was violating HIPAA when he accessed the file. SVIMC suspended Dr. Holland's privileges for two weeks and required him to complete on-line HIPAA training.

Sarah Elizabeth Miller, formerly an account representative at SVIMC, Sherwood Campus, was responsible for checking patients in and out of the clinic and for processing patient billing. In order to perform her duties, she had access to the SVIMC patient records program which includes all locations, not just that of the Sherwood clinic. Miller admitted that on October 20 and 21, 2008,

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# HIPAA Privacy Rule

- “Protected health info” = any info created or received by hospital that:
  - Relates to past, present, or future physical or mental health of an individual; provision of health care to an individual; or payment for the provision of health care to an individual; and identifies the individual; or
  - With respect to which there is a reasonable basis to believe the info can be used to identify the individual.

(45 CFR 160.103)

- Very broad.
- Includes fact that they were patient even if no specific medical info is disclosed.

# HIPAA Privacy Rule

- HIPAA allows board to use PHI for certain healthcare operations of the hospital (e.g., credentialing, responding to complaints, litigation, business planning, etc.)  
(45 CFR 164.501 and .506)
- Must use minimum necessary to accomplish permitted purpose.

(45 CFR 164.504)

# Emergency Treatment and Active Labor Act (EMTALA)



# EMTALA

- If patient comes to the hospital, hospital must provide emergency care.
- Cannot delay to inquire about payment.
- Hospital with specialized capabilities must accept transfer.

(42 USC 1935dd; 42 CFR 489.24)

## Penalties:

- Termination of Medicare/Medicaid.
- Civil penalties
  - Hospital:
    - < 100 beds: \$25,000
    - > 100+ beds: \$50,000
  - Physicians: \$50,000
- Hospital may be sued for damages.

(42 USC 1395dd; 42 CFR 1003.)

# EMTALA

If person comes to hospital seeking emergency care:

Medical screening exam

- Appropriate to condition
- by qualified medical personnel (QMP) approved by Board
- Within hospital's capabilities

No  
emergency  
medical  
condition or  
admit patient

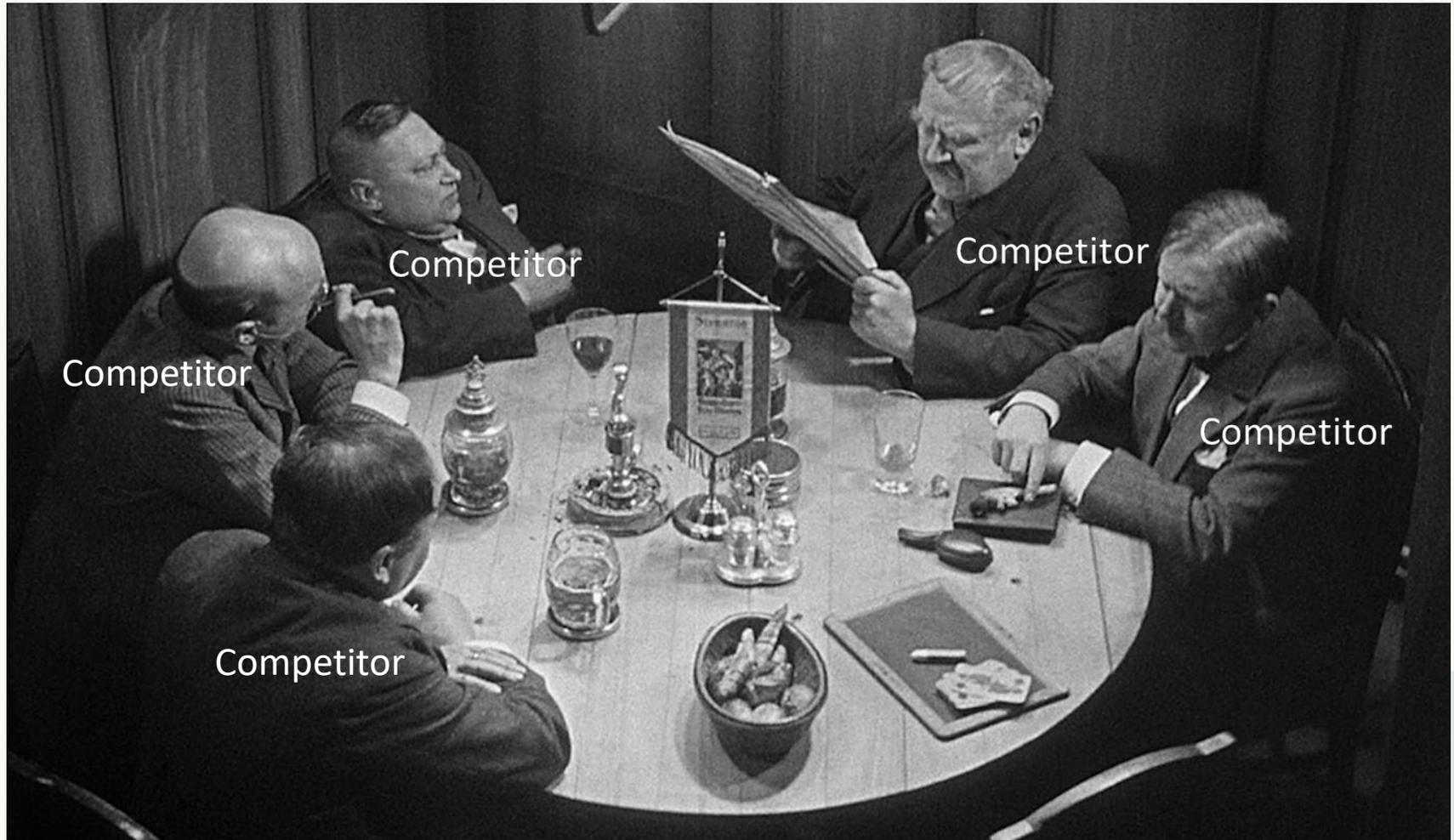
EMTALA ends;  
may transfer or  
discharge, but beware  
malpractice and COPs

Yes  
emergency  
medical  
condition

Stabilizing  
treatment within  
hospital's  
capabilities

Appropriate  
Transfer to  
another facility

# Antitrust Laws



# Antitrust Laws

- Sherman Act § 1
  - Prohibits agreement and conspiracy in restraint of trade.
- Sherman Act § 1
  - Prohibits monopolies or attempted monopolies.
- Clayton Act § 7
  - Prohibits mergers or acquisitions if effect would lessen competition or result in monopoly.
- Federal Trade Comm'n Act
  - Prohibits unfair methods of competition and unfair or deceptive acts or practices.
- Idaho state laws
- Criminal penalties
  - \$1,000,000 to \$100,000,000 fine
  - Prison up to 10 years
- Civil penalties
  - Action by state or federal govt
    - Treble (3x) damages
    - Injunctive relief, e.g., divestiture, break up corporation, restrictions, etc.
    - Attorneys fees
  - Private lawsuit
    - Treble damages
    - Injunctive relief
    - Attorneys fees

# Sherman Act § 1

- As defined by Supreme Court, only prohibits agreements that unreasonably restrain trade.
- Rule of reason v. per se violations



# Antitrust



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# Idaho Orthopedists Charged with Engaging in Group Boycotts and Denying Medical Care to Injured Workers

Friday, May 28, 2010

For Immediate Release

Office of Public Affairs

# FTC / DOJ Guidelines Withdrawn



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## Federal Trade Commission Withdraws Health Care Enforcement Policy Statements

Outdated statements no longer serve as useful guidance or reflect market realities

July 14, 2023 | [f](#) [t](#) [in](#)

**Tags:** [Competition](#) | [Office of Policy Planning](#) | [Bureau of Competition](#) | [Nonmerger](#) | [Health Care](#)

Related resources

The Federal Trade Commission announced today the withdrawal of two antitrust policy statements

Federal Trade Commission Withdraws

Holland & Hart

# What can/should the Board do?



# Board's Role in Compliance

- Gain basic understanding of key compliance issues.
- Accept compliance as a board responsibility.
- Endorse a culture of integrity and compliance.
- Ensure hospital has an effective compliance plan.
  - *See OIG Compliance Program Guidance for Hospitals*
    1. Competent compliance officer + committee
    2. Educate hospital staff
    3. Review and monitor compliance
    4. Process for reporting violations
    5. Investigate and respond to problems
- Make compliance a regular part of the board agenda.

# Board's Role in Compliance

- Ensure hospital has policies and procedures that are required by regulations.
- Ensure hospital trains and retrains staff concerning compliance issues.
- Require reports of significant compliance issues.
- Authorize compliance officer to report directly to board.
- Follow up regarding compliance problems, including potential repayment obligations.
- Beware high risk compliance issues.
  - Transactions with physicians and other referral sources.
  - Billing and coding.
- Consult with competent counsel as needed.
- If there's a problem...

# Protections for Board Members



# Liability Protections

- Business Judgment Rule.
- Statutory immunity.
  - Health Care Quality Improvement Act (42 USC 11101 *et seq.*)
  - Volunteer Protection Act (42 USC 14501)
  - Idaho Peer Review Immunity/Privilege (IC 39-1392 *et seq.*)
  - Idaho Non-Profit Volunteers (IC 6-1605)
  - Idaho Tort Claims Act (Idaho Code 6-901 *et seq.*)

# Additional Resources

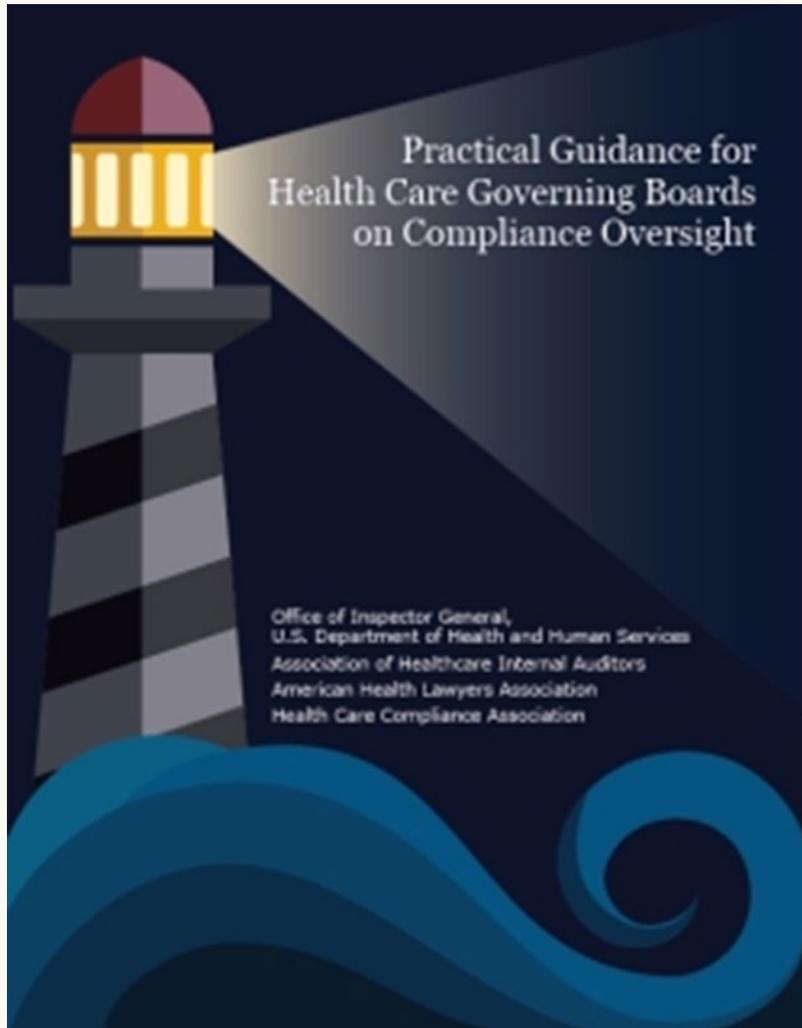


# Board Compliance Resources

- *OIG Compliance Program Guidance for Hospitals*
  - Original, 63 FR 8987 (2/23/98)
  - Supplemental, 70 FR 4058 (1/27/05)

<http://oig.hhs.gov/fraud/complianceguidance.asp>
- *OIG, A Toolkit for Health Care Boards* (2012)
- *OIG/AHLA, Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors* (2003)
- *OIG/AHLA, An Integrated Approach to Corporate Compliance: A Resource for Health Care Board of Directors* (2004)
- *OIG/AHLA, Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors* (2007)
- *OIG/AHLA, Practical Guidance for Health Care Governance Boards on Compliance Oversight* (2015)

# Board's Obligation for Compliance



- <https://oig.hhs.gov/documents/root/162/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>

# Board's Obligation for Compliance

- <https://oig.hhs.gov/documents/compliance-guidance/816/040203/CorpRespRsceGuide.pdf>

## **CORPORATE RESPONSIBILITY AND CORPORATE COMPLIANCE:**

*A Resource for Health Care  
Boards of Directors*



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NEW RESOURCE

## Boardroom 101: Key Strategies and Practical Tools for Orienting New Board Members

This resource from AHA Trustee Services provides information and guidance, including sample agendas and questions for board members to consider as they learn about health care, their hospital and/or health system, and board responsibilities.

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<https://trustees.aha.org/sites/default/files/trustees/09-guide-to-good-governance.pdf>

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## The Guide to Good Governance for Hospital Boards

Home > Resources > Reports > Guide To Good Governance >

The AHA's Center for Healthcare Governance is a community of board members, executives and thought leaders dedicated to advancing excellence, innovation and accountability in health care governance. The Center's mission is to offer new and seasoned board members, executive staff and clinical leaders a host of resources designed to progressively build knowledge, skills and competencies tailored to specific leadership roles, environments and needs to help fulfill its mission the Center is pleased to provide The Guide to Good Governance, a resource for U.S. hospital boards and leaders adapted from the original Canadian version developed by the Ontario Hospital Association.

The Guide contains a comprehensive overview of the key components of good governance practices, as well as templates and tools to support these practices.



The resource materials found in the Guide are intended for use by all hospitals, non-profit, government or for-profit, however, they may need to be adapted to meet the needs of specific institutions. Hospitals are therefore encouraged to customize the tools and templates to meet their unique needs. It is not expected that hospitals will adopt the Guide in its entirety. Further, hospitals may wish to consult the Guide for different purposes. For example, new board members may utilize the Guide to familiarize themselves with governance practices and processes, while more experienced board members and officers may look to the Guide to supplement their practices in a particular area the Guide is not intended, nor should it be construed as legal advice. Hospitals concerned about the applicability of specific governance practices to their organization are advised to seek legal or professional advice based on their particular circumstances.

As hospitals continue to improve their governance processes and practices, additional resources will be needed. The Center looks forward to developing further tools, resources and educational programs that will

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**Kim Stanger**

# Questions?



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