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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of *The Lighter Side of Health Law* AHLA podcast sponsored by Coker Group. I hope you enjoy this month's edition.

The Cranky Word List

You'd better sit down before hearing this astonishing medical discovery recently published in the *Journal of Medical Informatics Association*.

Are you seated? Okay, here goes. Researchers at Partners HealthCare in Boston conducted a study of clinical decision support alerts—the warnings that pop up on the screen as a doctor enters patient information in the electronic health record. The researchers wanted to find a method that would help identify alerts that were wrong or needed improvement.

Guess what they found? If doctors repeatedly enter what the researchers call *cranky comments* when overriding an alert, there's probably something wrong with the alert. They developed a *cranky word list* including words like *dumb*, *idiot*, *wrong*, *false*, and *please stop*. And they proved statistically that if doctors repeatedly enter one or more cranky words in overriding an alert, that alert probably needs to be improved.

So now you know, courtesy of Partners HealthCare, in the shadow of Harvard University: If doctors repeatedly override an alert and call it *dumb* or *idiotic*, it may need work.

Thank you, Partners HealthCare.

Reckless Determination of Recklessness

There was recklessness in a recent California medical malpractice case, but not where you would expect it. It was in the printed *verdict form* the court gave the jury.

Gary Higgins sued Providence Health, alleging that its negligence caused the death of his wife, Dona. California limits medical malpractice recoveries to \$250,000, but the cap doesn't apply if the defendant was not merely negligent but *reckless*.

The jury answered *yes* to the verdict form's question 1, *was the defendant negligent?* Question 9 asked whether any *officer or director* of the defendant committed the negligent acts. The jury answered *no*. The verdict form said to skip question 10 if the answer to 9 was *no*. So the jury skipped it.

Fast forward to question 13, *was the defendant's recklessness a factor in causing the death?* The jury answered *yes* and awarded Gary \$1.5 million.

So the outcome is clear, right? Well, not exactly. Remember question 10—the one the form said to skip? It asked whether the defendant was reckless. And the jury never answered that question, because the form told them not to.

So Providence appealed the \$1.5 million verdict, arguing that because the jury skipped question 10, there was no valid finding of recklessness. The appellate court agreed and reversed and remanded.

The case is *Higgins v. Providence Health*, Calif. Ct. of App.

Preventive Medicine in the Courtroom

Preventive medicine doesn't just treat an existing ailment; it *prevents* the ailment from occurring in the first place. A recent Florida federal court decision deals with an effort by a group of doctors to prevent a *business problem* from occurring.

The doctors all regularly perform a procedure called *Mohs surgery*. That's M-O-H-S. Named for the doctor who originated it, it involves removing thin layers of cancerous skin until only cancer-free tissue remains. It's performed by physicians in several different medical specialties.

The doctors were afraid that the American Board of Dermatology would formally recognize a subspecialty in the Mohs procedure and that without board-certification in that subspecialty, they would be at a disadvantage to those *with* board-certification.

So, without even waiting for the Board to create the subspecialty, let alone for it to do anything illegal or harm them, they filed an antitrust suit in federal court against the Board and against the umbrella Board of Medical Specialties that would recognize the new subspecialty if there ever *was* a new subspecialty.

Not surprisingly, the court regarded this effort as not just *preventive* but *premature* and dismissed it for failure to state a claim on which relief could be granted.

The case is *Allyn v. Amer. Bd. of Med. Specialties*, M.D. Fla.

The Judge Who Went Dental

Okay, the judge actually went *mental*—not *dental*. But the *reason* was dental, namely, the non-stop bickering of lawyers for clients in the dental industry.

Align Technology sued ClearCorrect back in 2011 for infringing on its tooth-straightening patent. Since then, for eight long years, the two sides have been whining and bickering like sulking six-year-olds.

That led to federal judge Vanessa Gilmore's recent meltdown and her order reading, quote, "The court is in receipt of the parties' *whiny* [italics added] letters. What is wrong with you parties/lawyers? Just STOP it" (with stop in all capitals).

For context, the judge wrote, quote, "This is my oldest and least favorite case. Please stop trying to be my least favorite *lawyers* [italics added]."

And no litigator wants to be a federal judge's least favorite lawyer.

The case is *Align Technology v. ClearCorrect*, S.D.Tex.

Four Walls Do Not a Prison Make

Here's an inspirational story, proof that you can imprison a person's body but not necessarily her spirit.

Alexis Norman was imprisoned for health care fraud: billing Medicaid for services provided by a nonexistent company, with the help of co-conspirator Karen Jones.

Did Alexis let the prison bars prevent her from using her God-given talent for Medicaid fraud? No way. While awaiting her sentence, she formed a *new* non-existent company to defraud Medicaid. Then, in prison she wrote billing instructions and information about Medicaid clients and providers on a slip of paper, hid it in her shoe, and sneaked it to Karen during jailhouse visits. Karen then used the information to continue to defraud Medicaid, just as though Alexis were still on the outside.

Alexis's response when she was caught? Yes, I did it. How else was I supposed to pay my legal bills for the fraud that put me in here I the first place?

The case is *U.S. v. Norman*, N.D.Tex.

Well, that's it for this month's edition of *The Lighter Side of Health Law*. I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition.

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