

# Health care Law:

Lawyers assist medical providers in **Heavily regulated** environment

*By Anthony Birritteri, Senior Editor*

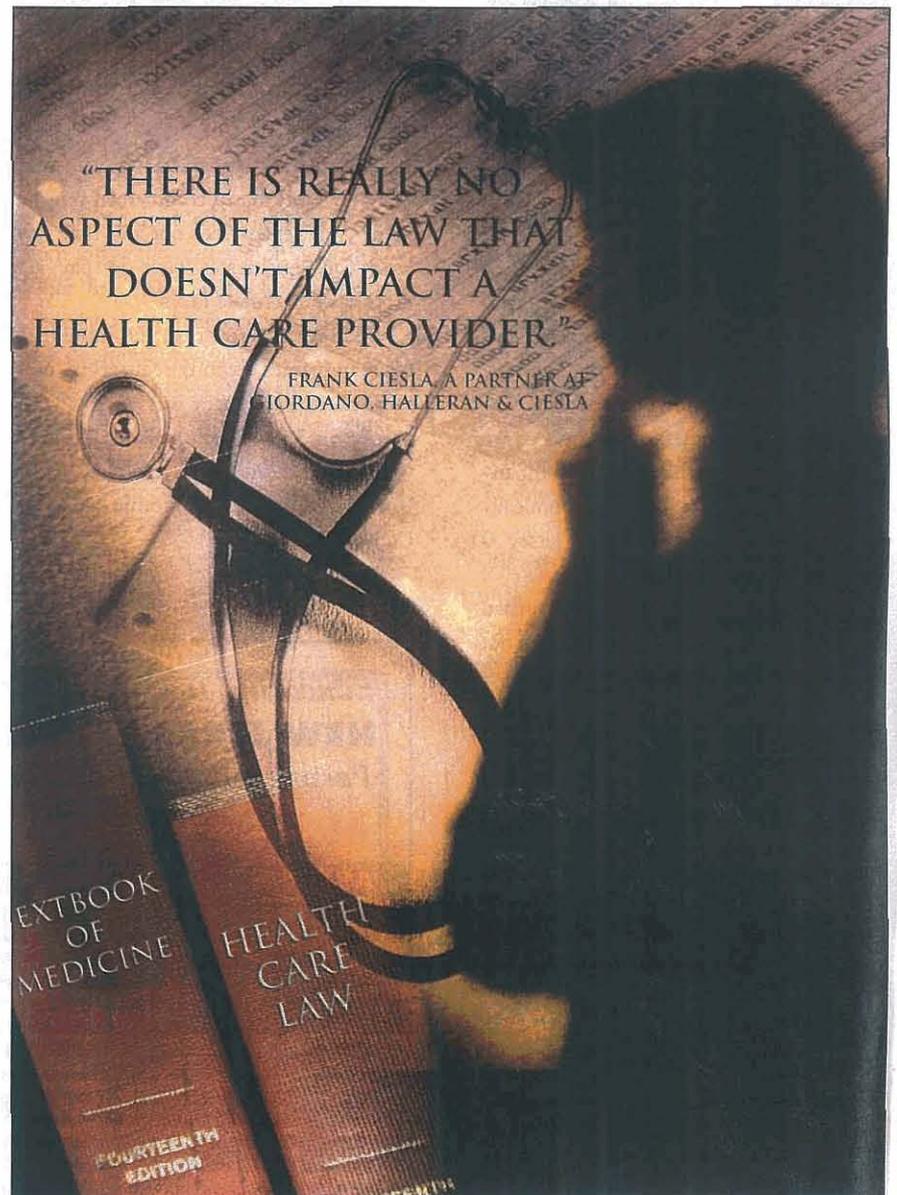
The medical malpractice dilemma in the Garden State is making residents and businesses aware of just one role lawyers play in the health care field – that of a plaintiff's personal injury attorney attempting to win a million dollar award on behalf of a client (see related sidebar).

This is just one side of the story. Lawyers also go to bat on behalf and in support of all health care professions, institutions and businesses. They help deal with a plethora of Medicare and Medicaid regulations, managed care and other third-party payment issues, state licensing rules, contracts between hospitals and physicians groups, and drafting merger and acquisition agreements for hospitals, doctors' groups, pharmaceutical firms and medical device companies, as examples. In fact, lawyers do more work in support of health care than seemingly attempting to bring it down.

"Health care is really everything you do in the law," says Frank Ciesla, president of Giordano, Halleran & Ciesla, the Middletown law firm with more than 45 attorneys. A health care provider such as a hospital deals with regulatory problems, third-party payor insurance problems, malpractice problems, etc. On top of all that, there are all of the normal problems of running a business, such as administrative, labor, environmental and real estate issues. "There is really no aspect of the law that doesn't impact a health care provider," he says.

By the same token, Ciesla says there are things that are perfectly legal in the business world that would be illegal if done by a health care provider.

What most lawyers commonly refer to in this area are Medicare and Medicaid anti-kickback laws, more generally termed



as fraud and abuse legislation. In essence, strong regulations are in place to make sure that physicians are not getting any form of kickback from a hospital for referring patients to that facility.

On a federal level, the Stark Law prohibits a physician or his or her immediate family member, who has a financial relationship with a hospital, from making a referral to that hospital for designated

health services that may be paid by Medicare or Medicaid. There are exceptions, but the Stark Law can be implicated in matters concerning joint ventures, medical directorships, employment arrangements, physician recruitment, medical office leases, compliance training, parking, meals and even coffee mugs and tee-shirts.

The Codey Law of 1991, sponsored by State Senator Richard Codey, is the New



## NJ's medical malpractice malady

Physicians in New Jersey began a "job action" during the week of February 3 to protest medical malpractice premiums that have been increasing by up to 30 percent per year for certain specialists. Doctors, such as neurosurgeons and obstetricians, for example, are coping with premiums that are as high as \$150,000 to \$200,000. The costs are so exorbitant that many physicians are leaving the practice of medicine altogether, scaling back their services, or moving to other states to earn a living.

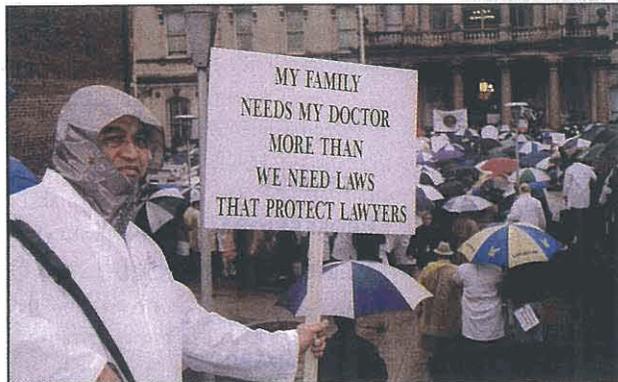
There's been much finger pointing as to who is to blame for the high premiums. Insurance companies and doctors are blaming personal injury lawyers who look to win million-dollar awards. Personal injury lawyers say the cause for higher premiums are medical malpractice insurance companies that have seen their stock market investments go sour in a down economy and are recouping money from increased premiums.

A February 4 rally outside the State House in Trenton revealed the anger and urgency of the dilemma as more than 5,000 physicians from around the state chanted for tort reform, the passing of rate caps and, finally, the ouster of Governor James E. McGreevey.

"Trial lawyers want to keep their incomes in place and you're the golden goose," said Richard Goldstein, president of the Society of Teaching Hospitals. "You never hear about lawyers leaving the state," he said, commenting on the fact that many physicians are leaving New Jersey because they cannot afford the high medical malpractice premiums.

"There are too many frivolous lawsuits," added U.S. Congressman Michael Ferguson (NJ-R-7). "Our health care system should serve patients, not trial lawyers." He said that he is for patients having their day in courts, but the frivolous lawsuits must be "stopped in their tracks."

Serving for years in the legislature, Assemblyman and Doctor Eric Munoz (R-21), said he doesn't want to hear anymore



Lowell Taclob, an internal medicine physician from Paterson, was one of nearly 5,000 medical professionals to take part in the "job action".

"lip service" about rate caps on pain and suffering, adding that the whole delay is "just politics."

"Did we hear anything about the medical malpractice dilemma or HMO reform in the Governor's State of the State address? No," said Assemblyman Nick Asselta (R-1). "We know where they (the McGreevey Administration) stand."

Among the crowd of physicians standing on West State Street, Dr. Lowell Taclob, an internal medicine physician from Paterson, said, "Our legislature is not doing anything about soaring premiums and medical malpractice awards, but the state is in danger." Taclob's insurance premiums are \$22,000, but his friends and peers who are surgical specialists are paying four times the amount. "I sympathize with them. They are borrowing money to pay the premiums."

"This is not about doctors, but about patients and possible limited access," said Dr. Gary Berman, a West Orange cardiologist. "Unfortunately, trial lawyers have money and influence."

The most biting criticisms against trial lawyers came from Nancy Schmidt, a nurse working

(continued on page 40)



Robert Rigolosi, president of the New Jersey Medical Society, explains why the current malpractice system does not work.

Frank Ciesla,  
president of  
Giordano,  
Halleran & Ciesla.



Jersey counterpart to the federal legislation.

"Originally, people thought kickbacks really meant kickbacks, but over time, regulators have come to apply the word, in broadly written statutes, to a number of situations that the average person may not consider illegal payment," explains Richard J. Webb, a partner at Newark-based McCarter & English, one of the state's oldest and largest law firms with 200 attorneys. "It has become very complicated and tricky to figure out clear answers . . . but if you want to take it (a transaction or joint venture) apart, and figure it all out, you may come up with a suspicion, or worse, that a doctor is getting X dollars for no reason we can figure out other than the doctor is putting a certain number of people in the hospital every year. That is a criminal violation with civil and criminal penalties," says Webb.



Richard J. Webb,  
a partner at  
Newark-based  
McCarter &  
English.

To combat the problem and prevent situations of fraud, lawyers are regularly called upon to help advise providers (doctors and hospitals) in structuring transactions or to review those already agreed upon, says Webb.

"Fraud and abuse laws are not black and white," comments Gary W. Herschman, head of the health practice group at Sills Cummis Radin Tischman Epstein & Gross, the Newark-based law firm with 150 attorneys in the state. "There are ways to structure transactions



Gary W. Herschman, head of the health practice group at Sills Cummis.

around kickback and referral laws, but sometimes you can't. If the services provided are not designated health services, you can get around the Stark Law.

"Knowledgeable legal counsel is needed to assist providers so that they stay safe (within compliance). That is what we bring to the table - our knowledge of the industry," says Herschman.

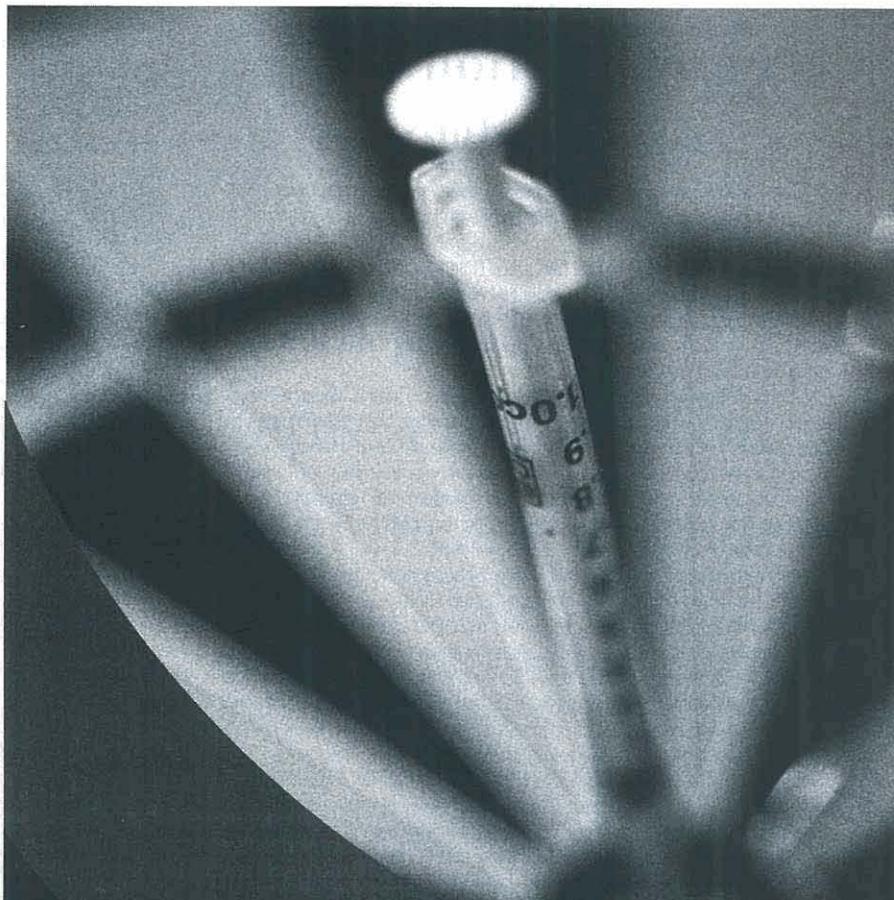
Sills Cummis monitors regulatory enforcement decisions and relates them back to clients. "We give guidance on how regulators are interpreting and enforcing laws, so that we can structure transactions to minimize risks," says Herschman.

Besides fraud and abuse laws, health care providers are facing Medicare budget cuts, and have to comply with what third-party insurance payors, including managed care companies, want to pay for services. "The medical profession is in a huge financial squeeze," says Ciesla. "The leverage is on the payor side, not the physician side or the hospital side."

Because of the squeeze, lawyers see hospitals and physician groups continuing to consolidate operations to achieve economies of scale and market share. "Because they are so regulated and because they are dependent on third-party payors, physician groups are looking to join forces so that they can have more leverage in their negotiations with payors," says Steven Greenberg, managing partner at Flaster/Greenberg, the Cherry



Steven Greenberg, managing partner, Flaster/Greenberg.



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## organ donation a timely issue for woodward strong

**W**hen Christina Woodward Strong goes to court, she knows that winning or losing a case is a matter of life and death for someone awaiting an organ transplant.

Strong is a lawyer at Gibbons, Del Deo, Dolan Griffinger & Vecchione, Newark. She specializes in the legal issues surrounding organ transplants and represents various organ procurement organizations and research and tissue banking organizations around the country, including the Organ and Tissue Sharing Network of New Jersey.

"Nationally, there is a huge need for organ donations. There is almost a one-to-one correlation that for every person who dies without donating an organ, another person will die waiting for that organ," she says. "So, if there are ever any legal obstacles that unnecessarily stand in the way of a voluntary organ donation, it's very pressing for me. If I lose an argument that I shouldn't have lost, I know that someone out there is actively hurting, possibly dying . . . everything stops when I work on a case like that."

Time is also a factor in Strong's work. Only 24 hours is available, for example, for a person who is brain dead and on a respirator, before all the organs start shutting down.

This area of medical law is just as heavily regulated as other facets. Food & Drug Administration laws must be followed in the case of tissue, and organs are Medicare reimburseable, so they are regulated by the Centers for Medicare and Medicaid Services (CMS). Strong even works with the Division of Motor Vehicles in many states, since drivers licenses can display who is an organ donor or not.

"Organ donations happen out of hospitals which are required to coordinate with an organ procurement organization, so we work on those type of contracting issues," she says.

Strong also works to have policies in place to make it easier for people to donate their organs. She, in addition, works on educating people to make them aware of organ donation.

She says that New Jersey is one of the states in which an organ donor's wishes cannot be over ruled. "In other states, families can overturn these wishes, but we were successful in getting favorable legislation passed in New Jersey," she says.



Christine Woodward Strong

Hill-based law firm with 42 attorneys. "The economic pressures that they are under are great."

Flaster/Greenberg represents physician groups and hospital medical staffs on transactional, regulatory and litigation issues. On the transactional side, this can include the merger and consolidation of groups, the creation of new entities, entering contracts with managed care groups and hospitals and handling a range of issues including the purchasing or leasing of real estate and the leasing or purchasing of equipment and services.

The trend of hospital mergers and affiliations, which were prevalent in the '90s for the creation of large health systems, will continue, according to Steven Gross, managing partner at Sills Cummis.

As a board member of Newark Beth Israel Hospital, Gross was involved in the institution's decision to consolidate into the St. Barnabas Health Care System, Livingston (the state's largest health care system).



Steven Gross,  
managing partner  
at Sills Cummis.

"With the change of economics favoring payors, hospitals started to consolidate," recalls Gross. "The small little community hospital was found to be an inefficient way of delivering medical services. As a stand-alone hospital, Beth Israel made the decision that it was too small to provide top quality care. It needed to expand with more assets, more doctors and the best equipment."

The hospital considered acquiring other institutions. It found, however, that its best route was to become part of St. Barnabas.

"It's wonderful," says Gross of the relationship, "because it (the merger) gives Newark Beth Israel the ability to be part of a larger system and be in a better position to negotiate with insurance companies and health maintenance organizations

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Acting as general counsel to Liberty Health Care System, which includes Jersey City Medical Center, Meadowlands Hospital, Greenville Hospital and Children's Hospital, is Zulima V. Farber, a member of Lowenstein Sandler, the Roseland-based law firm with approximately 200 attorneys in the state.

Zulima (who was New Jersey Public Advocate and Public Defender in former Governor Jim Florio's cabinet - recognized as the first Hispanic woman to have served as a state cabinet officer) oversees all contract work for the health care system. This includes negotiations with employees, medical staff, physician groups, administrators and suppliers. Her work also includes litigation in these areas.



Zulima V. Farber,  
a member of  
Lowenstein  
Sandler.

Since one hospital can enter into contracts with a number of physician groups to provide services in areas such as radiology, anesthesia, emergency rooms, and laboratories (areas in which 24-hour-a-day service is needed), Zulima assists Liberty Health Care in selecting the appropriate medical group. “We look for a group that has a good track record, is large enough, has all of the sub-specialties required in that particular service or department . . . and has a good track record on administrative matters such as billings and things of that nature,” she says.

For Jersey City Medical Center, which is also a teaching hospital, physician groups are sought that can also instruct residents. For Farber, environmental and real estate law also comes into play when dealing with the health care system. This ranges from the negotiation of property acquisitions and new building construction to waste material disposal.

For the construction of the new Liberty HealthCare Plaza, for example, which is

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being built on the Hudson River waterfront in Jersey City at Jersey Avenue and Grand Street, environmental remediation work had to be conducted at this brown-fields site.

The new \$200-million, 359-acute care bed hospital will replace the Depression-era Jersey City Medical Center that, according to the health care system, is costly to operate, in constant need of repair and inefficiently designed for contemporary health care delivery.

New hospital construction is a bright

spot in real estate construction today (see January 2003 issue of *NJ Business*), but it seems strange that the health care industry is talking about being economically "squeezed," while a construction boom exists.

According to Ciesla, expansions are being undertaken to make hospitals more efficient and to utilize high technology. "Very little of it (construction) is being done to increase the number of beds," he says. He takes, as an example, the new \$147-million South Jersey Regional Medical Center in Vineland. Ciesla says



John D. Fanburg,  
a partner at  
Brach, Eichler,  
Rosenberg, Silver,  
Bernstein,  
Hammer &  
Gladstone.

that the new 250-bed institution will replace approximately 700 beds that are closing at two other hospitals within the South Jersey Health System.

In order for a hospital to construct a new wing or facility or provide a new service, it needs to go through a certificate of need (CN) process with the New Jersey Department of Health and Senior Services. This is a lengthy process, according to John D. Fanburg, a partner at Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, the Roseland-based firm with 57 attorneys in the state.

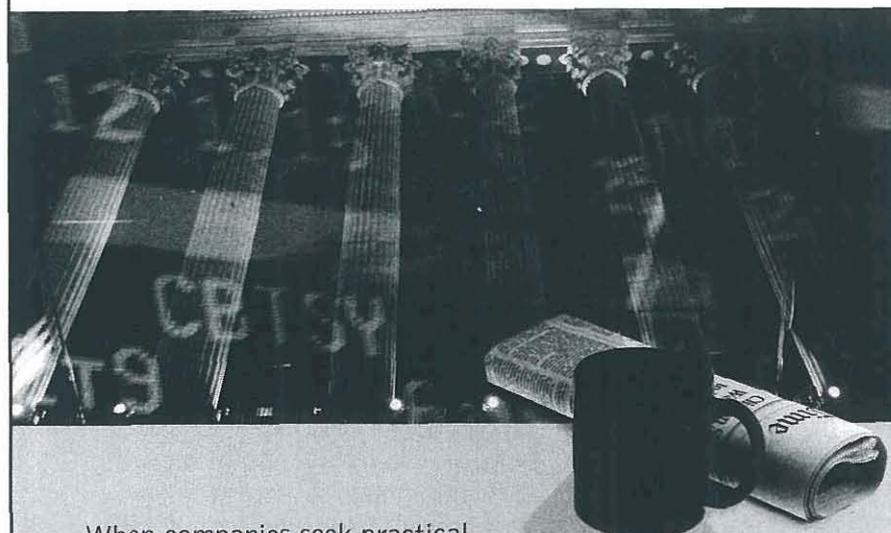
Fanburg, co-chair of the firm's health care and hospital law department, says the CN process, can be complicated and lengthy depending on the type of service being added to a health care facility. It is in place to assure there is no redundancy of service in a community served by a number of hospitals.

"A big service that all hospitals want to get into right now, for example, is cardiac care," says Fanburg. "However, if every hospital offers the service, there is not enough volume to go around. So the CN institutes a certain level of planning . . . it tries to restrict the expenditure for high-tech modalities because if every hospital has expensive equipment, how do they pay for it?"

He adds that politics is involved in the process, because if one hospital is approved for a program in a particular area, and another is denied, it can hurt the latter. "There are winners and losers. So hospitals and providers engage lobbyists to try and change rules or influence decision-makers."

An example that comes to mind is the skirmish between St. Peter's University Hospital and Robert Wood Johnson University Hospital (RWJUH), both located within a mile of each other in New Brunswick.

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Angelo Genova, partner in the firm of Genova, Burns & Vernoia.



RWJUH had received approval from the state to establish a regional perinatal center for high-risk pregnant women and ill, premature infants. St. Peter's, led by Metuchen Bishop Paul Bootkoski, said the new center would put St. Peter's, with its own leading perinatal center, out of business.

At the Bishop's urging, Governor James E. McGreevey reversed his own administration's newly adopted regulation regarding children's hospitals that would have RWJUH continue with its plan.

The case, at press-time, is still ongoing and the McGreevey administration is drafting a new proposal subject to public hearing.

While hospitals and physicians claim to have no room for revenue growth due to the regulatory restraints and the power leverage of payors, they must also deal with labor and employee relation issues among their own staffs . . . attempting to keep wages up while showing profitability.

Experienced at such employee and labor relations issues is Angelo Genova, partner in the Livingston-based firm of Genova, Burns & Vernoia. Always attempting to find more creative ways to abate or maintain costs, since higher salaries means higher health care services and higher insurance premiums for patients, Genova says the role of the labor lawyer is to find ways at the union bargaining table "to provide competitive salaries that . . . can attract quality people without breaking the bank."

Genova is handling this issue while a current nursing shortage exists in New Jersey and around the country. "The shortage has, collectively, given nurses a great deal of leverage - and hospitals can't function without nurses. Hospitals now have to pay more."

Urban hospitals are perhaps hit the hardest in dealing with nursing shortages. They handle more Medicare and Medicaid

patients, and since funding from these programs is being reduced, the money for the higher salaries needed to attract higher-quality nurses, isn't there.

These various examples reveal that it is getting difficult to practice medicine today. "It's hard for physicians to focus on the business of medicine because they're too busy providing health care," says Michael F. Schaff, chair of the corporate department and health care group at Wilentz, Goldman & Spitzer, the Woodbridge-based law firm with approxi-

mately 160 attorneys in the state.

Many times, he meets with doctors in the early morning or late evening hours. "It's sometimes between 6 a.m. and 8 a.m., before they make their hospital rounds. I even had to meet a physician at 8 a.m. Sunday," he says.

Schaff is a health care transactional attorney, dealing with physician employment agreements, partnerships and joint ventures with hospitals, for example. "I'm supposed to make their life a little bit easier in regards to the issues," he says.

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Michael F. Schaff, chair of the corporate department and health care group at Wilentz, Goldman & Spitzer.

A current area in which physicians, hospitals and other health care institutions, insurance companies as well as businesses must comply with is the Health Insurance Portability and Accountability Act (HIPAA). Passed in 1996 and with a compliance deadline of April 14 of this year, the law calls for enforced privacy protection of personal medical data by setting and enforcing privacy standards and the standardization of electronic data interchange.

According to Webb at McCarter & English, the law emanated from the proliferation of computers, information systems and the Internet and the likelihood that health care information and the payment of health care was going to be "out of the realm of paper records." The federal government developed a structure so that entities entrusted with information would be responsible and accountable for maintaining it in a secure fashion.

"HIPAA is changing the way offices and physicians do business because they now have to protect everyone's information," adds Schaff. (Next month, *New Jersey Business* will provide a detailed look at HIPAA compliance.)

With so many ever-changing regulations to adhere to and issues to combat, many lawyers say that health care is the most exciting area of the law.

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## Kocsi Named Director

James A. Kocsi is named District Director of the U.S. Small Business Administration's New Jersey District Office, Newark, by SBA Administrator Hector V. Barreto. As district director, Kocsi is responsible for overseeing the delivery of agency programs such as financial assistance, management counseling and business development throughout the State of New Jersey. Kocsi started his career as a loan officer with the SBA in 1976.

"Because of its tremendous importance to society, the complexities of the law and dealing with the needs of different groups, health care law presents tensions that a lawyer – who likes being a lawyer – can resolve. That's his or her best calling," says Gross at Sills Cummis.

"Health care," he adds, "is probably the part of life that everyone is impacted by. We all need it, from the richest to the poorest. You can do without a lot of things in this world, but you can't do without health care."

Just as citizens seek out doctors and hospitals to provide relief from their physical ailments, the health care profession seeks out lawyers to provide legal relief from a host of regulatory, reimbursement and transactional issues. ♪

## Horn President of Somerset Group

**J**effrey A. Horn of Madison is named president and CEO of the **Somerset County Business Partnership**.

Horn most recently served as executive vice president, real estate, for Newark Sports and Entertainment, Inc., a subsidiary of YankeeNets, LLC. He has also served as executive director of the New Jersey Chapter of the National Association of Industrial and Office Properties (NAIOP), a non-profit trade organization. In addition, he worked for the New Jersey State Office of Business Advocacy.

"Jeff Horn brings a hands-on understanding of the state's Smart Growth agenda and a Somerset County history that is a perfect fit for advancing the agenda of the Business Partnership," says Partnership Chairman Charlie Dalton of Aventis.

"I have done extensive research on the activities of Somerset County in the areas of smart growth and business advocacy," says Horn. "Somerset is New Jersey's trend setter in the state in both of these areas; in planning, in agenda setting, and in action."

Horn will oversee implementation of the agenda developed under an organizational structure that will include a Governmental Affairs Chamber; Business Issues Chamber; Tourism, Arts & Culture Chamber; Economic & Community Development Chamber; Workforce Issues Chamber; and Chamber Services.

The Business Partnership was formed in January of 2001 through the merger of the Somerset Alliance for the Future, The Somerset Coalition for Smart Growth and the Somerset County Chamber of Commerce. The partnership is focusing on the following areas: improved regional mobility; tax stabilization and government efficiency; smart targeted growth; workforce development; organizational development; and networking and member services.

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