



# THE PENCAK REPORT

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## Newsletter by E-mail

The *Pencak Report* is going to be available by e-mail.

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[pencakreport@hotmail.com](mailto:pencakreport@hotmail.com).

## Cyber Cautions

A recent case from the New Jersey Supreme Court addresses an employer's right to monitor e-mail and internet usage on company computers. The case, *Stengart v. Loving Care Agency*, focused on whether a woman's employer could read personal e-mails between herself and her attorney, which were sent on a company provided laptop. The woman used a personal, password-protected e-mail account to e-mail her attorney regarding an employment discrimination suit. After she filed suit, the company recovered files on the computer and read the e-mails. The company argued that the woman had waived her attorney-client privilege because of the company's written policy on electronic communication.

The New Jersey Supreme Court found against the company based upon the actions the woman used to protect her privacy, including using a personal, password-protected e-mail account (not her company e-mail address), she did not save her e-mail account password on the computer and the e-mails between her and her attorney contained a disclosure that the information was personal, confidential and may contain attorney-client communications. *Change the facts slightly and the employer prevails.*

Reduce your personal expectations of privacy at the workplace. This includes everything from e-mails and Facebook messages to websites visited. Besides, your employer has a legitimate expectation that you should be working on company time. *Use your own computer on your own time for personal matters.*

## Used Copier & Computers as Security Risks

New Jersey is considering a law requiring health professionals to destroy the hard drives before selling used digital copying machines. The hard drive could be exploited to divulge information about thousands of patients, etc. Imagine all of the private information in that digital copying machine?

The same concern goes for your business and personal computers when you turn them over to "recycling centers". Did you know that recycling centers don't really do anything environmentally responsible with computers? They ship them to Africa where poor people strip the computers, sell the hard drives to enterprising internet scammers and the rest is burned to extract precious metals from your old computer. Instead of recycling we are merely exporting our environmental hazards and putting our private information at risk. Destroy the hard drive.

## Social Networks and Your Professional License

An entire book could be written on the legal dangers of internet social networking. I will point out some new trends and not repeat the obvious known dangers to your career and opportunities to enter universities or professions.

- The Florida Board of Bar Examiners announced it will be examining lawyers' Facebook and Myspace websites when the Bar receives allegations of substance abuse! Yes, that means that photos and comments including jokes about tailgating, drinking at the lake, etc. will be used by that Florida licensing authority to form an opinion about the practitioner regarding substance abuse. *I think the spelling, grammar and composition tells me more about that lawyer. The net is killing elegant, stylish writing.*
- Expect health professional boards to follow the lead of the Florida Board of Bar Examiners.

- Remember that colleges have already been searching social network pages to decide whether to admit an applicant to their college or professional school.
- Recently, a health care professional was fired from her job at an Alabama hospital because of a tweet. In the tweet, she commented about the special care that a VIP received compared to regular patients. It is only a matter of time before more health professionals are disciplined or fired because of the contents of what they talk about in social networks. Use caution and common sense rules when using social networks.
- The United States State Department has warned people who may want to get a job with the State Department that they are not to even discuss WikiLeaks let alone repeat any contents if they wish to be employed by the State Department.
- Employers are using **credit reports** in deciding who to hire.

## What Should Employers Do?

If you own a healthcare business you should be certain that your employee manual has strict and clear policies concerning internet bullying, HIPAA, sexual harassment, defamation, disparagement and breach of confidentiality among other topics. This **includes** your employees' conduct on social networks **outside** of the work place. Increasingly, the courts have been addressing lawsuits filed by employees who claim that they have been bullied, sexually harassed, etc. by supervisors and/or co-workers on internet social networking sites. You may think that what your employees do on their own time should not impact your business, but there are courts that will disagree with you and employees squabbling on the internet about your company creates a bad image and hinders your company's growth.

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*At every crossway on the road that leads to the future,  
each progressive spirit is opposed by a thousand men  
appointed to guard the past. Maurice Maeterlink*

## RxNT.com Prescriptions

I never get bored with law practice. Something new always comes my way. Recently a client had an insurance company deny a certain number of prescriptions because the prescriptions were faxed to him by a company called RxNT. RxNT is probably not the only company doing this, but essentially they contract with doctors to handle their e-prescribing. The doctor apparently e-mails a prescription to RxNT and that company sends a **facsimile** of the prescription including controlled substances to the pharmacy. This presents a question of legality that I want to warn you about. While following this procedure does not present an issue with regard to non-controlled substances, it may be illegal according to DEA regulations when this facsimile is used for controlled substances. CFR Section 1311.170(f) states:

An electronic prescription must be transmitted from the practitioner to the pharmacy in its electronic form. At no time may an intermediary convert an electronic prescription to another form (e.g. facsimile) for transmission. (Emphasis added)

According to feedback, RxNT is quite active in this area and there are other companies doing this. I have contacted the DEA and reported this company's activities so that they might investigate and hopefully have the company make changes so that pharmacists aren't hurt. Doctors probably won't be hurt by this practice, however, a pharmacy will be hurt because an auditing insurance company will have a justification to disallow the prescriptions for controlled substances and cause a potential for a large chargeback.



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Clearly, this problem necessitates an emergency meeting with State and Federal authorities, pharmacists, and insurance companies to resolve this issue.

### **Pharmacy Board Hits Triple**

The Ohio Board of Pharmacy passed a rule restricting Ohioans to one prescription transfer—from one pharmacy to another—once a year. The Ohio Board made the change after pharmacists complained about unnecessary paperwork, time and the potential for miscommunication during transfers, according to Tim Benedict, the Board’s Assistant Director. Tim Benedict said “This is a patient safety issue. If you keep transferring prescriptions around, you’re eventually going to have problems.” “There is a difference between penny pinching and coupon shopping to the point it becomes unsafe” said Bill Winsley, the Board’s Executive Director.

Pharmacists working in community pharmacies complained that giant, big box retailers like CVS, Giant Eagle and Walmart offered incentives such as gift cards or free gasoline to transfer prescriptions. The independent pharmacies complained that it took a lot of their time just dealing with the transfers and many patients were lost solely because of the coupons according to Mr. Benedict. “It’s been kind of a hot topic debate among pharmacists” according to Kate Wilder Adams, co-owner of Wilder City Pharmacy. “The coupons are used to lure patients into the big box, corporate pharmacies and to keep them there”. Ms. Wilder Adams continued that at her pharmacy she knows her patients by name and offers personal consultations. She continued that comparing an independent pharmacy to a CVS or Kroger is “like comparing fine dining to fast food”. *Whether you agree with her or not, Pharmacist Wilder Adams is direct and colorful in expressing herself.*

### **Brighter Future**

By now, I imagine everyone reading this Newsletter has had a friend or acquaintance that lost their pharmacist position with a large corporation where it appears that the true reason they lost their job was their age. Most of those pharmacists thought they had security in the big corporation.

Government will not protect you from the depredations of big corporations because big corporations run our government and not the other way around. Yes, I am perhaps overgeneralizing here because it isn’t just big corporations; it is also individual multi-billionaires too.

So what is there to do? One pragmatic way is to start your own business either full- or part-time with your friends or family. You don’t have to open a pharmacy, just choose a business you are passionate about. Yes, there is risk in starting your own business but is there not risk in any investment?

### **Irony**

Many of you know that Michigan is the only State in the Union that has a statute barring claims against prescription drug manufacturers for drug product liability by its own citizens. MCL 600.2946(5). Governor Engler sold this bill with a claim that having such a law would cause a flood of drug manufacturers to locate in the State of Michigan and would

produce tons of jobs. Of course, the jobs never did materialize but the campaign contributions did. Here is the irony, the State of Michigan itself (not a lowly citizen) brought a claim under the Medicaid False Claim Act against the makers of Vioxx™ claiming that essentially the manufacturer’s dangerously defective drug shouldn’t have been marketed, prescribed and paid for by Michigan’s Medicaid. Now here is the ironic part, the Court dismissed the suit pursuant to MCL 600.2946(5) and asserted that the State of Michigan was just trying to get around its own drug manufacturer immunity statute by using the False Claim Act.

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*Against brute force and injustice the people will have the last word. That of victory.* Ernesto Guevarra

### **Fraudulent Billing and You**

Remember, that while some heads of federal and state agencies are paid off by the industries they are supposed to regulate, the **vast majority** of the agencies’ employees are moral, dedicated people who are trying to make this country a better place to live. These public employees can be trusted to protect our environment and public safety but they need our help.

Just beneath a veneer of corporate respectability often lies a practice of greedy, cynical fraudulent billing by health care providers. Sometimes, it is as transparent as a visiting physician billing Medicare for tests and drugs that were never administered. Or, it could be a PBM overcharging for drugs through clandestine, procurement schemes. In either case, if you have knowledge and a desire to restore integrity and nobility to the health professions I want to work with you.

There is a discrete mechanism in place that allows people with inside knowledge to work through me to address this expensive swindling. In most cases, the federal investigators would not know if, when and how the frauds take place if it weren’t for private citizens and lawyers filing confidential *qui tam* actions.

The federal government has been able to recover hundreds of millions of dollars in pure fraud each year in Michigan alone. The relators in these cases typically are paid from 15% to 25% of the amount recovered by the government! As a fellow health professional you can be certain that I understand the need to preserve your confidentiality when you contact me and of that you can be assured. Since so many corporations have no conscience we shall have to restore integrity one scoundrel at a time.

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Please take a look at my blog at [pharmacylawpro.com](http://pharmacylawpro.com). The blog format allows me to respond to law developments more spontaneously and with more detail. I think my latest blog on a novel way of addressing substance abuse is a really important, original and innovative concept that could be easily implemented in Michigan and nationwide.

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To all of you who were kind enough to extend your condolences to me for the recent passing of my older brother, your kind wishes and prayers were greatly appreciated.