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Clinical Trials COMPLIANCE

STRATEGIES FOR MEDICARE BILLING, FDA, AND RESEARCH COMPLIANCE

—INSIDE—

Avoiding lawsuits

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Draft guidance released

On p. 8 you can read more about a draft guidance that was released recently regarding conflicts of interest.

HIPAA

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Private practice physicians should use care when conducting research

It used to be that clinical research was mostly conducted at teaching hospitals and large institutions. However, in recent years the demand for researchers has skyrocketed, and more and more independent physicians and physician specialty organizations are joining the game.

Yet new researchers' forays into clinical trials can be fraught with problems. While the more traditional research facilities have had years to come up with systems and policies to ensure research compliance, independent physicians and physician organizations

often have not.

Physicians may also need to navigate ethical problems that traditional researchers don't experience, simply because the subjects they recruit are also their patients. It takes a shift in mindset for a physician to move from providing medical treatment to patients to conducting research on subjects.

Attorney **Robert Nicholas**, a partner with McDermott Will & Emery in Washington, DC, says there are ways that independent physicians can avoid problems when it comes to conducting research. The > p. 2

Lawsuit filed in wake of trial deaths

The widow of an elderly New York man who died of cancer last year is suing two former Department of Veterans Affairs (VA) researchers, saying they used her husband as a "guinea pig," enrolling him in experimental drug trials that contributed to his death.

Attorney **Alan Milstein** filed suit in U.S. District Court in New York on March 18 on behalf of Jayne Steubing of Albany, NY. The suit claims that research assistant Paul Kornak of Clifton Park, NY, and oncologist James Holland, MD, of Voorheesville, NY, altered medical records while working at the Strat-

ton Veterans Affairs Medical Center in Albany. They allegedly were attempting to make patients seem sicker or healthier than they really were so they could be enrolled in drug studies they would not otherwise have qualified for.

"They were enrolling people in the study who shouldn't have been in the study. The subjects are just desperate to take any shot for a cure, and researchers take advantage of that," Milstein says.

The suit seeks to enroll as many as 100 other patients who participated in human subject research > p. 4

Private practice

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most critical steps, he says, are ensuring proper training and documentation.

But first, physicians must understand that conducting research is not the same as treating patients. “Clinical research is not the practice of medicine,” says Nicholas. For primary care physicians, the only focus is treating the patient’s condition. The goal of research is fundamentally different. Physicians conducting research are bound by the protocol.

This can lead to problems for physicians who are often inclined to treat subjects in trials as they would patients who come into their practice. For example, a physician might be more inclined to deviate from a protocol in order to improve a patient’s care, but doing so can invalidate data and ruin the research.

“Obviously this doesn’t mean that you let a patient die or go untreated,” says Nicholas, but the mindset needs to be different.

Avoiding recruitment conflicts

Physicians can run into unique problems when it comes to recruiting subjects for a trial and taking them through the informed consent process. More often than not, the subjects being enrolled are patients of the practitioner. The physician likely has a relationship with the patient already, which can cloud the process.

In addition, there is also a financial component—namely that the physician is being paid to conduct research. That means there is a physician has an incentive to enroll the patient in the study and a potential for conflict, says Nicholas.

“This is something that physicians have to be sensitive to,” he says.

A number of high-profile lawsuits involving research include instances of a researcher bending enrollment

criteria to sign on a subject who should not have qualified for the trial. For example, a recent lawsuit filed against two former Department of Veterans Affairs researchers alleges that a patient, who later died eight months after receiving experimental cancer

drugs, should have been excluded from the trial because of pre-existing medical conditions. (See related story on p. 1.)

Organizations can guard against this by requiring documentation for all enrollment criteria, says Nicholas. For example, if the trial is only open to people of a certain age, require a driver’s license and include that documentation

as part of the record.

Understanding research obligations

In addition to overcoming the treatment mindset, physician’s offices aren’t always equipped to handle the documentation or compliance issues that come along with research.

Unlike research facilities, these offices might not have policies, procedures, or in-house oversight to use to review their work. “Most of the medical doctor organizations don’t have their own IRBs,” says Nicholas. More often than not, multi-site trials in which they participate have a central IRB, which could be free-standing or part of one institution. This means that there is no one in-house for the physician to report to, which can impair communication regarding the trial.

In addition, physicians are not necessarily as schooled in paperwork or reporting requirements, says Nicholas. They may also run into additional documentation issues, because often their subjects are also active patients and two sets of records may exist one for treatment and one for the trial.

For example, protocols have defined steps that outline when tests need to be done, and set windows for various visits. Problems can arise when a patient

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shows up for a non-study related visit at the same time a study-related visit was mandated. The study-related requirements might be missed because records are not cross-referenced, says Nicholas. “[Physicians] have to be prepared to do things differently,” says Nicholas.

Staff oversight

In many cases, the responsibility for this additional documentation and recordkeeping will be left to office staff. Many physicians are using research to make up for decreasing reimbursements from managed care, and as a result are relying heavily on office staff to perform many research tasks and provide oversight—sometimes too heavily.

“I’ve seen cases where physicians had no idea what their responsibilities were,” says Nicholas. This can lead to major problems, particularly if the staff is not well trained.

It’s critical that physicians hire qualified staff and provide adequate training for them. Train staff to understand that the protocol is inviolate. If you deviate from it, you have to talk to the sponsor.

Proper documentation and good recordkeeping is also critical. “FDA’s rule is that if it’s not written, it’s not done,” says Nicholas.

Understanding your responsibilities

Physicians must also understand what their role is and what work they need to oversee when it comes to a clinical trial.

That’s not to say you can’t rely on staff, says Nicholas. “Physicians should delegate tasks,” he says. “There is no reason for them to perform every function.” But they need to be involved and they need to be guided by the protocol.

Be certain that the amount the sponsor is paying you to conduct a trial is enough to actually cover your costs of being involved in it. This way you’re not tempted to skimp, he adds.

And don’t rely exclusively on the sponsor’s monitor-

What to do if you do get audited

If you are conducting research that’s overseen by the FDA, there’s a chance you could get audited. Today more than ever, there is added pressure on researchers to comply with research regulations because of heightened scrutiny and recent litigation.

If the FDA shows up at your site, it will be for one of the three following reasons, according to attorney **Robert Nicholas**, a partner with McDermott Will and Emery in Washington, DC:

1. The study is a pivotal one used to support regulatory approval of a new drug or device
2. It’s a random audit of IRBs and clinical investigators
3. They received a complaint and are conducting a for-cause inspection

In the event that the FDA does audit your site, ensure that your records are well organized, complete, and that you understand your legal responsibilities. Be certain of the following:

- You can find required records quickly
- Files are well organized and readily available
- You answer questions but don’t volunteer information to auditors
- You answer questions honestly and in a forthright and non-evasive manner
- There are documents for actions, and consistency between patient charts and study documents ■

ing program to find problems within your institution, says Nicholas. Be certain you know what is going on in your own organization. Know what your legal responsibilities are and what your ethical responsibilities are. “It’s not enough to care about your patients,” says Nicholas. ■

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Trial deaths

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drug trials conducted by Kornak and Holland between 1999 and 2003 in a class action suit. Jayne Steubing is the only named plaintiff so far, but Milstein says he has already spoken with several others who may join the suit.

Damages in excess of \$1 million are being sought, but Milstein says it will be up to a jury to decide the actual amount. "It's not the kind of thing you can estimate," he says. "It's not something you can even suggest to a jury. Whatever the jury believes is reasonable in light of what they see as pain and suffering."

The claimed damages are based on violations of federal regulations governing human research and the rights to bodily integrity and human dignity as guaranteed under the Fifth Amendment and the Nuremberg Code, a list of research ethics drafted in response to Nazi war atrocities.

Feds also under fire

Milstein, of the firm Sherman, Silverstein, Kohl, Rose & Podlosky in Pennsauken, N.J., says he is also planning to file suit against the federal government. Before doing so, he has to file a federal court claims notice, giving the government an opportunity to respond.

He claims the federal government was negligent because Stratton officials hired Kornak to recruit for and monitor patients in sensitive cancer studies despite knowing his medical license had already been

revoked in two states.

The lawsuits are the first of what could be a string of legal problems arising from how studies are conducted at VA. Investigators from the VA have also found research problems at centers in other parts of the country. The VA spends \$1.3 billion annually on medical studies, making it one of the country's leading research institutions.

As a result of what allegedly took place at Stratton, human research studies at dozens of Veterans Affairs hospitals are now undergoing a review. In March the VA ordered a 90-day "stand down" on all human research activities at its affiliated medical centers. This stand down was not a suspension or research activities, according to a VA memorandum circulated at the time. Rather, it was seen as a way for the VA to review its research practices. (For more information see the April issue of **CTC**.)

Patients at risk

Steubing first became involved with the VA research program shortly after being diagnosed with stomach cancer by his private physician in January 2001. This diagnosis followed Steubing's successful treatment for colon cancer in 1985.

Soon after his stomach cancer diagnosis, the suit says, Steubing learned of a drug trial for patients with his type of cancer that was taking place at Sloan-Kettering Cancer Center and at Stratton in Albany. Because

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of a two- to three-month wait period at Sloan-Kettering, Steubing met with Kornak, who recruited and enrolled him in one of the seven human subject experiments taking place under his supervision and direction at Stratton.

In Steubing's case, his history of colon cancer should have kept him out of the stomach cancer trial.

The suit, says Kornak and Holland, "willfully" ignored that Steubing's history, blood chemistry, and hematology exposed him to increased risk of harm and suffering if he were to participate in the experiment, which should have made him ineligible for the study. Steubing died about eight months after receiving experimental cancer drugs.

The suit says that after Carl Steubing's death, the chief of staff of Stratton informed Jayne Steubing that her husband's condition may have been compromised by the defendants' wrongful conduct, and that he may not have been qualified for the study.

"Federal authorities were warned seven years ago that veterans with cancer at Stratton . . . were being given drugs in violation of medical protocols," the suit says. It says some staff members complained that Stratton patients were treated "as guinea pigs."

Skeletons in the closet

The suit also includes disturbing details about Kornak's past. The chief of staff told Jayne Steubing that in 1990, Kornak was denied a medical license by the state of New Jersey because he falsified many of the documents he filed with his application. He provided transcripts from a Polish medical school which he had created himself and altered undergraduate transcripts from the Junior College of Albany and the College of Saint Rose. He added courses he hadn't taken, raised most of his grades, changed the cumulative averages, and re-dated the transcripts to reflect a more recent date.

In 1991, the state of Iowa revoked Kornak's license for providing false information on a license application. A year later, he was convicted of mail fraud for forging credentials when he tried to obtain a license in Pennsylvania. He was sentenced to three years probation and fined \$2,500, the suit states.

The suit also claims Holland hired Kornak in 1999 knowing that Kornak's medical license had been revoked.

"Federal authorities were warned seven years ago that veterans with cancer at Stratton . . . were being given drugs in violation of medical protocols," the suit says. It says some staff members complained that Stratton patients were treated "as guinea pigs."

Pondering criminal charges

Kornak and Holland are also allegedly targeted in an ongoing criminal investigation centering around the hospital's troubled cancer program, according to published reports. Federal investigators are looking into whether the medical records of some patients were forged to enroll them in drug studies that may have put

their health at risk—or even killed them.

Kornak and Holland both stopped working at Stratton several months ago when federal investigators began digging around.

Lessons to live by

So what can research institutions do to keep their researchers from going too far? "That's the million-dollar question," says Milstein. The main thing, he says, is to tell the truth about what the study is about and what the likely results will be. Another key is to have a patient or subject advocate who serves as a go-between for the researchers and patients.

"[Advocates] may think more about the patients' well-being," Milstein says. "That's certainly an important part of it, to make sure you have somebody in between to talk to the patients and make sure the patients' best interests are being dealt with."

Some experts say another key to avoiding a lawsuit, is to ensure strict compliance with federal regulations and to properly disclose financial conflicts of interest. (See related story on p. 6.) ■

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Analyzing recent research-related lawsuits

In recent years, a number of high-profile lawsuits have been filed against people and institutions involved in clinical research.

Almost all of these lawsuits have four factors in common, according to **Dianne Bourque, JD**, chief legal counsel for the Lahey Clinic in Burlington, MA. They all

- were brought by the same law firm, Sherman, Kohl, Rose & Podlosky in Pennsauken, NJ
- were brought by the same lawyer—Alan Milstein
- contain similar claims
- contain long lists of defendants, which have included everyone from the IRB chair to the university president

So could your organization be the next one targeted by Milstein? “Of course,” says Bourque, who spoke during a recent workshop, *The Future Face of Protecting Human Subjects: Legislation and Implementation*, hosted by the Lahey Clinic and the Harvard Medical School in Boston. But avoiding lawsuits shouldn’t be your organization’s focus, she says.

“Once you get past the hype, civil litigation is not your biggest risk,” says Bourque. Regulatory compliance is what most organizations should be focusing on. “Once you drift away from the laws, you drift toward plaintiff-lawyer infested waters,” she says.

Research can make an easy target for attorneys, she says. “Any decent lawyer can pound on the table and say, ‘This doctor gave subjects medicine and he didn’t even know if it worked.’ ”

“Well, yeah—that’s research,” Bourque points out.

Legal claims

All the cases filed by Milstein include similar claims, says Bourque. Some claims are more valid than others (see related box, p. 7).

Milstein typically challenges the ethics of conducting research. In addition, all suits “portray the plaintiffs as helpless guinea pigs at the mercy of financially motivated investigators,” says Bourque. However, these cases have also all involved violations of research compliance regulations. (Read about Milstein’s most recent lawsuit on p. 1.)

For example, Bourque says, in one case filed by Milstein, the families of participants in a blood cancer clinical trial performed at the Fred Hutchinson Cancer Research Center in Seattle, sued the center for failing

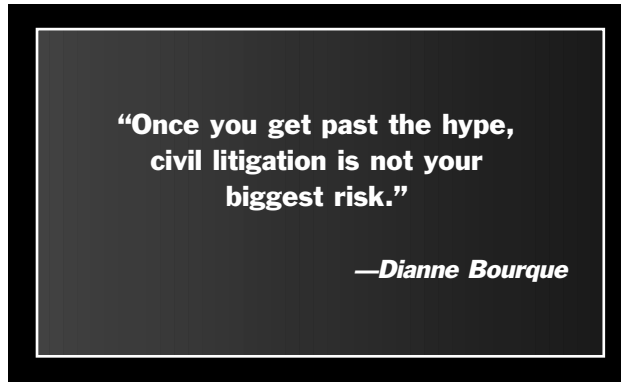
to adequately warn them about the risks involved in the study. Among the problems that existed were the following, according to Bourque:

- Patients were enrolled who didn’t meet the admissions criteria
- Adverse events went unreported
- Changes to the protocol were not reported to the IRB
- Investigators were not properly trained
- The average IRB meeting was one hour “including dinner”

In another case—the death of 18-year-old Jesse Gelsinger in a gene therapy experiment at the University of Pennsylvania—the following violations were found:

- Consent forms were inadequate
- Adverse events weren’t reported
- Patients enrolled didn’t meet study criteria
- Research staff weren’t properly trained

In addition, there is typically also some financial con-



flict of interest that existed in all of these cases. Potential conflicts include the following, she says:

- Equity ownership
- Gifts
- Donations
- Incentives
- Grants

“A lot of these things can be completely legitimate,” says Bourque. But if not managed properly, they can lead to problems.

It’s critical to properly disclose conflicts so that they can be managed. (See related story on p. 12 regarding Milstein’s views on managing conflicts.) In addition to managing conflicts, the most important steps an organization can take to protect itself are to ensure that it does the following:


- Complies with federal and institutional policies.
- Documents compliance.
- Includes indemnification provisions in research contracts. This will protect your IRB members in the event that they are sued.


Taking these steps to ensure your facility is in compliance will help protect you from lawsuits in the future. ■


Sorting through the legal claims

The legal cases filed by Alan Milstein have included both valid and more controversial claims. **Dianne Bourque, JD**, chief legal counsel for the Lahey Clinic in Burlington, MA analyzed the various claims and their validity.

The shaky claims filed by Milstein are as follows:


 **Breach of assurance.** This is similar to a person getting into a car accident with an uninsured driver. That person cannot sue the other driver for breach of driver’s license, she said. Driver’s license violations can only be enforced by the state, similar to this claim.

 **Breach of 45 CFR 46,** a federal regulation. This is similar to the above case. Only the federal government can sanction someone for violating a law, not a private plaintiff.


 **Breach of dignity right.** This is not currently a real right.


 **Negligent infliction of emotional dis-**


stress. This is a tough claim to bring, Bourque said. Lawyers usually bring this claim when they can’t show damages.

 **Breach of the Belmont Report, Declaration of Helsinki and Nuremberg Code.** Milstein, she said, claims these are world statutes, which allows him to bring legal action based upon them. “It’s a lovely sentiment, but it’s not true,” she said.

The more legitimate claims, she said, are as follows:

 **Battery.** The lack of proper informed consent can be considered battery. A person was essentially touched without his or her permission.

 **Fraud.** This claim is made more compelling in these cases because often the researchers had financial conflicts of interest.

 **Strict products liability.** This would involve, for example, the inappropriate manufacturing of a vaccine, leaving the product open to contamination. ■

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Draft guidance targets financial conflicts of interest

The government recently released a draft guidance that seeks to help protect human subjects from potential perils caused by financial conflicts of interest.

If the draft guidance, published in the March 31 *Federal Register*, were approved in its present form, it would mean additional steps for research institutions and IRBs, says **Adil Shamoo, PhD**, a research scientist and professor at the University of Maryland in Baltimore. For example, "The IRB will now have to ask each IRB member if they have a conflict of interest," he says.

The draft guidance applies to human subjects research conducted or supported by the Department of Health and Human Services (HHS) and replaces an interim guidance that had been issued on this topic in January 2001. Shamoo calls the guidance a "small step forward," but says it should have done more to reveal potential conflicts. However, he says one advantage of this document is that it unifies the FDA and Office for Human Research Protections positions.

The draft guidance suggests questions to help institutions define their conflict of interest policies. It also recommends that organizations take steps to reduce conflicts, such as the following:

- Create conflict of interest committees and extend their responsibilities to address institutional and financial interests in research
- Establish criteria to determine what constitutes an institutional conflict of interest, including identifying leadership positions for which the individual's financial interests are such that they may need to be treated as institutional financial interests
- Establish clear channels between conflict of interest committees and IRBs

- Provide training material on conflicts

In addition to institutional recommendations, the guidance also suggests steps that IRBs and investigators should take, including the following:

- Remind IRB members of conflict of interest policies at the start of each meeting and ask whether anyone has potential conflicts related to specific protocols
- Record the results of this polling in IRB meeting minutes
- Record in IRB meeting minutes verification (for each protocol) that conflicted members did not participate in discussion or vote on protocols involving his or her conflict of interest
- Include information on the consent form such as the source of funding and funding arrangements for the conduct and review of research
- Include on the consent form information about a financial arrangement of the institution or an investigator and how it is being managed

Go to www.clinicaltrialscompliance.com to see a copy of the draft guidance. Comments are being accepted on the draft guidance until May 30. Go to www.fda.gov/OHRMS/DOCKETS/98fr/03-7691.pdf for more information. ■

Questions? Comments? Ideas?

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Incorporating HIPAA into your consent process

If your organization is a covered entity under HIPAA, your informed consent process just got more complicated. On April 14, the HIPAA privacy rule went into effect. Under HIPAA, sites must get authorization from subjects in order to use or disclose their protected health information, or PHI.

The HIPAA authorization is the responsibility of the covered entity—unlike informed consent, which in the FDA-regulated environment, is a joint responsibility of the study site and the sponsor, says **Lawrence “Doc” Muhlbaier, PhD**, a faculty statistician and IRB member at Duke University in Durham, NC.

These authorizations have been difficult for many sites to create. This is likely true because the authorization language and content described in the final rule is generic. It’s designed for all authorizations—not just those used in research. It has only one or two research-specific elements—the expiration date on the authorization can be indefinite (as long as this is clearly stated), and it allows for the withholding of the information in the research record until the study is over.

Include authorization in your consent document

The HIPAA authorization can be part of your existing consent form or a separate document. The authorization does not have to be reviewed by an IRB, unless it is combined with the informed consent document.

However, some IRBs—particularly independent ones—have taken the stance that they must review authorizations if they had to review consents.

“That’s part of the confusion,” says Muhlbaier. Recent guidance from the Department of Health and

Human Services (HHS) emphasized that IRBs did not have to review authorizations.

“Personally, I think it’s better to combine the forms. It’s less of a patient burden. The loss of privacy is treated as one of the risks of a study,” he says.

“At Duke we made the decision in 2002 to combine the authorization and the consent, and we made the educated guess that the proposed rules from March 2002 would become final . . . so that is the language we started using in renewals,” Muhlbaier says. “We did this to minimize the impact on continued enrollment.”

Many sites are likely to also opt for a combined form, says Muhlbaier.

He conducted an informal survey among IRB members, which showed that about half of the sites were going to begin with a combined consent/authorization form.

The other half of sites, however, while planning on switching to a combined form by 2004, were initially starting off with separate forms. This is because stand-alone authorizations can go through a less complicated administrative process.

The disadvantage of the separate authorizations, however, is that you now have two pieces of paper to present to subjects, two separate education requirements, and two separate processes to track, says Muhlbaier.

There is also the risk of inconsistencies cropping up between the two documents, which can put your facility in violation of one or another of the research regulations.

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**“Personally,
I think it’s better
to combine the forms.
It’s less of a patient burden.
The loss of privacy is treated as
one of the risks of a study.”**

**—Lawrence “Doc”
Muhlbaier, PhD**

HIPAA

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Crafting your authorization

Consider your subjects when creating your authorizations. Make them clear and easy to read.

Because of this plain language requirement, legal departments should not be the ones drawing up the documents, says Muhlbaier.

“The language that is appropriate for legal contracts is clearly inappropriate for authorizations,” he says. Often consent forms for FDA-regulated studies are drafted in the regulatory affairs department with the help of professional writers.

Authorizations should be written at an eighth-grade level, and this becomes a daunting task when it comes to explaining complex medical procedures or laboratory tests.

To combat this problem, Duke University has provided its IRB with sample language to assist investigators in writing clear and easily understood descriptions of laboratory tests and other complex procedures.

Muhlbaier says organizations should take steps to come up with similar definitions rather than leaving it up to the investigators.

“This promotes consistency, but also the documentation will also support [Duke’s] decisions in the event of [an HHS] audit.”

Statement of further disclosures

When you are drafting your HIPAA authorization, it’s also important to consider using care when inserting the required statement that further disclosures may not be subject to the privacy regulations. Depending on the circumstances surrounding the use of the PHI, this statement may or may not be true, says Muhlbaier. However, it is required.

This may prompt some sites to work with sponsors in modifying the site contract to include some of the promises from the sponsor regarding how

they will protect privacy and confidentiality.

Currently, few site contracts make mention of how they are going to treat PHI, although many do include some confidentiality language. But almost all of that language is devoted to ensuring that the site will keep the sponsor’s proprietary information confidential, not information provided by the site.

“I think some sponsors are going to be amenable to adding these protections,” says Muhlbaier. “But they are going to resist being drawn into full HIPAA compliance, because they are not covered entities.”

Duke University will limit the amount of information that it releases to sponsors. The consent form standards state that direct identifiers, such as name, address, and medical record number, will not be sent to the sponsor. Exceptions to that standard will require scientific justification, says Muhlbaier.

Sponsors will likely be interested in what your authorization forms look like, says Muhlbaier. While sponsors can’t dictate the content of the authorization, they certainly will have an interest in the content, because a poorly crafted authorization might reflect badly on them or make it so they can’t use information that is obtained, says Muhlbaier.

So, how will sites fare under these new HIPAA authorization requirements? “Only time will tell how much the reduction in enrollment really comes from HIPAA and HIPAA non-readiness at the sites,” says Muhlbaier.

Many of these enrollment reductions are likely to be caused by sites that don’t have the proper forms in place, and don’t have the paperwork done. Another holdup could be if sites don’t have the needed processes in place to track the paperwork. Sites have to be able to retain the signed authorizations for six years. ■

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FDA looking in new directions in clinical research

The FDA is handling a heavier workload than ever before. There are more investigators; currently the FDA database contains more than 50,000 active investigators—a number that grows by 8,000 to 9,000 each year.

There are also more vulnerable subjects, including children, and more multicenter and multinational trials. The FDA is also seeing more delegation, outsourcing, and more sophisticated technology, such as Internet trials.

With these changes in mind, the FDA and its new commissioner **Mark McClellan, MD**, are looking in new directions when it comes to research, according to **David Lepay, MD, PhD**, the senior advisor for Clinical Science with the FDA.

Lepay gave an FDA update during a recent conference sponsored by the FDA and the Office for Human Research Protections, and hosted by the Lahey Clinic in Burlington, MA, and the Harvard Medical School in Boston.

He said that while research has grown and become more complex, compliance is actually better than it was 25 years ago. But fraud is still a problem.

Public confidence in research is also an issue. While 83% of adults believe research is essential or very important, only 24% are very confident that patients in trials are not being used as “guinea pigs,” Lepay said.

To meet its new challenges, the FDA hopes to improve the flow of information and promote communication and coordination in the future.

Increasingly, the FDA is also encouraging facilities to take risk-based approaches when it comes to research. “Risk management recognizes what is riskiest and puts attention in those areas,” said Lepay. Another focus is increasing public confidence in the research system.

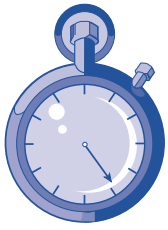
The FDA is hoping to improve research oversight by encouraging IRBs to return to a back-to-basics approach. IRBs should ensure the following:

- ☑ Trials are ethical before they begin and as they continue forward
- ☑ Informed consent is adequate to truly help subjects understand the risks of a trial
- ☑ Contacts provided to subjects during research are the correct ones to answer any questions that might arise

Lepay said the FDA will likely also focus on the following key areas in the future:

- ✎ Developing structures to help support the IRB, such as data safety monitoring boards. It plans to release a draft guidance related to data monitoring committees. He noted that data monitoring committees are not required (except under 50.24).
- ✎ Identifying additional safeguards for vulnerable populations including children, pregnant women, and others.
- ✎ Identifying issues that may compromise IRB review and effectiveness (i.e., IRB shopping). The FDA recently sought comments to determine the extent of the problems and related issues.
- ✎ Promoting better coordination with the OHRP.
- ✎ Promoting voluntary accreditation as a means of helping IRBs improve themselves.
- ✎ Working to prevent problems caused by conflicts of interest.
- ✎ Closing loopholes. “We need to have a system in place to identify people who falsify data,” said Lepay. In particular he mentioned oversight of or by sponsor-investigators, and ensuring trials have an IND/IDE when one is required. ■

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Quick tip: Conflicts can't be managed, according to attorney Alan Milstein

Attorney **Alan Milstein** has been involved with some of the most high-profile legal cases related to clinical research. Among them, he represented the family of Jesse Gelsinger, an 18-year-old who died during a gene therapy experiment at the University of Pennsylvania in September 1999.

Milstein, a partner with the firm of Sherman, Silverstein, Kohl, Rose & Podolsky, in Pennsauken, NJ, spoke in March during the Third Annual Medical Research Summit in Washington, DC.

He told audience members to be vigilant when it comes to conflicts of interest involving investigators.

"I'm of the belief that you can't manage conflict of

interest," said Milstein.

Conflict of interest was an issue in the Gelsinger case, he said. The lead investigator had stock in the company that he founded to market the gene therapy technique that resulted in Gelsinger's death.

The University of Pennsylvania, he said, knew the researcher had a conflict, and they even included a statement to that effect on the consent form, said Milstein.

But the conflict still became an issue in the case, Milstein said. He said the best advice he can give to researchers, "If you have a conflict, don't do the research." ■

"I'm of the belief that you can't manage conflict of interest."

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