DALLAS BAR ASSOCIATION
HEALTH LAW SECTION

PRESENTS

Health Law 2016:
Mediation Killers & Cures

12:00 noon, Wed., 10/19/16
The Belo Mansion
Dallas, Texas

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COMMON HEALTHCARE CLAIMS

- HCFA
- ERISA
- CPT Codes
- Superbills and Batching
- Clean & Unclean Claims
- Claims of Fraud & Abuse
- Electronic Billing
- ICD9 Diagnostic Codes
- PPACA
- HIPPA
- Managed Care
- Texas Medical Foundation
- Medicare
- PPOs

- HMOs
- Health Systems
- Home Healthcare Agencies
- Real Estate
- Office Leasing
- Business Transactions
- Practice Consolidations
- Physicians’ Contracts
- Nurse Practitioners’ Contracts
- Other Medical Staff Contracts
- Stark and Safe Harbors
- Medical Malpractice
- Asset Protection
- Medicare Liens
COMMON HEALTHCARE CLAIMS

• Negligence Referral
• HCQIA (Health Care Quality Improvement Act)
• Emergency Medical Treatment and Active Labor Act (EMTALA)
• Texas Health Care Quality Improvement Act (Tex. Occ. Code)
• Texas Identity Theft Protection Act and Data breaches
• Physician Credentialing
• Peer Review Dispute
• Peer Review Privilege and Immunity
• Data Bank Reporting (NPDB and HIPDB)
• Genetic Information Non-discrimination Act of 2008 (GINA)
• Family & Medical Leave Act (FMLA)
• Covenant not to Compete
• 1981 Civil Rights Act
• ADEA
• Disability ADA/ADAAA Claims
• Title VII
• Race, Sex & Gender Discrimination
• Sexual Harassment
• Wrongful Termination
• Coverage Disputes
(d) If a hospital's credentials committee has failed to take action on a completed application as required by Subsection (k), or a physician, podiatrist, or dentist is subject to a professional review action that may adversely affect his medical staff membership or privileges, and the physician, podiatrist, or dentist believes that mediation of the dispute is desirable, the physician, podiatrist, or dentist may require the hospital to participate in mediation as provided in Chapter 154, Civil Practice and Remedies Code. The mediation shall be conducted by a person meeting the qualifications required by Section 154.052, Civil Practice and Remedies Code, and within a reasonable period of time.
MANDATORY MEDIATION FOR HEALTHCARE PROFESSIONALS

– *May* adversely affect her/his medical staff membership or privileges
– Healthcare professional *may* require the hospital to participate in mediation.
– The mediation *shall* be conducted by qualified mediator.
– Mediation *shall* be conducted within a reasonable time
– Healthcare professional has cause of action to require mediation
Preparation of the Healthcare Personality

• Most cases include at least one physician
• Physicians uniquely trained (i) to be “in charge” and (ii) regularly interrupt lives for well being and lives of others; therefore, limited patience for lengthy mediation process and mediation downtime
• The apology: trained to never apologize
Preservation of Confidentiality

• Healthcare Quality Improvement Act of 1986 for confidentiality of peer review information (+ immunity from lawsuits and monetary for hospital and peer review committee)

• Health Insurance Portability and Accountability Act (“HIPAA”) – mediator as contractor
THE DATA BANK

- National Practitioner Data Bank
- The Healthcare Protection and Integrity Data Bank

www.npdb-hipdb.com
• Centers for Medicare & Medicaid Services ("CMS") new rule ending mandatory arbitration of nursing home claims is effective November, 2016
METHODOLOGY & THE SURVEY

• One Question: List 3 Reasons Mediations Fail
• 249 mediators surveyed from across U.S.
  – TMCA Conference (Austin, 10/2014)
  – JAMS Dallas Panelists (Dallas, 11/2014)
  – Dallas Chapter, Association of Attorney Mediators (Dallas, 12/2014)
  – Dallas Chapter, National Employment Lawyers Association (Dallas, 1/2015)
  – Dallas Fort Worth Arbitration Study Group (Dallas, 9/2015)
  – Association of Attorney Mediators (Nashville, 4/2016)

• 684 Responses
THIRD PARTY INTERFERENCE

Patient & Families

Federal Regulators

Peers

Insurance Adjustors

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MONEY

• Attorneys’ Fees & Costs
• Insufficient Settlement Funds
• No Money to Offer
• Economy
• Insolvency
• Bankruptcy
• Past & Future Medical Expenses
PREFERS COURT

Have a story to tell a judge/jury

Think they will prevail

Think they will get more money

Power play to save face

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“Other”

- Unethical
- Illegal
- Mental Incapacity
- Unexpected Illness
- Etcetera
COMMUNICATION

Miscommunications

Afraid to speak up

Information Withheld (Discovery)

Language Barriers (Native/Technical)

Facts Misrepresented

22
AUTHORITY TO SETTLE

Present
Adequate
Power to Act
Not Via Phone

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MEDIATOR

Skills
- Effective Negotiator
- Process Knowledge
- Applicable Experience
- Substantive Expertise

Control
- Over the setting/facilities
- Over the process

Communicate
- Effective Communication
- What’s Left Unsaid
MEDIATION PROCESS

Timing: too late, too early, not enough

Process misused/abused

Not a fishing expedition

Remediations
LACK OF PREPARATION

BE PREPARED

Client
Attorneys
Mediator
Others

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BAD FAITH

Refusal to move

No desire to be there

Refusal to cooperate

No intention of settling
LAWYERS

Hidden agenda

Gumming up the works

Power play

Drumming up fees

Delay

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UNREALISTIC EXPECTATIONS

About the process
About the outcome

About the money
Of clients/attorneys

Risks
EMOTIONS/EGO

Anger

Fears

Hate

Pride

Impatience

Vindictiveness

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EMOTIONS/EGO

FEAR

People/Relationship

- Insecurity
- Anxiety
- Uncertainty
- Dread
- Panic

Hospital/Corporate/Business

- Saving Face
- Business Reputation
- Intra-Business Repercussions
- Financial Ruin
EMOTIONS/EGO

ANGER

Antagonism

Fury

Resentment

Vengeance

Provocation

Frustration
CURES/BEST PRACTICES

• Properly time the mediation
• Prepare and communicate with the attorneys in advance
• Deal with unrealistic expectations
• Identify and confront bad faith
• Embrace emotions
CONTACT INFORMATION

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