

Texas Medical Liability : Addressing its Impact on your Practice

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1

Why Does Medical Liability Matter to You?

➔ <http://s388.photobucket.com/albums/oo330/MUSCEthics/?action=view¤t=Scrubs--Ethics--KelsoShutsDownWing.flv&newest=1>

2



Representing the Malpractice Insured: What is the Risk?

Why Does Medical Liability Matter to You?

- ➔ Cost of Care vs. Quality of Care
- ➔ Managing Risk
- ➔ Recovering Cost of Care
- ➔ Being a pro-active member of the Team by assisting your providers

3

What are the issues we face?



4



Representing the Malpractice Insured: What is the Risk?

Medical Malpractice in Texas: A Medical Liability Update

➔ How Texas Law & Federal Laws Impact You

- Texas Medical Liability Act
- Federal Medical Liability
- Texas “Paid & Incurred” & Secondary Payor Act

➔ Participating in the Legal Process

- The initiation of a lawsuit
- The importance of safeguarding medical records
- Your investment in the proceedings

➔ Understanding the Tripartite Relationship

➔ Your Insurance Policy

5

Understanding the Texas Medical Liability Act

➔ Statutory Language

- Healthcare Provider
- Healthcare Claim
- “Inseparable Part”

➔ Threshold Steps Required

- Notice of Claim
- Medical Authorization

➔ The “Expert Report”

➔ Protecting the Records



6



Texas Medical Liability Act

- **Non-economic Caps:**
 - \$250,000 per individual defendant;
 - Additional \$250,000 if a second unrelated corporate defendant
- **Other Caps:**
 - Death Cap – \$500,000 now \$1,400,000 (adjusted by Consumer Price Index)
 - Punitive Damages Capped – the greater of:
 - 2 X Actuals and up to \$750,000 found by jury
 - \$200,000

7

Texas Case Law: The “Missing Link”

- Can a plaintiff avoid application of Chapter 74?
- Can he plead a premises liability case?
- Can he use intentional torts?
- Fraud?

Marks v. St. Lukes (Texas 2009)



Diversicare General Partner v. Rubio (2005)

NCED Mental Health, Inc. v. Kidd (2006)

8



Federal Medical Liability Update

➔ HIPAA

- Privacy breaches may create liability

➔ Medicare Regulations & Billing Guidelines

- Treatment, lack of treatment
- Other claimed departure from accepted standards of medical care or healthcare

➔ EMTALA



Value of the Case – “Paid & Incurred”

➔ Evidence Relating to Amount of Economic Damages:

- In addition to any other limitation under law, recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.
- TEX. CIV. PRAC. & REM. CODE § 41.0105 (Vernon 2010).

10



Best Practices for “Paid & Incurred”

- Use this statute to modify the defendant client’s exposure to actual damages
- Collect the actual billing information
- Use the information on economic losses to limit non-economic exposures
- Work out a stipulation of the damages early – It may work to your client’s advantage.

11

Other Cost Exposure Concerns 2003 Medicare Secondary Payer Act

Medicare has First Right to Money – Past & Future

- Regardless of finding of liability
- “Primary Payor” includes
 - Self insured entities
 - Health insurers
 - Liability insurers



12



The Initiation of a Lawsuit: Understanding the Legal Process

- Initiation of the Lawsuit
- Written Discovery & Electronic Records
- The Deposition Process
- Mediation
- Trial
- Settlement
- Data Bank Concerns



Understanding Electronic Medical Records



14



Electronic Records: Why do we need them?

Galveston, TX
September 2008
"The Surge"



15

Your Investment in the Proceedings

➤ What is my role in the Lawsuit Process?

- Notice, pre-suit discovery
- Service of Suit
- Deposition
- Mediation
- Trial



16



Your Investment in the Proceedings: Being Prepared

➔ What will a Jury do?

- Expert opinions differ, so the jury will consider your patient care:
 - As demonstrated in your practice
 - As demonstrated in your chart
 - As demonstrated in your demeanor

17

Be Invested in the Lawsuit!

- ➔ Early coordination with the defense team
- ➔ Early protection of the electronic records
- ➔ Deposition preparation
- ➔ Mediation – a non-binding process
- ➔ Trial
- ➔ Impact of settlement



18



Being Proactive: National Practitioner Data Bank

<http://www.npdb-hipdb.hrsa.gov/welcomesq.html>

The HIPDB is primarily a flagging system that may serve to alert users that a comprehensive review of a practitioner's, provider's, or supplier's past actions may be prudent. The HIPDB is intended to augment, not replace, traditional forms of review and investigation, serving as an important supplement to a careful review of a practitioner's, provider's, or supplier's past actions.

19

Being Proactive: National Practitioner Data Bank

- ➔ Reports “adverse actions”
- ➔ Allows self-queries
- ➔ Health care and licensure queries
- ➔ Keeps statistical information

20



The Tripartite Relationship

Hey! Professional Insurer! I have been sued!



- Who is the client?
- How is attorney picked?
- What loyalty does the lawyer have to me?
- Who is in charge of trial or settlement decisions?

21

Your Insurance Policy

Being an Educated Purchaser of Professional Liability Insurance

- Types of Insurance: Claims Made v. Occurrence
- Important Terms and Conditions
 - Consent Clauses
 - Obligations During Suit
 - Duty to Settle & the Hammer Clause
- Other Insurance to Consider?

22



Your Insurance Policy

- An occurrence policy is triggered by a claim that occurs within the policy period.
- Claims Made has two triggers: prior acts dates and reporting date during the policy
- Example:

Policy 1	Policy 2	Policy 3	Policy 4	Policy 4
1.1.04- 1.1.05	1.1.05- 1.1.06	1.1.06 - 1.1.07	1.1.07 – 1.1.08	1.1.08- 1.1.09
Occurrence	Occurrence	Claims Made Retro 1.1.04	Claims Made Retro 1.1.04	Claims Made Retro 1.1.04

23

Your Insurance Policy: Stowers Doctrine

The insurer has a duty to accept reasonable settlement demands within policy limits if three prerequisites are met:

- The claim is within the scope of coverage
- The settlement demand is within the policy limits
- The terms of the demand are such that an ordinarily prudent insurer would accept it
- Caveat: Consent Clause and Hammer!

When does the Stower's doctrine apply?

24



When does Stowers Apply?

TX Medical Liability Act § 74.303(d)

The liability of any insurer under the common law theory of recovery commonly known in Texas as the “Stowers Doctrine” shall not exceed the liability of the insured.

- ➔ So: It’s the calculation of the caps!
 - Non-economics
 - Wrongful death if applicable

25

Questions?

Thank You for your Time!

Please feel free to contact me for additional information:

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26

