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HEALTH CARE MEDIATION: TRENDS, TIPS AND TRAPS

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With the implementation of the ACA/ObamaCare and the increased number of participants in Health Care systems, the number of Health Care disputes and mediations have grown. These mediations typically involve:

1. Health Care professionals and employers;
2. Payors and providers/Texas Prompt Pay Act; and
3. Health care fraud/Qui Tam actions.

Increased mediations require attention to the trends, the best practices and the minefields that impact effective, efficient settlements of lawsuits and arbitrations.

TRENDS

One trend in Health Care mediation is the increase in cases involving employment claims with additional whistleblower claims under the federal False Claims Act. In light of the Sabine Pilot limitations, Texas, as an employment at-will state, has seen few successful whistleblower cases. The federal False Claims Act, coupled with ACA/ObamaCare, gives plaintiffs a new cause of action. Additionally, Qui Tam cases under the federal False Claims Act, have increased.

Whistleblower and Qui Tam cases are particularly appropriate for mediation because there are multiple parties and Protected Health Care Information (PHI). Texas mediation confidentiality

statutes allow the parties to better maintain the confidentiality of the PHI.

TIPS

The necessity to maintain the PHI leads to the best practice of treating the mediator as a business associate under HIPAA. The neutral should sign a business associate agreement (BAA). A BAA coupled with a protective order from the court or the arbitrator, helps to ensure the protection of sensitive PHI.

Another best practice is to select a mediator with a working knowledge of the Health Care industry. The mediator who does not understand terms like HIPAA, ACA, HCFA, ERISA, CPT codes, PPO and HMO, etc. will have a hard time speaking to medical professionals. Credibility with the parties, not just their attorneys, is a critical aspect of mediation.

In the Health Care ADR arena, contractual claims between providers and payors are center-stage and require a more managed mediation. The experienced Health Care mediator guides the parties through the dispute resolution process, reducing settlement time and expense. In payor-payee/Texas Prompt Pay Act actions, the PHI is typically thousands of claims for multiple procedures involving multiple patients in a single action. The mediator



and the parties need to confer before the first day of mediation to determine how the PHI is communicated and handled. Without this early conference call, the mediation may very well get bogged down because the claims involve multiple decision-makers from

different departments within the same organization. A good mediator helps the parties decide how to categorize the PHI and make it spreadsheet-friendly.

TRAPS

Following are a few traps to keep in mind as you and your clients prepare for your Health Care mediation:

1. Failure to anticipate the whistleblower claims;
2. Failure to protect the PHI;
3. Failure to have effective spreadsheet PHI information;
4. Failure to select a mediator with Health Care knowledge; and
5. Failure to have a meaningful pre-mediation telephone conference to manage the process.

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