MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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President's Message

We are the champions (of the third branch)

By Kathy Jo Cook

As I sit in Suffolk Superior Court waiting for a jury to come back after a grueling six-week trial, my thoughts turn to the third branch. That's us.

The legislature makes the laws and the executive puts them into practice, but the judiciary has the job of making sure that they are enforced properly. And make no mistake, we, as lawyers, are the engines that make the judicial branch run.

As lawyers, we are problem solvers. Lawyers willingly take on other people's issues and champion them in the courtroom. Many of us are comfortable being the underdog, and some of us (particularly plaintiffs' lawyers) know that the deck is often stacked against us, but we have faith that the rule of law will prevail in the long run.

Big business continues to try to minimize the role of litigation by pressing for mandatory arbitration and immunity legislation. At the same time, some in the media help perpetuate myths about the civil justice system by emphasizing cherry-picked stories and ignoring the benefit to the public interest stemming from lawsuits. Who can blame the average person on the street for being confused by or disillusioned with the legal system?

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Although we cannot reach everyone, as lawyers we *must* take an active role in rebuilding the public's confidence in our system.

The most important way that we can do this is by being good people and doing a good job in our dealings with our clients, with witnesses and with the jury. Starting first with the way we treat our clients and through our interactions with members of the public in discovery, in the voir dire process and in ongoing trial communications, we all have direct opportunities to demonstrate the relevance and importance of the American justice system in real time. Civility, honesty and compassion, in the courtroom and in all aspects of our practice, will go a long way toward convincing the public

Continued on page 8

Handling Chapter 93A discovery and disputes

By Laura D. Mangini

The judge thanks the members of the jury for their service and sends them on their way. Seconds ago, the jury came back with a plaintiff's verdict. A verdict that was triple the amount of the last offer from the insurance company. Your client is ecstatic. You feel vindicated. You've been telling the adjuster for the past 18 months that the case was worth a lot more than he was offering. In response, you've been forced to listen to a slew of excuses:

- I am reducing the medical bills because they are too high;
- Your client has health insurance, so the out-of-pockets aren't really what you are claiming they are

Continued on page 6

EDITOR'S NOTE

DSM-5: The trial lawyer's best friend for psych evidence

By Jonathan A. Karon

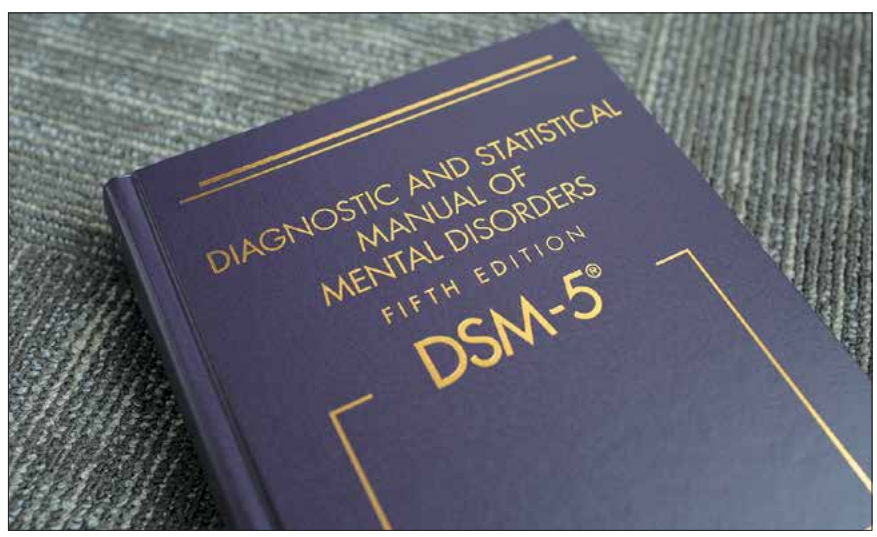
A few years ago, I wrote an Editor's Note entitled "The Trial Lawyers Bookshelf," which listed six essential books that I referred to constantly in my practice. One of them was the "Diagnostic and Statistical Manual of Mental Disorders," 5th Edition, published by the American Psychiatric Association, which mental health practitioners uniformly refer to as "DSM-5."

I call it "the Trial Lawyer's Best Friend" in cases involving psychological evidence. Even if you have nothing else, this book will arm you to cross-examine any psychiatrist, psychologist or social worker (hereinafter "shrinks").

You will be able to establish that DSM-5 is "reliable authority" because every shrink owns a copy of DSM-5 and uses it in their practice. The reason is that insurance companies insist that therapists assign a DSM-5 diagnosis code to their patients as a condition of getting paid.

As a result, the book contains specific diagnostic criteria for virtually every conceivable mental disorder, which it divides into categories. Both the criteria and the categories change from edition to edition, so it is important that you are referring to the most recent edition (or at least the one that was current at the time the patient was evaluated). DSM-5, published in 2013, is presently the most recent edition.

So let's look at some of the nuggets in DSM-5 concerning conversion disorder and Post-Traumatic Stress Disorder (PTSD), two of the more important



diagnoses in personal injury cases.

Conversion disorder is a popular diagnosis of defense experts in mild traumatic brain injury cases and may also arise in other PI cases. In a nutshell, conversion disorder occurs when unconscious anxiety, conflicts or depression produce physical symptoms that the patient experiences as real.

A classic example is paralysis in a hand or foot without any of the necessarily associated dysfunction in an arm or leg. Defense experts love to claim conversion disorder because it allows them to assert that your client's symptoms are all in their head, without having to

Continued on page 8

HITECH medical records requests in the wake of *Ciox*

By Kevin J. Powers

Since 2009, the Health Information Technology for Economic and Clinical Health, or HITECH, Act, 42 U.S.C. §17935(e), and associated regulations at 45 C.F.R. §164.524, have provided a means for patients to obtain low-cost electronic copies of their medical records.

Attorneys have used the act to obtain copies of client medical records at low cost in all manner of cases. Many, if not most, medical providers have accommodated the low-cost electronic medical records requirements of HITECH. The large third-party medical records contractors that work with many larger medical providers and hospital facilities, however, saw in HITECH an imminent threat to their bottom lines. After years or decades of charging exorbitant records request fees for what often amounts to pressing a button on a photocopy machine or burning a single CD, these contractors are now faced with a catastrophic threat to their bottom lines. Attacking the HITECH rights of patients on all fronts, the contractors recently won a skirmish, and the consequence for attorneys is a relatively slight but extremely consequential change to the HITECH records request procedure.

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HITECH before Jan. 23, 2020

An effective HITECH request appeared to issue from the client/patient and was sent on the letterhead of the client/patient. The request was directed to the provider, and preferably requested certified records provided in PDF format on CD. The request specifically cited 42 U.S.C. §17935(e)(1) and 45 C.F.R. §164.524. The request reminded the provider that HITECH limits the cost of records to actual labor costs for reproducing those records in electronic format, the actual cost of portable media (i.e., CD), and postage. 45 C.F.R. §164.524(c)(4). The Department of Health and Human Services (DHHS) has stated that "[c]harging a flat fee not to exceed $6.50 per request is ... an option available to entities that do not want to go through the process of calculating actual or average allowable costs for requests for electronic copies of PHI maintained electronically." See Department of Health and Human Services, Individuals' Right under HIPAA to Access their Health Information 45 CFR §164.524 [hereinafter "the 2016 Guidance"], at https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html#maximumflatfee (last accessed Feb. 11, 2020). The request also reminded the provider that HITECH requires the provider to act upon the request "no later than 30 days after receipt of the request" or to extend the time to act upon the request "by no more than 30 days." 45 C.F.R. §164.524(b)(2). The request insisted that the provider advise as to any records available only as paper copies, and as to the cost of copying such records, prior to the provider sending such records.

Under prior practice, the request would ordinarily and explicitly instruct the provider to send the records not to the client/patient himself or herself, but instead to a designated third party under 42 U.S.C. §17935(e)(1). The "person or entity designated" was legal counsel. That practice must now change in order for the low-cost HITECH rate (the "patient rate") to remain in force.

Ciox Health, LLC v. Azar: The bad news

On Jan. 23, 2020, Judge Amit P. Mehta of the U.S. District Court for the District of Columbia issued a memorandum opinion in *Ciox Health, LLC v. Azar*, Case No. 18-cv-00040 (APM). In that opinion, available online at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0040-51, Judge Mehta found that DHHS, in issuing the 2016 Guidance, effectively issued a legislative rule (rather than a mere policy), to wit: that the patient rate applies not only to records requests in which the records are to be sent directly to the client/patient, but also to "an entity or person designated" by the patient, such as counsel or other third parties. Judge Mehta further found that DHHS, in issuing that rule, failed to provide notice and opportunity for comment by interested persons pursuant to the Administrative Procedure Act (APA). 5 U.S.C. §553. Therefore, at least until such time as DHHS promulgates the rule anew and provides for notice and opportunity for comment, the rule is unlawful. Judge Mehta declined to decide the substantive issue of whether the application of the patient rate to third-party records requests conflicts with the HITECH Act.

> HITECH remains a powerful weapon for dramatically slashing the cost of medical records requests, but counsel must now take care to wield that weapon with the precision and dexterity that it deserves.

Ciox Health, LLC v. Azar: The good news

Judge Mehta addressed more than the procedural issue regarding application of the patient rate to third-party records requests. He also addressed the validity of a provision in the 2016 Guidance, which clarified that providers *may not charge any fee* for the cost of labor associated with "locating the data." Therefore, "the labor costs associated with preparing the responsive information for copying cannot be recovered, but the labor costs incurred in copying can be." Judge Mehta found that, in this regard, the 2016 Guidance merely clarified a 2013 regulation; thus, the 2016 Guidance was not a legislative rule, was not subject to the APA notice-and-comment requirements, and therefore remains valid.

HITECH after Jan. 23, 2020

In the wake of *Ciox Health, LLC v. Azar*, counsel appears faced with two alternatives: either the HITECH records request letter ostensibly sent by the client/patient must direct that provider send the electronic records directly to the client/patient, thereby preserving the patient rate; or counsel, if continuing to draft the HITECH records request letter to direct the provider to send the records to counsel, should prepare the client/patient for the old-fashioned inflated records production fees of yesteryear. Depending upon how one views the relative security of e-mail in light of HIPAA requirements (a subject beyond the scope of this article) counsel, in drafting a "send the records directly to the client/patient" letter for the client/patient to send personally, may want to suggest that the provider either send the records via postal media to the client/patient mailing address, send the records via e-mail to the client/patient, or send the records via encrypted e-mail or server transmission to the client/patient. On the last point, however, beware of the "receive your records via our special portal" trick, discussed *infra*.

How would a reviewing court view a HITECH records request letter directing the provider to send the records to "Mr. Paul P. Patient, c/o Law Offices of Fine, Howard, & Fine"? Probably too cute by half, and probably insufficiently direct to preserve the patient rate. In any

Continued on page 9

Kevin J. Powers has been active in the Massachusetts appellate bar since 2006, a member of MATA's Amicus Committee since 2017, Interim Chair of the Amicus Committee from 2018 to 2019, and current Vice Chair of the Amicus Committee. In addition to his reported decisions, he has co-written or edited several of MATA's recent amicus filings. Lee Dawn Daniel, Of Counsel to Alekman DiTusa, LLC, who is currently MATA Treasurer and Executive Committee Member, provided invaluable practical insight and editorial assistance in the writing of this article.

HITECH medical records requests in the wake of *Ciox*

Continued from page 4

event, that sort of alchemy is now inadvisable if counsel's priority is to preserve the patient rate.

Ah, the old "receive your records via our special portal" trick!

Some medical records contractors offer requestors the opportunity to receive records via a convenient, new-fangled, shiny, ultra-friendly e-portal, frequently characterized by these and a laundry list of other effusive adjectives. Counsel should beware of this ploy, and should caution the client/patient to refuse to partake of any such mechanism. First, HITECH and the associated regulations do not require the use of such a portal. Second, the click-through fine print in the user agreements for many such portals include language purporting to require the requestor to pay any and all fees that the contractor may invoice the requestor for. Third, portals generally do not provide the patient with the entirety of the actual patient chart. Thus, this sort of portal often appears to be little more than an attempt by the contractor to achieve through the device of a contract what it could not achieve pursuant to a statute or a regulation.

Ah, the old "no certified records for the patient" trick!

Some medical records contractors willingly provide electronic medical records to the patient, at the HITECH price, but refuse to provide a Keeper of the Records certification with those records. Although such a certification may help counsel to obtain an agreement by opposing counsel to dispense with the more strict requirements of either G.L.c. 233, §79 or G.L.c. 233, §79G in order to utilize the records at trial, when counsel contacts the contractor and explains that the patient request specified *certified* records, the contractor will often respond "Oh, we don't do that for *patient* requests. But you can submit an *attorney* request, and we can certify the records for you." Naturally, an "attorney" request would carry an "attorney," i.e., non-HITECH, pricetag for a certification, which will likely not be compliant with the precise requirements of either G.L.c. 233, §79 or G.L.c. 233, §79G.

Client and counsel might consider reaching out to the provider, ponder whether the contractor's conduct could implicate the provider in various potential claims (including, potentially, claims pursuant to G.L.c. 93A), and ask the provider to prepare "certified" records directly, pursuant to the original patient HITECH request and for the HITECH-compliant fee. Many providers, often unaware of the outrage-inducing conduct of records contractors and the ill will that such conduct engenders against the providers, will ultimately provide the "certified" records directly, and for the HITECH-compliant fee. Nonetheless, counsel must be sure to follow the provisions of G.L.c. 233, §§79, 79G to the letter, in order to ensure admissibility at trial.

> "Many providers, often unaware of the outrage-inducing conduct of records contractors and the ill will that such conduct engenders against the providers, will ultimately provide the "certified" records directly.

If negotiation proves unavailing, then the more formal procedure for obtaining review of a HITECH denial is set forth in 45 C.F.R. §164.524(d)(4).

Outright refusal

If the provider and the contractor refuse outright to comply with HITECH, or refuse to adjust an invoice to either the $6.50 flat rate or a fee truly reflective of the actual cost of making a digital copy of digital records, then counsel should file a complaint with the DHHS Office of Civil Rights.

Conclusions

Counsel must carefully learn and understand both 42 U.S.C. §17935(e) and 45 C.F.R. §164.524. In addition, even if counsel does not pore over every nuance of the APA, counsel must nonetheless understand the essential, restrictive finding of *Ciox Health, LLC v. Azar*: medical records requests are subject to the HITECH patient rate only if those requests direct the provider to send the records *directly to the client/patient*. HITECH remains a powerful weapon for dramatically slashing the cost of medical records requests, but counsel must now take care to wield that weapon with the precision and dexterity that it deserves. The dark side is waiting and watching for every opportunity to trip up counsel, to befuddle client/patients, and to exact its revenge.

SAVE THE DATE:

MATA ANNUAL CONVENTION & DINNER

May 12, 2020

Framingham Sheraton

MATA MEMBERS CONTINUE *holiday traditions*

On December 10, MATA members and friends gathered for the annual MATA Holiday Ball. Long-time pals and new acquaintances mingled and made the evening fun for everyone. Thanks to everyone who donated an impressive number of toys for our traditional Toys for Tots collection.