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“STEMMING THE RISING EPIDEMIC OF INSURANCE FRAUD”

I. DR. FARID FATA

GREED LEADS TO FRAUD

Insurance fraud is at an all-time high. There is no better example than Dr. Farid Fata, the Michigan oncologist who is spending the next 45 years in prison. Last September, he plead guilty or no contest to 23 counts of Health Care Fraud, one count of Conspiracy to Pay and Receive Kickbacks, and two counts of Money Laundering. Federal prosecutors call him arguably the most egregious fraudster in the history of the United States. Dr. Fata intentionally prescribed over 9,000 unnecessary cancer injections and infusions to at least 553 patients over a six-year span. These treatments amounted to nearly \$35 million in insurance billings.

At his sentencing, he stated; “I misused my talents, yes, and permitted this sin to enter me because of power of greed. My quest for power is self-destructive.” Thankfully, one of his own staffers took him down under the protection of the Whistleblower Act. We will delve into what it took to finally unravel Dr. Fata.

By the time Dr. Fata was done with his six-year run, the carnage was everywhere. Patients were forced into bankruptcy, some lost limbs, and others will suffer from lifetime effects from the unnecessary and potent treatments.

HOW DO WE EXPOSE FRAUD EARLIER?

Dr. Fata’s shocking story is part of a larger trend of fraud, particularly among medical providers. What can we do to derail it before it gets out of control? Much of this hinges on the first responders: the insurance claim representatives, and bill reviewers. While they are usually inundated with claims, it is critical to stop, slow down, look at the medical bills, and see if they pass the “smell test.” Are there six CPT codes being billed at every visit? How do we know that the items placed on the bill are actually being performed? If something isn’t adding up, set up a clinical inspection of the facility to make sure they have all the equipment they are placing on the bills.

USING THE INJURED PARTY TO OUR ADVANTAGE?

If you are suspicious about a medical facility, depending on your state's laws and terms of the insurance policy, a recorded statement or an examination under oath should be considered. Who knows better what happens each time when they go to their doctor than the patient? The injured party can become your best ally. They can provide you a detailed breakdown of how long they are generally at the office, each of the modalities that are provided, and what truly happens.

II. LAWYER-DIRECTED MEDICAL CARE

SHOULD LAWYERS BE DOING THIS?

This is a national epidemic. The job of a lawyer is to counsel a plaintiff about their legal rights following an auto accident. It is not their role to quarterback medical care. That should be left to the client's primary care physician, who would be in the best position to refer to the right doctors. Still, the unfortunate reality remains that numerous plaintiff firms have clear-cut arrangements with a chain of doctors that they utilize time and time again. Each side is clearly profiting from the business relationship. It is hard to envision how the plaintiff lawyer has their client's best interest at heart when they are simultaneously carrying a vested financial stake with their hand-picked stack of doctors in an attempt to inflate their medicals.

In Wisconsin, an ethics question was posed: Can an attorney practicing personal injury law suggest various health care providers or other sources of medical care if the injured party does not have a treating physician? According to the opinion, E-92-4, the lawyer should explain how a referral by the lawyer could affect the representation and, for example, explain:

1. That the lawyer's involvement in a referral might be used to impeach the testimony of the healthcare provider in question, particularly if there is a pattern of such referrals to the provider; and
2. Any financial interest that the lawyer may have in the health-care provider's business and any other association that the lawyer may have with the health-care provider that could materially limit the client's representation.

IS THERE A REFERRAL PRIVILEGE?

Some firms allow their Plaintiffs to admit they were referred to specific doctors. Others direct the Plaintiff to refrain from answering, asserting the attorney-client privilege.

The law varies from jurisdiction to jurisdiction, but, for example, there is a split of opinion in Florida as to whether or not a Plaintiff can testify that they were referred to the doctor by their law firm. The Florida Court of Appeal, Fifth District, in *Worley v. Central*

Florida Young Men's Christian Association Inc. et al., case number 5D14-3895, a 2015 case, stated "Having exhausted all other avenues without success, we find-contrary to the trial court's preliminary ruling and to *Burt v. Government Employees Insurance Company* 603 So. 2d 125 (Fla. 2d DCA 1992), that it was appropriate for YMCA to ask Worley if she was referred to the relevant treating physicians by her counsel or her counsel's firm. However, the court certified a conflict with the decision in *Burt v. Government Employees Insurance Co.*, to the extent that it holds that the disclosure of a referral of a client by an attorney to a healthcare provider is always protected by attorney client privilege.

If there is a protection, how would you get around it? Ask them whether they were referred their by their own doctors, family, or friends. Rule everyone else out, and reasonable minds will be able to read between the lines.

BRINGING OUT THE RELATIONSHIP TO THE JURY

While defense lawyers and insurance companies are cognizant that certain plaintiff firms are directing their client's care, jurors are not. Here are some ways in which jurors may be able to read between the lines:

- Delve into the plaintiff's relationship with their primary care physician prior to the accident. Point out that they had been seeing their physician for 20 years, yet strangely, never returned to see that doctor after the accident.
- Ask the plaintiff if they had ever heard of the doctor that their lawyer directed them to, or knew where their office was prior to the auto accident occurring. Then ask them how they knew to go there, and who arranged their transportation. Usually, the next answer is: My lawyer.
- Collect the witness lists that you have with particular firms, and store the ones where they continually use the same doctors as treaters. Then use these to cross-examine the doctor, and demonstrate the pattern between the physician and the law firm.
- Request the treating physician disclose what plaintiff firms he/she sends gift baskets to at the end of the year.

III. The Demons in Plaintiff's Closet

HIDING THEIR HISTORY

If Plaintiffs were smart, they would be candid about their past history, admit prior injuries, and reveal their old doctors. However, many Plaintiffs take the other route. They are sometimes evasive about their past. They refuse to reveal prior injuries, accidents, and treaters. The motivation is clear: they want to drive up the value of the claim. Plaintiffs certainly won't serve up their history on a platter.

In an article published by the American Medical Association, “*Examinee-Reported History Is Not a Credible Basis for Clinic*,” Ph.D. Robert Barth cites numerous studies confirming that claimants tend to misrepresent their pre-claim functioning as having been “superhuman,” and distort their reported history in a fashion that potentially inflates the financial compensation for their claims.

The important thing – whether you are taking a recorded statement, an EUO, or a deposition – is to pin them down about their past. Lock them into their testimony so there is no wiggle room: “So, you have never had any back problems before this accident? You have never had an MRI of your back before? No one ever recommended surgery on your back before?”

Now, the hard part.

DIGGING FOR GOLD

ISO searches: Are a great way to start. They can provide information on prior claims. If they went into litigation, this can provide a wealth of information. Make sure to obtain discovery responses, witness lists, deposition transcripts, IMEs, disability slips, medical records, MRIs, and medical treaters.

Prescription Drug Monitoring Programs (PDMP): A PDMP is an electronic database that collects designated data on substances dispensed to a patient in the state. Thirty-seven states currently have PDMPs. On September 1, 2011, pharmacists in Florida began submitting data to the recently implemented Florida Prescription Drug Monitoring Program. Across the country, access to this information is restricted to physicians and law enforcement personnel. While defense attorneys are not able to subpoena the information, if you are lucky, the plaintiff’s treating physician may request a PDMP if he or she suspects drug abuse or doctor shopping. Generally, the physician will not supply a copy of the PDMP in a standard subpoena unless requested, or if you happen to come across it during a review of the actual file in a doctor’s deposition. If you do land such a report, it may provide an abundance of information, including prior treaters and pharmacies, and demonstrate evidence of pre-accident drug abuse.

Veteran Administration Records: Do not skim over the fact that a plaintiff served in the military 40 years ago. He or she may still be treating and receiving prescriptions from your local VA hospital. Further, if a plaintiff is receiving a pension from the VA, he or she periodically has to undergo a disability determination, and fill out paperwork. It is always compelling to see what the plaintiff tells the VA, as compared to Social Security Disability, workers’ compensation, and plaintiff’s own treaters during the identical time frame.

Health Insurance Cards: Somewhere in every treater’s medical record, hospital’s intake sheet, or hidden deep within a prior auto accident claim file is a copy of plaintiff’s health insurance card (if he or she has one). If located, these health insurance records may provide a precise history of all prior hospital, doctor and pharmacy visits.

IMPACT OF EXPOSING HISTORY

Cases often live and die on the credibility of the Plaintiff. Even in surgical cases, juries aren't afraid to cast their vote against people who are caught red-handed. Claim values may be significantly lowered. The key in these cases is persistence. Often times, doctors or facilities will never provide you the whole chart. Keep on them, show cause them, until you get the records you have been searching for to assist your case.