Health Law Section
The Mississippi Bar

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Message from the Chair

Jeffrey S. Moore, Chair

PROFESSIONALISM AND THE LAW

At the Section Chair's orientation meeting for the upcoming Mississippi Bar year held on August 13, 2015, the current President of The Mississippi Bar, Roy Campbell, III, reminded the Section Chairs of the importance of professionalism when practicing our profession as attorneys. This is an issue that attorneys struggle with on a daily basis in their practices, whether they serve as outside legal counsel, in-house counsel, work for or represent federal or state governmental agencies, or practice in some other capacity. We can all use a daily reminder that practicing law is a privilege that should not be taken for granted, and that we should treat other lawyers or individuals with whom we interact in our practices with respect and courtesy.

While we have a duty to advocate zealously for our clients and push aggressively for what is in our client's best interest, we should temper this duty with professionalism in all communications and interactions. In today's technologically advanced society, with unlimited vehicles for instantaneously communicating with others, we should remind ourselves to abide by the Golden Rule, that we should treat others as we would want to be treated. We rely heavily on email, text messages and other means of real time electronic communication in our everyday lives and practices. The immediacy of email, text messages and other electronic communications could be argued to have reduced the filter or buffer zone that used to exist when lawyers communicated through more traditional correspondence and other means of communication that required more time and thought to produce.

If you are like me, your first reaction to the receipt of a snappy or biting email from opposing counsel may be to reply with a quickly drafted email with the same negative tone without thinking twice before pushing the send button. While this may provide some immediate relief or sense of gratification for firing back at my opponent, it usually results in me asking myself later, "Why did I do that?" Had I spent more time considering the email or text message I received from opposing counsel and not responded so quickly in the heat of the moment, I likely would have thought more carefully about my words and hopefully would have sent a more civil, or at least neutral, response. The concept is similar to the situation where someone says something to you that you don't like or you find to be less than courteous, and you snap back in a similar fashion. I have often been told that in these situations it is better to "count to ten" before responding to allow for a cooling off period which usually results in a less heated and more reasonable response.

I have worked on a number of cases and projects in the past 24 years as a lawyer in Mississippi, most of which time I got along fairly well with opposing counsel or his or her client. However, there are a number of instances I can recall when I felt like my or my client's character, competence or integrity was being attacked, and I responded in a manner that was less than purely professional. I have worked on this over the years and believe that I have gotten better, although there always remains room for improvement.

If you are like me, and strive to improve on your degree of professionalism in your practice, consider the following tips in your everyday practice of law:

- Practice according to the Golden Rule. Treat opposing counsel or others with whom you interact in the same manner in which you would like to be treated.
- Take the high road; don't take the bait.
- Count to ten and allow for a cooling off period before pushing send on your email, text, or other form of social media communication.
- Assume that your communications are being recorded (which they could be). Would you feel comfortable defending your recorded communications at a later date?
- Treat the practice of law as a daily privilege, and bring a positive and professional attitude to your place of work.

2015 Healthcare Legislative Summary

by: Blake Adams, Phelps Dunbar LLP & Stephen Clay, Clay Law Firm

The 2015 Mississippi legislative session saw a number of health care related bills signed into law. From technical amendments to the State Medicaid program to new patient caregiver requirements for hospitals, staying abreast of these legislative changes is important for any health law practitioner. Below are summaries of selected healthcare related bills passed during the most recent legislative session.

SB 2124 — Extension of Hospice Moratorium – Effective after Passage (3/31/2015)

Extends to July 1, 2018, the existing moratorium on the Mississippi State Department of Health processing any new applications for hospice licensure or issuing new hospice licenses, except for renewals, unless the application was pending on March 1, 2013.

HB 910 —Establishment of Infant Mortality Reduction Collaborative – Effective after Passage (4/23/15)

Creates the Infant Mortality Reduction Collaborative ("IMRC") to be composed of eleven (11) members. The IMRC will meet at least quarterly and make annual policy recommendations to the legislature and recommendations for regulatory changes to state agencies on the following matters:

A. Ensuring the availability, accessibility and affordability of a hormonal supplement that is used to prevent preterm deliveries in pregnant women.

B. Ensuring access to preconception health care.

C. Reducing the number of early elective deliveries.

D. The development of perinatal regions of care.

SB 2588— Medicaid Technical Amendments Bill – Effective after Passage (4/22/2015)

Includes a number of technical amendments and changes related to the Mississippi Medicaid program, including:

A. Directs the Mississippi Division of Medicaid (DOM) to apply for a waiver amendment to increase payments for all adult day care facilities based on acuity of individual patients, with a maximum of $75.00 per day for the most acute patients.

B. Establishes the Mississippi Hospital Access Program (MHAP). The MHAP is to be approved by CMS and replaces the current Upper Payment Limit (UPL) program. The purpose of MHAP is to protect patient access to hospital care by maintaining total hospital reimbursement for inpatient services, to the extent possible, for inpatient services rendered by in-state hospitals and the MED in Memphis. The intent of MHAP is that, to the extent possible, DOM shall replace additional hospital reimbursement from UPL program with additional reimbursement under MHAP.

C. Carves inpatient hospital services into MississippiCAN (MCAN) and establishes that MHAP will ensure the current UPL payments made to hospitals will remain the same.

D. The MHAP will provide increased inpatient capitation payments to the participating MCAN managed care organizations (MCOs). The MCOs will act as a pass-through and transfer all of these funds to a third party for distribution to Mississippi hospitals. This could only be accomplished by removing the MCAN inpatient hospital carve-out. Funding for the MHAP will continue to be provided by the hospital assessment established at § 43-13-145 of the Mississippi Code.

E. In the event that the MHAP is not approved by CMS, the UPL will revert to the current UPL method.

2015 Healthcare Legislative Summary, *continued*

F. Grants the DOM authority to contract with provider-sponsored health plans for the purposes of participating in the MCAN program.

SB 2407 – Community Hospital Transparency Act – Effective January 1, 2016

A. Establishes that the boards of trustees of community hospitals are "public bodies" subject to the Open Meetings Act, but provides executive session exceptions for:
   1. Transactions of business or discussion of matters relating to community hospital employees, medical staff membership, or credentialing.
   2. Transaction of business or discussions related to medical services.
   3. Transactions of business or discussions regarding strategic business decisions of public hospitals.
   4. Transactions of business that would require discussion of identifiable patient information.

B. Establishes new requirements for appointment as a community hospital trustee and provides a procedure for owners of community hospitals to remove trustees for good cause.

C. Requires the owners of a community hospital to establish an "accountability and transparency website" containing certain financial and other disclosures.

D. Amends Mississippi Code Section 41-9-68 to provide that the following records maintained by public hospitals are subject to the Mississippi Public Records Act:
   1. Official minutes of the board of trustees of a public hospital.
   2. Financial reports not otherwise exempt that are required by state or federal regulation to be filed with the owner of the public hospital or any other state or federal agency.
   3. Any other record maintained by a public hospital that does not fall within the definition of a "hospital record" as that term is defined in Mississippi Code Section 41-9-61, except for the following records, which shall be exempt:
      (a) Records relating to employment or services contracts, medical staff privileges, and medical staff membership.
      (b) Records directly relating to credentialing, health, performance, salary, raises or disciplinary action of any employee or medical staff member or applicant for medical staff privileges.
      (c) Records relating to prospective strategic business decisions.
      (d) Records directly relating to individual patient billing and collection.

SB 2108 – The Caregiver Act – Effective July 1, 2015

A. Requires hospitals to provide each patient or their legal guardian the opportunity to designate a "Lay Caregiver," after admission but before discharge. The lay caregiver is an individual who will provide aftercare assistance to the patient in their residence following discharge.

B. If the patient or legal guardian does not designate a lay caregiver, the hospital must document this fact in the medical record.

C. If the patient or legal guardian designates a lay caregiver, the hospital must obtain the lay caregiver's contact information and record it in the medical record as well as obtain a written consent to release medical information to the lay caregiver.

2015 Healthcare Legislative Summary, *continued*

D. The hospital is required to contact the lay caregiver and notify him or her prior to the patient being discharged or transferred.

E. The hospital is required to provide an opportunity for the lay caregiver and patient to ask questions about the patient's aftercare and discuss the discharge plan with the lay caregiver.

SB 2441 – Provider Sponsored Health Plans – Effective July 1, 2015

Authorizes the creation of Provider-Sponsored Health Plans ("PSHP"). A PSHP is defined as a Mississippi not-for-profit corporation formed for the purposes of operating a not-for-profit health plan or managed care entity, with its principal place of business within the State of Mississippi, and which is owned and governed exclusively by either:

A. Not-for-profit Mississippi hospital or physician industry or trade association in which the majority of the hospitals or physicians within the state are members, or

B. A combination of:

1. Not-for-profit Mississippi hospital or physician industry or trade associations that represent a majority of the hospitals or physicians in the state; and

2. Licensed Mississippi hospitals or physicians who participate in the Mississippi Medicaid program.

C. At least one purpose of the PSHP must be to contract with the DOM to provide managed care services.

D. The Department of Insurance shall certify that any entity applying to operate a PSHP meets the definition contained in the Act and has been licensed as an HMO pursuant to Mississippi Code Section 83-41-1 *et seq*., or as an insurance company pursuant to Mississippi Code Section 83-19-1 *et seq*.

E. PSHPs must also:

1. Demonstrate ownership or substantial representation in governance and operations by licensed Mississippi hospitals and physicians that participate in the Mississippi Medicaid program. For purposes of meeting this requirement, hospitals owned by local government entities are authorized to provide funds for the establishment and operation of a PSHP, provided the hospital governing body first determines that such participation is in the best interest of the hospital.

2. Meet all contractual requirements for contracting with the DOM to provide managed care or coordinate patient care pursuant to Mississippi Code Section 43-13-117(H).

3. Satisfy the minimum financial and reserve requirements established by the Department of Insurance.

4. Such other requirements as may be established by valid regulation of the Department of Insurance.

HB 545 – Medicaid Amendments – Effective July 1, 2015

Enacts a number of amendments to the Mississippi Medicaid program, including:

A. Authorizes the Pharmacy and Therapeutics Committee of the DOM to meet as often as needed to fulfill its responsibilities.

B. Provides that any judicial appeal by a Medicaid provider regarding a decision by the DOM to recover overpayments must be made within sixty (60) days after the date that the DOM has notified the provider by certified mail sent to the proper address of the provider on file with the DOM and the provider has signed for the certified mail notice, or sixty (60) days after the date of the final decision if the provider does not sign for the certified mail notice.

2015 Healthcare Legislative Summary, *continued*

C. Enacts the following requirements applicable to "Medicaid Planners," which are defined as an individual who provides Medicaid planning services to other individuals for compensation:

1. Medicaid planners must register annually with the DOM;
2. The DOM shall provide the list of registered Medicaid planners and the information contained in the registrations to each local and regional Medicaid office;
3. The DOM shall include questions related to the applicant's use of Medicaid planners on the application for Medicaid benefits;
4. At the time of initial registration, each Medicaid planner shall file with the State Treasurer a surety bond in which the planner is the principal obligor in the amount of $100,000. The bond will be in favor of the State of Mississippi for the benefit of any individual for which the Medicaid planner has provided Medicaid planning services and suffers or incurs any loss, liability, or damages by reason or acts of fraud, dishonesty, malfeasance or misfeasance of the planner or failure of the planner to provide the services as represented; and
5. Provides for criminal penalties for Medicaid planners who willfully fail to register with the DOM or file a surety bond.

D. Authorizes regional mental health commissions to establish regional holding facilities for treatment and holding of any person 18 or older being held for the purposes of civil commitment. Each regional commission is authorized to create a holding facility fund and enter into holding facility cooperative agreements with counties both inside and outside of the regional commission's designated region.

1. Each county electing to use a regional holding facility may contribute to the regional commission's holding facility fund, and the State of Mississippi may match the county's contribution by paying no more than $2.00 into the holding facility fund for every $1.00 contributed by the county, if sufficient funds are available.
2. Crisis stabilization units operating and receiving state funds from the Department of Mental Health as of January 1, 2015 are not eligible for the holding facility state matching provided for in this bill.
3. Counties not contributing to a regional commission facility holding fund are not entitled to use a holding facility, and courts may not order a patient to a holding facility if the county in which the commitment action is pending has not entered into a cooperative agreement with a regional commission and has not made a contribution to a regional commission holding facility fund.
4. Holding facilities must comply with the operational standards for holding facilities established by the Department of Mental Health.
5. Holding facilities and committing courts may not remove persons from the holding facility unless the removal is for clinical purposes.
6. Persons taken to a holding facility and any treatment professionals called as witnesses may not be required to appear at the court's location for commitment proceedings, except when extraordinary circumstances are found and determined as reflected by a written order of the Chancellor.
7. For the purposes of civil commitment hearings, persons being committed and treatment professionals may participate through videoconferencing. Holding facilities may provide any necessary treatment in-person or through the use of videoconferencing between the person and the treatment professional.

2015 Healthcare Legislative Summary, *continued*

HB 583 – Certificate of Need Law – Effective July 1, 2015

A. Amends the Healthcare Certificate of Need Law (Miss. Code Section 41-7-191) to exempt the following projects from the requirements of obtaining a certificate of need:

1. The planning, design, construction, renovation, addition, furnishing and equipping of a clinical research unit at any health care facility under the direction and control of the University of Mississippi Medical Center.
2. The repair or rebuilding of a health care facility that sustained significant damage from a natural disaster that occurred after April 15, 2014, in an area that is proclaimed a disaster area or subject to a state of emergency by the Governor or by the President of the United States, subject to the following conditions:
   (a) "Significant Damage" is defined as damage to the health care facility requiring an expenditure of at least $1,000,000.
   (b) The repair or rebuilding of any such damaged health care facility must be within one mile of the pre-disaster location of the campus of the damaged health care facility.
   (c) The repair or the rebuilding of the damaged health care facility (1) does not increase or change the complement of its bed capacity existing before the Governor's or President's proclamation; (2) does not increase or change its levels of and types of health care services that it provided before the Governor's or President's proclamation; and (3) does not rebuild in a different county.
   (d) The exemption is valid for only five (5) years from the date of the Governor's or President's proclamation, and construction must be begun within that five (5) year period.

B. Authorizes the State Department of Health to approve a change of ownership of a part of a health care facility. This provision repeals after one (1) year.

C. Clarifies the authority of the Mississippi State Department of Health to issue a certificate of need under an expedited review process for any emergency replacement or relocation of all or the damaged part of a healthcare facility or to alleviate an emergency condition and restore health care access. In the case of destruction or major damage to a health care facility, the Department of Health will be authorized to issue a certificate of need to address the current and future health care needs of the community, including the expansion of the healthcare facility and/or relocation of the health care facility.

SB 2199 – Department of Health and Human Services – Effective July 1, 2015

A. Extends the repealers on the statutes which establish the Mississippi State Department of Health and Human Services and its divisions to July 1, 2019.

B. Authorizes the Division of Youth Services to implement a Standardized Risk Assessment Tool to use in youth court adjudications and develop a graduated sanctions policy.

SB 2485 – Right to Try Act – Effective July 1, 2015

A. Allows physicians to prescribe experimental drugs, products, and devices to terminally ill patients who have exhausted all other legal treatment options. Experimental treatments must have successfully completed phase one of clinical trials.

B. Allows terminally ill patients to try medicines that have passed Phase I of the FDA approval process but are not yet allowed at pharmacies.

2015 Healthcare Legislative Summary, *continued*

C. Shields physicians and pharmacists from disciplinary actions as a result of prescribing or dispensing such treatments, except in the case of gross negligence or willful misconduct.

D. Provides civil immunity for any licensed physician or pharmacist who prescribes or makes recommendation to an eligible patient regarding an experimental treatment in accordance with this Act.

HB 204 – Licensing Boards – Effective July 1, 2015

A. Prohibits the respective licensing boards for physicians, osteopaths, dentists, optometrists, chiropractors, advanced practice registered nurses, and physician assistants from conditioning the licensure of the provider upon:

1. The provider's participation in any public or private insurance plan, public healthcare system, public service initiative, or emergency room coverage; or
2. The provider's compliance with the "meaningful use" of electronic health records as set forth in 45 C.F.R. Part 170.

HB 1393 – Licensing Boards – Effective July 1, 2015

A. Amends Mississippi Code Section 73-17-11 to extend the repealer on the licensure requirements for nursing home administrators until July 1, 2018.

B. Amends Mississippi Code Section 73-17-11 to exempt from the nursing home administrator licensure requirements persons who are licensed by the State Department of Mental Health as a mental health/intellectual disability program administrator if the licensee is employed in the State mental health system as an Administrator of an Intermediate Care Facility or Facilities for persons with intellectual disabilities no larger than sixteen (16) beds.

HB 692 – Emergency Response and Overdose Prevention Act – Effective July 1, 2015

A. Authorizes physicians and certain other licensed healthcare providers, in compliance with the standard of care of the applicable practitioner, to prescribe an opiod antagonist to a person at risk of experiencing an opioid-related overdose or other persons in a position to assist the person at risk of experiencing an opioid-related overdose.

B. Authorizes pharmacists to dispense opioid antagonists under a prescription issued in accordance with this Bill.

C. Authorizes emergency medical technicians to administer an opioid antagonist as clinically indicated.

D. Provides immunity from civil or criminal liability or professional licensing sanctions against persons who take the actions authorized under this Bill.

E. Creates the "Mississippi Medical Emergency Good Samaritan Act" which provides immunity for certain drug violations by persons seeking treatment from a drug overdose if the evidence of the violation results from the medical treatment of the drug overdose as follows:

1. Any person who in good faith seeks medical assistance for someone who is experiencing a drug overdose cannot be arrested, charged, or prosecuted for a drug violation if there is evidence that the person is under the influence or in possession of small amounts of a controlled substance.
2. Any person who is experiencing a drug overdose and, in good faith, seeks medical assistance or is the subject of a request for medical assistance, cannot be arrested, charged, or prosecuted for a drug violation if there is evidence the person is under the influence of or in possession of a small amount of a controlled substance.

2015 Healthcare Legislative Summary, *continued*

HB 952 - Oral Cancer Drug Parity Bill – Effective July 1, 2015

A. Prohibits health plans and policies, including the State and Schools Employees Life and Health Insurance Plan, that cover injected, intravenously administered and oral anti-cancer medications from requiring a higher copayment, deductible, or coinsurance amount for patient-administered anti-cancer medications than they require for anti-cancer medications injected or intravenously administered by a health care provider, regardless of the formulation or benefit category determination.

B. Provides that health plans and policies may not comply with the prohibition by increasing the copayment, deductible, or coinsurance amount for injected or intravenously administered anti-cancer medications that are covered under the plan or policy or by reclassifying benefits with respect to anti-cancer medications.

C. Authorizes the State and School Employees Health Insurance Management Board to accept bids for surgical services that include a negotiated single case rate bundle and payment for orthopedic, spine, bariatric, cardiovascular, and general surgeries.

SB 2687 – Mississippi Primary Direct Care Act

A. "Direct primary care agreement" is defined as a contract between a primary care provider and an individual patient or his or her legal representative or between a primary care provider and an employer on behalf of its employees in which the primary care provider agrees to provide primary care services to the individual patient for an agreed-upon fee and period of time.

B. Provides that a direct primary care agreement shall not be considered an insurance product, nor shall the primary care provider be considered engaging in the business of insurance.

C. Provides that a primary care provider is not required to obtain a certificate of authority or license to market, sell or offer to sell a primary care agreement.

D. Provides certain requirements for offering a direct primary care agreement, including:

1. Be in writing;
2. Be signed by the individual patient or his or her legal representative and be made available for the records of the primary care provider or agent of the primary care provider;
3. Allow either party to terminate the agreement on written notice to the other party;
4. Describe the scope of primary care services that are covered by the periodic fee;
5. Specify the periodic fee for ongoing care under the agreement;
6. Specify the duration of the agreement, any automatic renewal periods, and prohibit the prepayment of the agreement. Upon discontinuing the agreement, all unearned funds, as determined by the lesser of normal undiscounted fee-for-service charges that would have been billed in place of the agreement or the remainder of the membership contract, are returned to the patient. Upon termination of the agreement, the patient shall not be liable for the remainder of payment associated with the agreement or membership contract. However, the patient shall be responsible for the true cost of services rendered regardless of when the contract is terminated;
7. Prominently state in writing the following:
   (a) That the agreement is not health insurance;
   (b) That the agreement standing alone does not satisfy the health benefit requirements as established in the federal Affordable Care Act; and

2015 Healthcare Legislative Summary, *continued*

(c) That, without adequate insurance coverage in addition to this agreement, the patient may be subject to fines and penalties associated with the federal Affordable Care Act.

HB 885 – Autism Bill – Effective July 1, 2015

A. Requires health insurance policies to provide coverage for the screening, diagnosis, and treatment of autism spectrum disorders on or after January 1,2016. However, a small employer with one hundred (100) or fewer eligible employees that provides or offers a health insurance policy to its employees may charge the plan participant with the cost of obtaining the additional coverage for screening, diagnosis, and treatment of autism spectrum disorders.

B. Creates the Mississippi Autism Board to license and regulate the practice of applied behavior analysis. The board shall consist of five (5) members. The Governor shall appoint one (1) licensed psychologist practicing in the area of applied behavior analysis, one (1) licensed behavior analyst, and one (1) public member who is not licensed in behavior analysis and who is the family member of a recipient of applied behavior analysis services. The Lieutenant Governor shall appoint two (2) licensed behavior analysts.

C. Provides for eligibility requirements for the licensure as a behavior analyst or assistant behavior analyst, and provides for the procedures and fees for obtaining a license or renewal.

D. Requires licensed behavior analysts and licensed assistant behavior analysts to register with the board all behavior technicians providing services under their supervision. The licensed behavior analyst shall update the board of the termination of supervision as required by the board.

SB 2123 – Nuclear Medicine Technologist – Effective July 1, 2015

A. Amends the definition of a "Nuclear Medicine Technologist" at Mississippi Code Section 41-58-1 to provide the following:

1. A nuclear medicine technologist may administer medications or procedures incidental for nuclear medicine exams.

2. A certified nuclear medicine technologist may also perform diagnostic CT exams on hybrid equipment for diagnostic purposes, including the administration of parenteral and enteral contrast media and administration of other medications or procedures incidental to CT exams. Certified nuclear medicine technologists who perform CT scans must be certified in CT by the American Registry of Radiologic Technologists, the Nuclear Medicine Technology Certification Board, or other CT certifying body. A certified nuclear medicine technologist may do on-the-job training on hybrid equipment provided that the certified nuclear medicine technologist is supervised by a certified technologist and obtains a CT certification within six (6) months of that training.

Health Law Section

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We are on the web!

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Upcoming Events

Thursday, February 11, 2016
Health Law Section Ethics Teleseminar
"Legal Ethics in Healthcare Representations"
Free to Section members

Tuesday, May 3, 2016
Health Law Section 6 hour CLE
at the Mississippi Bar Center in Jackson.

Thursday, July 14, 2016
Health Law Section Annual Meeting
at the Sandestin Hilton.

Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Blake Adams at blake.adams@phelps.com.

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

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