

Talk It Through: Parity, Reform, Regulatory, Liability, and Ethical Issues



CROWE&DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW

4th Annual Collaborative
Behavioral Health Provider
Training

Topics

-  Mental Health Parity
-  ACA and Reform
-  Regulatory/Litigation Issues
-  Ethics

Mental Health Parity: History

- 📖 U.S. Mental Health Parity Act (1996)
 - Parity for annual and lifetime benefits.
 - Preserved discretion for extent and scope of benefits.
 - Not applicable to substance abuse/chemical dependency.

Mental Health Parity: History

U.S. Mental Health Parity Act (cont'd)

- Applies only to group health plans and insurers offering group health coverage.
- Not applicable to groups with less than 50 employees.
- Sunset provision extended.

Mental Health Parity: Reforms

- 📖 U.S. Mental Health Parity and Addiction Equity Act of 2008
 - Continued and expanded MHPA.
 - Expanded to include substance use disorder benefits.
 - Parity for “financial requirements” (i.e. deductible, co-pay, co-insurance, out of pocket limitations)

Mental Health Parity: Reforms (cont'd)



U.S. Mental Health Parity and Addiction Equity Act of 2008

- Parity for treatment limitations.
- Parity for out-of-network benefits.
- Required availability for plan information.
- Limitations:
 - Applies only to group health plans and insurers offering group health coverage.
 - Not applicable to groups with less than 50 employees.
 - Does not mandate plan provide mental health/substance abuse disorder benefits.



Mental Health Parity: Oklahoma



Requires benefits for treatment of “severe mental illness.”

- Schizophrenia
- Bipolar disorder
- Major depressive disorder
- Panic disorder
- Obsessive-compulsive disorder
- Schizoaffective disorder



Other mental health and substance abuse disorder benefits optional.



Mental Health Parity: Oklahoma (cont'd)

Parity:

- Pre-authorization and utilization review
- Inpatient hospital services
- Outpatient services
- Medication
- Home health visits
- Co-payments, deductibles, co-insurance, lifetime benefits

Mental Health Parity: Oklahoma (cont'd)

- 📖 Applies to “health benefit plans.”
- 📖 Does not include individual insurance.
- 📖 Small employers exempt.

Affordable Care Act: Qualified Health Plan/Essential Health Benefits

Qualified Health Plans

- Plans certified to participate in state health benefit exchanges.
- Must provide “Essential Health Benefits”

“Essential Health Benefits”

- (E) Mental health and substance use disorder services, including behavioral health treatment.

Other Reforms

Oklahoma Tort Reform

- Comprehensive Lawsuit Reform Act of 2009
- 2011 Tort Reform Legislation
 - HB 2128/SB 863

HIPAA/HITECH

- Breach Notification
- Civil Penalties

Comprehensive Lawsuit Reform Act of 2009

- 📖 \$400,000 Cap on Non-Economic Damages
- 📖 Professional Negligence
- 📖 Pleading Amount in Controversy

\$400,000 Cap on Non-Economic Damages

- In civil case arising from bodily injury, non-economic damages shall not exceed \$400,000
- Does not apply to any action that accrues before establishment of the Health Care Indemnity Fund (by 5-1-11)

\$400,000 Cap on Non-Economic Damages (cont'd)

- 📖 “Non-Economic damages” include any non-pecuniary harm such as pain and suffering, loss of consortium, disfigurement, mental anguish, and any other intangible loss
- 📖 “Bodily injury” means actual physical injury to the body and any resulting sickness or disease.

\$400,000 Cap on Non-Economic Damages (cont'd)

Two Exceptions

- **Both exceptions lift the cap if:**
 - Permanent and substantial physical abnormality or disfigurement; or
 - Permanent physical functional injury that prevents caring for self; or
 - Defendant's actions or failure to act were:
 - in reckless disregard for the rights of others
 - grossly negligent
 - fraudulent; or
 - intentional or with malice

- **Differences:**
 - Standard of Proof
 - All cases except physician malpractice – “preponderance of evidence”
 - Physician malpractice – “clear and convincing evidence”
 - Physician Malpractice – non-economic damages above \$400,000 paid from Health Care Indemnity Fund (capped annually at \$20,000,000)

Professional Negligence

- 📖 Plaintiff must attach expert affidavit, attesting claim is meritorious and based on good cause
- 📖 Upon defendant's written request, plaintiff must, within 10 days, provide:
 - a copy of expert's opinion; and
 - a HIPAA-compliant release of plaintiff's medical records for past 5 years
- 📖 Expert's opinion is NOT admissible at trial or subject to inquiry during discovery or trial
- 📖 Indigent exemption

2011 Oklahoma Tort Reform Legislation




HB 2128

- Lowers non-economic damage cap to \$350,000.00.
- Eliminates Health Care Indemnity Fund.
- Amends standards for lifting cap.

HB 2128

- 📖 Permits removal of damage cap in all negligence actions arising from claimed bodily injury where:
 - Clear and convincing evidence; and
 - Actions or failures were in reckless disregard, grossly negligent, fraudulent, or intentional or with malice.

HB 2128

-  Removes separate proof standards between physicians and all other professionals.
-  Removes application limited to only professional negligence claims.
-  Removes additional permanent impairment grounds for lifting cap.

Other Reforms (cont'd)



HIPAA/HITECH

- Breach Notification
 - Applies to breaches involving, unsecured protected health information.
- Civil Penalties

Regulatory/Litigation Issues

Regulatory Investigation Sources

- Medicare Integrity Program
- Oklahoma Medicaid Program Integrity Act

Regulatory/Litigation Response

- E-Discovery

Medicare Integrity Program

Powers and authority:

- Medical, utilization, and fraud review
- Audit of cost reports
- Payment determination
- Quality assurance education

Medicare Integrity Program

Powers and authority (cont'd):

- Recoupment
- Interest penalty
- Extrapolation

Medicaid Program Integrity Act



Powers and authority:

- Records access required as condition of participation/assistance.
- Subpoena power to compel access.
- Records obtained by regulators are confidential and not subject to Open Records Act.
- Disclosure is not breach of confidentiality.

Medicaid Program Integrity Act

Powers and authority:

- Recoupment
- Interest Penalty
- Extrapolation

Regulatory/Litigation Response

 E-Discovery Implications

 Response Plan

Electronically Stored Information ("ESI")

- 📖 Immense and Expanding Volume and Sources of Electronically Stored Information ("ESI")
 - 28% U.S. businesses report proliferation of Electronically Stored Information (ESI) as biggest legal challenge
 - 70% U.S. businesses report developing in-house E-Discovery plans

E-Discovery

2006, 2007

- Federal Rules of Civil Procedure amended to include ESI.
- State Courts usually follow.

2010

- Oklahoma enacted SB 2039.
- Amended Oklahoma Discovery Code to expressly include ESI.
- Effective November 1, 2010.

ESI Proliferation




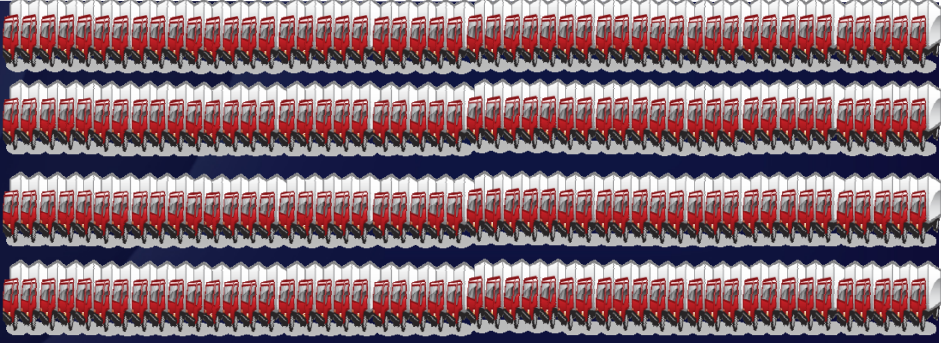
Traditional ESI Sources

- 📖 Office desktops
- 📖 Office laptops
- 📖 Business e-mail
- 📖 Business voicemail

Proliferating ESI Sources

- 📖 Electronic Medical Records
- 📖 Facebook, MySpace, Twitter
- 📖 Instant Messaging
- 📖 Text Messages
- 📖 PDA's, Cell phones
- 📖 Yahoo Mail!, Gmail
- 📖 Blogs
- 📖 Metadata

ESI Volume

ESI Quantity	# of Pages	# of Boxes	=
5 Gigabyte	250,000	100	
25 Gigabyte	1,250,000	500	
250 Gigabyte	12,500,000	5,000	
1 Terabyte	50,000,000	20,000	

ESI Sanctions

 Re-produce Documents

 Monetary Fines

 Adverse Inference

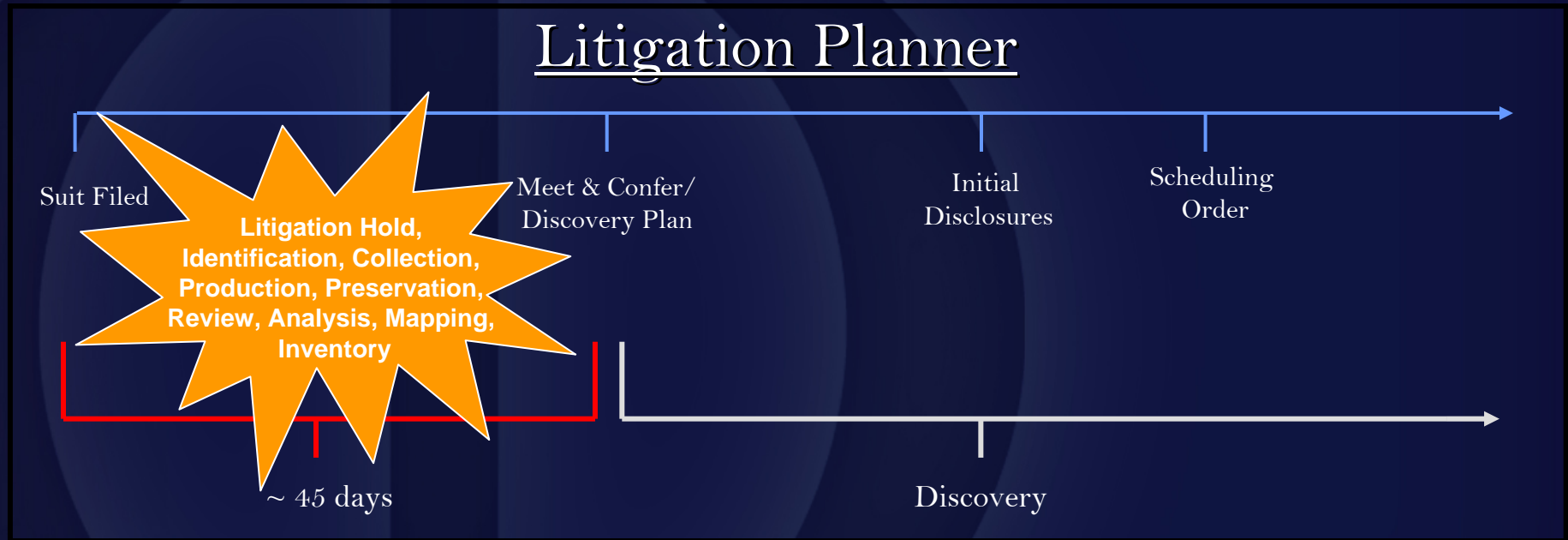
 Default Judgment

ESI Deadlines



Compressed time deadlines

Litigation Planner



Response Solutions



ESI Leadership Team:

- Multi-Disciplinary
 - Legal Counsel
 - IT
 - Management
 - Human Resources/Personnel
 - Employees

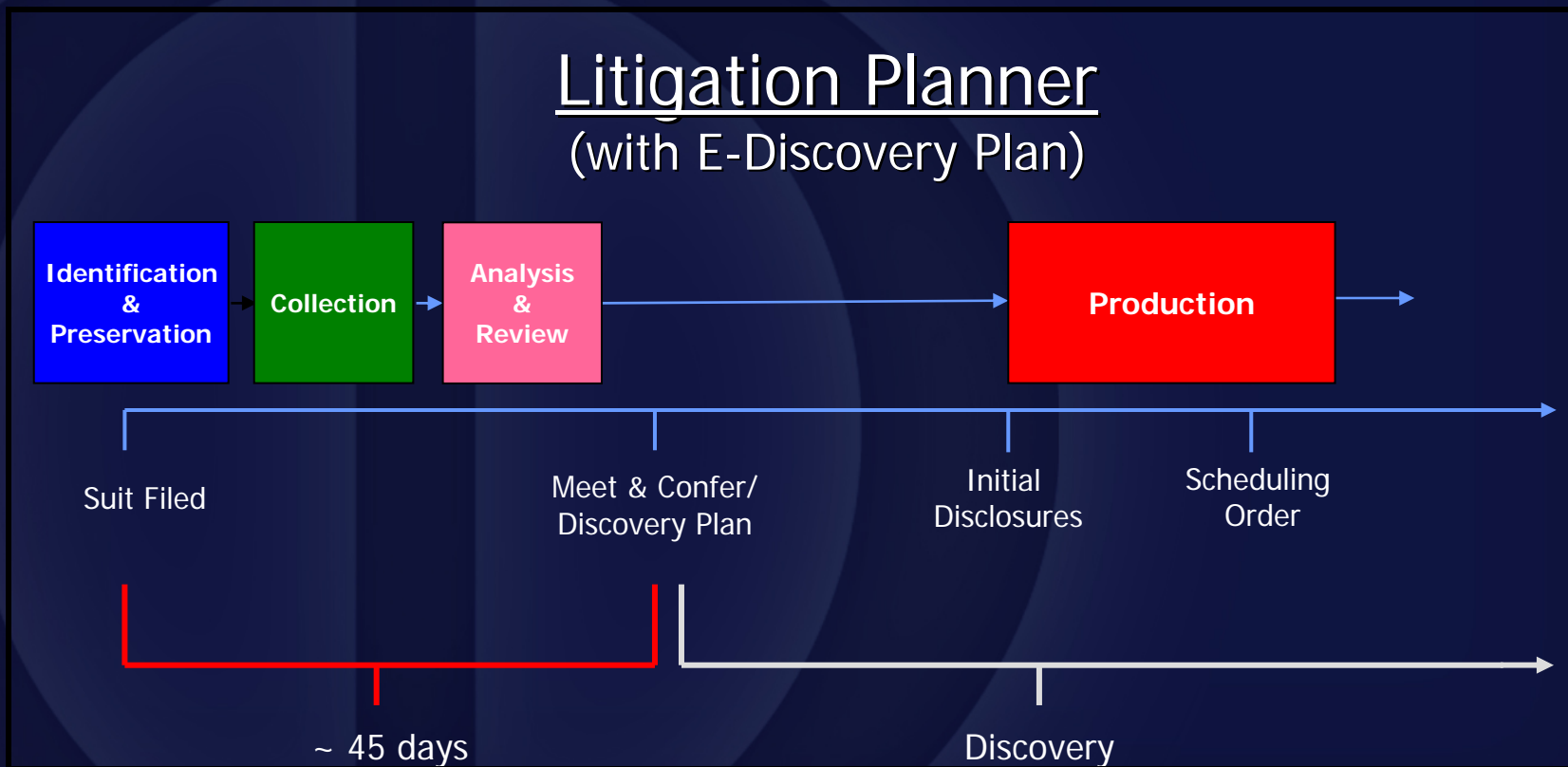


Response Solutions

Response Readiness Policies:

- ID, Inventory, Map
- Retention, Destruction, Hold
- Collect, Analyze and Review
- Produce
- Audit

A Plan for Success



Common Ethical Issues

- 📖 Professional integrity
- 📖 Scope of practice/use of professional titles
- 📖 Professional boundaries
- 📖 Confidentiality
- 📖 Respect for differences in cultural, individual, age, gender, sexual orientation, race, ethnicity, religion, disability, language, and socioeconomic circumstances.

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