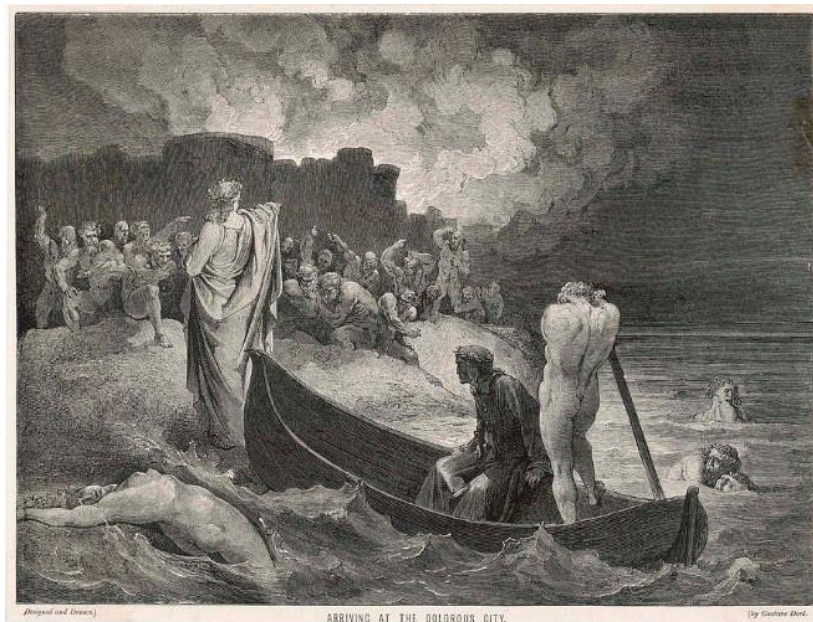


A DIVINE COMEDY REDUX: DISCOVERY AND USE OF HEALTHCARE INFORMATION (RECORDS, BILLS, AND BEYOND)

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“Damages for wrongful personal injury include the reasonable expenses for necessary medical care, but it has become increasingly difficult to determine what expenses are reasonable.”

Haygood v. De Escabedo

OVERVIEW

Writing about the changes in discovery and relevancy of healthcare information in Texas is like writing a traveler’s guide for travel through hell. Discovery in this area is like an unending nightmare of darkened switchbacks that interminably descend into greater complexity and darkness without hope of salvation or transcendence. Ironically, compared to the rest of the procedural, discovery, and evidentiary issues in a medical malpractice case, the discovery and admissibility of medical records and bills historically have been rather mundane. Well, throw another log of complexity on the medical malpractice inferno. Simply put, discovery and admissibility of medical records and bills have become magnitudes more complicated and challenging than in the past. How did we get here? Unfortunately, I am not Virgil and I do not profess to have his insight and wisdom to be the most dependable pilot for such a mysterious and challenging journey. Nonetheless, having agreed to undertake the role, I will do my best.

Discovery of healthcare information and bills over the last few years has been the focus of considerable appellate attention. These recent developments have been particularly vexing to practitioners handling car wreck litigation. While not quite as impactful in medical malpractice litigation, these developments are noteworthy and will influence strategy and tactics. The purpose of this paper is to hopefully shed light on what has happened and how to deal with it.

What is particularly intriguing, and often confounding about the discovery (as well as the admissibility) of medical records and bills are the concepts of relevancy and proportionality. There is no question that medical records and bills specifically pertaining to the care at issue will be relevant in a medical malpractice claim. ***The question is how much more healthcare information can we get and for what period of time?*** More specifically, what volume of data for what time period and for what conditions will past medical records and bills be discoverable and usable at trial? Recent Texas Supreme Court opinions indicate that it may be more difficult in the future to obtain expansive past medical records pertaining to Plaintiffs and others whose medical condition is put in issue. However, discovery and admissibility of information relating to the reasonableness of medical bills have become much more expansive.

Relevancy not only is a critical consideration in discovery between the parties, it is also an important consideration when applied to discovery from non-parties. The scope of discovery is the same for non-parties as it is for parties, with the caveat that a non-party might be able to obtain reimbursement for unduly burdensome requests.

Healthcare providers have experienced additional intrusion and burden as a result of the recent developments in the scope of discovery pertaining particularly to medical bills. Healthcare providers now not only must deal with the burden of providing medical records and bills pertaining to their care of a Plaintiff, but in many cases, they must also respond to inquiries about billing agreements with the Plaintiff and third parties. These inquiries include what is charged to various patients depending on whether they are in-network, out-of-network, insured or uninsured, or covered by Medicare or Medicaid. Physicians engaged in the practice of providing letters of protection are now exposed to an even more expansive scope of discovery, particularly if the protection extends only to reasonable and necessary charges. See *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021) discussed in detail below.

Attorneys tend to view developments in the law cynically. They often believe that the opposing side is the one that is not being forthcoming in discovery, so the law needs to address this abuse. However, rarely is abuse one-sided and what affects one side usually also affects the other. That is the probable effect of the holding in *In re Kuraray America, Inc.*, 656 S.W.3d 137, (Tex. 2022). While the defense bar probably hails the decision as bringing some reasonable restraint to Plaintiff's expansive requests for cell phone data in personal injury cases, particularly motor vehicle collisions and construction incidents, the opinion could also likely add some constraint on the scope of medical records that Defendants will be able to obtain regarding the Plaintiff in personal injury cases and medical malpractice cases. The same underlying predicate required to obtain cell phone data beyond the immediate time of the incident could and probably will be applied to Defendants' requests for Plaintiff's medical records in a medical malpractice case. If so, there will need to be a demonstration of how records going back to the Plaintiff's birth are relevant to the claim at issue in the lawsuit. This paper will examine and discuss what may be required in this regard.

Another consideration that has slowly been folded into the mix over the last decade is the concept of proportionality. This too will be discussed in the cases we review. Proportionality, by definition, requires a balancing of interests and needs. In a particular medical malpractice case, what is the Plaintiff claiming or seeking and what is the comparative burden imposed on the Defendant? Most importantly, to what extent does the requested discovery aid in the resolution of the claim?

There also is the issue of protection. While a court often will be at risk of abusing its discretion in denying discovery entirely, especially if it goes to the heart of a claim or defense, a court is allowed great discretion in modifying the scope of discovery that is.

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