



# Opting In and Opting Out

EXPLORE Healthcare Summit 2018

Legal Issues Updates



# Opting In and Opting Out

- A Very Broad Topic
- No Longer just in or out of Medicare and Medicaid
- Opting In or Opting Out of Allopathic Medicine or Osteopathic Medicine...
- Opting In or Opting Out of “Evidence Based” Medicine as opposed to anecdote based belief
- Using non-conventional tools or practices to improve profit models
- Opting In or Opting Out of Corporate Medicine
- Opting In or Opting Out of Employment based Medicine
- Opting In or Opting Out of Patient Based Medicine...



## Opting In and Opting Out

The Ever-Present “Quackery” in all  
branches of medicine

The Unproven Remedy to Life’s  
Aliments

\$ One Dollar Snake Oil



# Opting In and Opting Out

We are told to use of guidelines [“Evidence-Based Medicine”] ...the use of controlled trials as opposed to anecdote-based belief ...nonetheless...

- *“Medicine with a side of mysticism: Top Hospitals promote unproven therapies”* Casey Ross STAT [online] March 7, 2017...discussing University of Florida, Thomas Jefferson University, University of Arizona, Georgetown, Johns Hopkins, Mayo Clinic, and Cleveland Clinic
- Their use of patients as “Customers” ...
- Customers have demands, hospital executives and administrators develop “an enterprise strategy for growth and development”
- Naturopaths and acupuncturists to cure disease, marijuana clinics to treat pain\*, and reiki [“lightly touching patients can unleash a cosmic energy flow that will heal naturally”]



# Opting In and Opting Out

- Even in the medical literature, trivial data make the news as if fact:
- “*Thyroid Nodule Location Predictive of Malignancy*” made all the news media and physician literature...198 patients with nodules, 7.4% were found by FNBx to be malignant (15 patients, right or left lobes) of which 12 were in the lower lobe...actually an anecdote-based study using innuendo
- A ketogenic-diet plan based on a single, non-controlled open label trial is being touted by a speculative investment company called Virta as being able to “reverse” Type II Diabetes with the goal to treat 100 million patients to health by 2025...and is being purchased by companies for employees
- And then there is the continued debate on chronic Lyme Disease, Anti-Vaccination movement and safety, Vitamin D as a preventative for cancer and ASCVD, and the unregulated, multi-billion dollar market of supplements (more than the pharmaceutical industry)
- “Pricey Pee” as an article by Melissa Walton-Shirley called it...

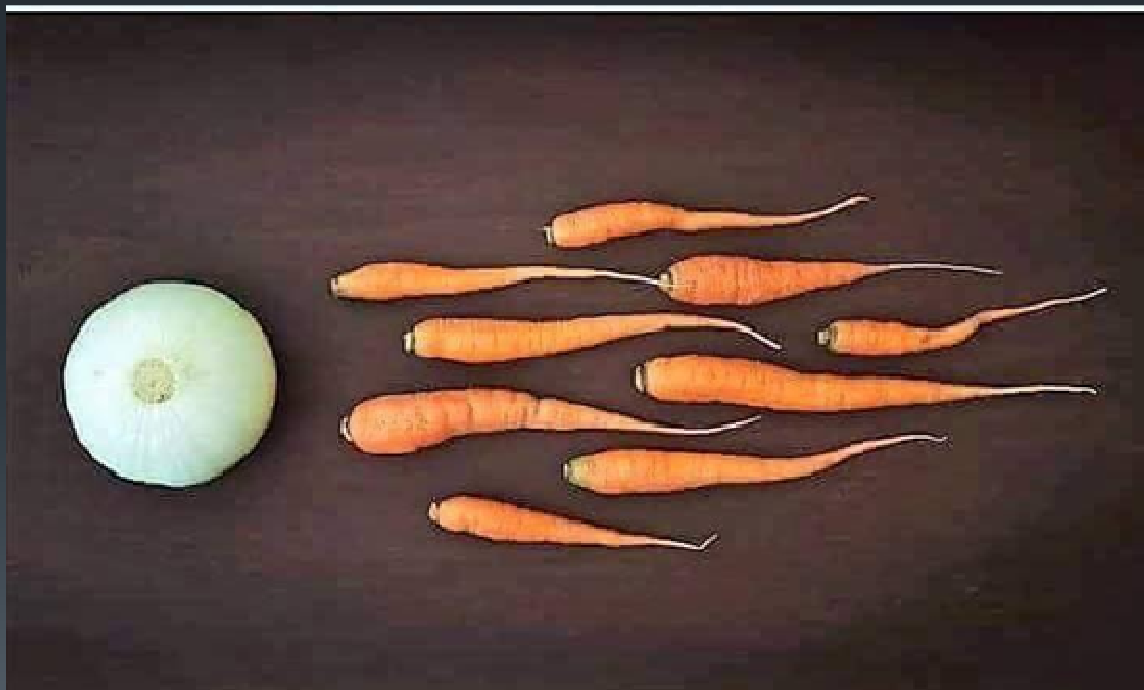


## Are Vegans Born or Made?

- No question from the literature that Vegan and Vegetarian Diets are the healthiest...hard to stay with...
- An Age-Old question...like “which came first, the Chicken or the Egg?”



# How Vegans are Conceived





# Opting In and Opting Out

- Hot-button Issue: Is “Medical Marijuana” actually “medical?” There was no improvement of pain when added to opioids in a 4 year prospective trial of 1514 non-cancer pain patients (Campbell et al *Lancet* 3:e341(July 2018); see also John Watson “Smoke and Mirrors: Is Marijuana Actually Medicinal? *Medscape* April 18, 2018)
- **A Classic Article:** “Parachute use to prevent death and major trauma related to gravitational challenge: Systematic review of randomized controlled trials” C. Gordon S. Smith and Jill Pell *BMJ* 327:20-27 (2003)
- The authors summarize: “What we know: (1) Parachutes are widely used...(2) Parachute use is associated with adverse effects due to failure of the intervention and iatrogenic injury; (3) Studies of free fall do not show 100% mortality (4) No randomized controlled trials of parachute use have been undertaken ...and need to be before we decide if parachutes work and should be used widely”





# Opting In and Opting Out

- Putting aside for now how we decide what is “true”
  - Medical Legal Issues and Updates



# Opting In and Opting Out

- Knowing all the insanity that seems to be “out there”...we hunker down, try to follow the best guidelines, and keep our heads below the radar...right?

## ▪ Social Media

Over the age of 50, we are immigrants to the Internet and  
Social Media

Under 50, we are Natural Born Citizens



# Opting In and Opting Out

- *Social Media is still the Wild West* of Patient Contact and Increased Liability
- The Federation of State Medical Boards published Model Guidelines for the use of Social Media in April 2012, revised in minor ways since then, still good advice; see *also* Catherine Caldicott “A Period of Maladjustment” *J Medical Regulation* 103:24-31 (2017)
- Facebook, Instagram and Twitter are fraught with risk...violations of **privacy** (HIPPA and State Law) and increased legal and social accountability
- Providing more information than is safe for the physician, exposing the physician to **personal and financial harm**
- **Janice Joplin: “Freedom is just another word for nothing left to lose.”**



# Opting In and Opting Out

- “Should physicians be friends with their patients on social media” *The DO*, June 11, 2018
- 69% of all adults and 88% of those 18-24 use some form of social media (Pew Research), and social media is a source of medical information for the majority of Americans
- 2/3 of millennials and 43% of all adults feel it is appropriate to contact their physician about a health issue by online posting or direct messaging (The Harris Poll April 2018 for the AOA)
- 67% of physicians use social media for professional purposes
- Telemedicine is expanding in both use and legal parameters (Medicare has estimated they mis-paid over 40% of claims in 2017; see also Kaveney and George “Potential for Fraud and Abuse in the Administration of Telehealth Services” ABA Health eSource 14;8 April 2018)



# Opting In and Opting Out

- Telemedicine is clearly useful in rural settings, done well ... *The Oklahoman* (July 25, 2018) “Rural health care goes remote” ...quotes Di Smalley, Regional President Mercy in Oklahoma on its proper use
- BUT: Large survey (Deloitte July 19, 2018) found over 90% of physicians afraid of medical errors, privacy violations, lack of reimbursement/increased cost, and a lack of patient interest/technology as limiting their use
- Using Social Media as a “work-around” does not solve those issues



# Opting In and Opting Out

- The Problem [the ‘elephant in the room’]:
- Social media creates a **permanent record** of all contacts...it does not disappear...as the #MeToo movement has proven
- The reach of any message sent is never certain...that is, who actually sent the message and who actually reads the message? And will it be reproduced?
- Social media is not “private” between the parties...evidenced by “friending” on Facebook ...and the use of the information harvested from your contacts by Facebook itself
- **Do you want to be accountable for something you said or did 20 years from now? “A picture is worth a thousand words”**



# Opting In and Opting Out

- John Kaveney and Megan George “Potential for Fraud and Abuse in the Administration of Telehealth Services, ABA Health eSource 14:8 (April 2018)
- Alex Mangrolia, “10 Online Reputation Management Rules for Physicians” July 11, 2018
- *Practice Builders* at
- 1 Technology Drive, Bldg 1, Suite 829, Irvine, CA 92618
- [www.practicebuilders.com](http://www.practicebuilders.com).



# Opting In and Opting Out

- And then there is “Social Determinants of Health Data (SDOD)” and “Big Data”
- **LexusNexus** has accumulated comprehensive data in 442 separate categories on 279 million persons, with proprietary algorithms to provide “scores” using non-protected personal data
- “Risk scores” to “red dot” patients for more intensive medical care, but also for financial risk, medical risk, including arrest records, bankruptcy, marriage, divorce, voter registration
- “23 and Me” ...operates under the premise that we are our genetic codes, but SDOD is more accurate...it is Epigenetic data
- Facebook, Twitter and other social media provide some of information
- Facebook data use is not just “laser marketing”...





## Opting In and Opting Out

- Okay, so there is nothing [or little] new under the Sun to “cure disease”, and Social Media is not an easy way to expand or streamline my practice...
  - What now?
- “All I really want to do is see patients and earn a living, maybe if I just go back to those basics...”



## Opting In and Opting Out

- One possible solution: **Opting In...**
  - Being Employed by a hospital or large physician organization
  - Which involves Corporate Medicine and Contract Law
  - And the ever-present Electronic Health Record [“In or Out”]



# Opting In and Opting Out

## ■ Seeing Patients:

- Electronic Health Records now take over 70% of our time to complete: “I spend twice as much time tending to things that really have very little or nothing to do with direct patient care.” Michael Hodgkins, CMIO of the AMA based on a recent study
- To earn a living I need to complete the record, so I spend less than 20% of my precious 20-30 minutes with the patient actually looking at the patient
- “Seeing the patient” is not possible
- *“Putting Patients First by Reducing Administrative Tasks in Health Care: A Position Paper of the American College of Physicians” Annals of Internal Medicine March 28, 2017*
- Excellent article and Position Paper
- Thus far, largely ignored by Hospital Administrators...but not by Software firms



# Opting In and Opting Out

- **Physician Burnout** (depression in the workplace) continues to worsen on a national level, as nothing changes
- Burnout is a large topic...
- The seminal article is: Shanafelt and Noseworthy “Executive Leadership and Physician Well-Being; Nine Organizational Strategies to Promote Engagement and Reduce Burnout” Mayo Clinic Proceedings 92:129-146 (January 2017); see *also* FSMB “Physician Wellness and Burnout” Policy Statement April 2018
- The literature is rich and growing on this problem, from medical error increases to high suicide risk among physicians
- EHR’s have increased the workload, operating costs, inefficiency and decreased “productivity” for 2/3 of physicians surveyed...and remain the #1 cause of burnout



# Opting In and Opting Out

- To Interject ...
- *Is there something on the horizon that might help?*
- **The Medicare Integrity Initiatives**, and the Provider Education component
- **Medicare Billing reforms**
- **Software Development** including pressure on commercial insurance firms to develop changes



# Opting In and Opting Out

- The **Contract** ...a requirement of Opting-In
- **The marriage and the divorce...a form of pre-nuptial**
- A number of practical issues: Call/Rotation, term of the contract, salary/benefits, malpractice insurance, managed care participation, loan payments...
- Moonlighting, Related Revenue, and the ability to work outside the physician organization, “blue lines” (non-solicitation)...



# Opting In and Opting Out

- *And then there is:*
- “Productivity Goals”...making physicians “widgets” under “indentured servitude” or “sharecropper” arrangements
- Termination without cause and with cause [catch all phrase “any conduct which employer deems detrimental to ...” listing documents that are not included but referenced]
- Recently in Arizona Steven Maron, MD (in practice 31 years) wrote an opinion piece praising NP’s but noted that they had less training than physicians and were not *equal* substitutes to physicians, that physicians added an “extra dimension of care”
- Fired because his article stood in violation to the organization’s principles of “mutual respect”...a catch-all phrase in one of the ancillary documents, not Medical Staff Bylaws
- Rebecca Bernard MD *Medical Economics* blog section March 31, 2018



# Opting In and Opting Out

- Another Thought... **Opting Out**
- NYU school of medicine Donna Shelley MD July 2018: In NYC 13.5% of docs in small independent practices (174 small groups of less than 5 physicians out of a total of 235 practices studied) felt burned out while the national average is 54.4% (Stanford Univ School Med study of 6700 physician) John Commins *HealthLeaders* July 12, 2018
- Less than 1/3 the burnout rate when physicians closely associate





# Opting In and Opting Out

- **The Association of Independent Doctors**  
400 N. New York Ave, Suite 213 Winter Park, FL 32789  
[www.aid-us.org](http://www.aid-us.org)
- **The American Association of Physicians and Surgeons**



# Opting In and Opting Out

- **Concierge Practice**
- Several Models: (1) Direct Primary Care (lower membership fees, no insurance filed, MC Opted Out)
- (2) Hybrid Concierge
- (3) HSA/high-deductible insurance and reduced fees
- (4) Classic Concierge with high or low membership fees



## Opting In and Opting Out

- Mayo Clinic, Virginia Mason Medical Center (Seattle), Massachusetts General Hospital, Stanford Health Care and Duke have developed concierge models



# Opting In and Opting Out

- **Among attractive features:**
- Small Businesses can afford
- Provides care for those without insurance, even the poor
- Rapid, personalized service
- Physicians have time, patients appreciate the time spent, and electronic health records may be absent or minimal
- Physicians can return to patient care, care is better and less depression



# Summary

A hundred options in a thousand places...

- Let me recommend: If you are a specialist, opt out... if you intend to practice more than 3-5 years
- If you are a generalist, look at your situation and realize marketing your practice will be essential if you opt out
- You are less “trapped” than you feel



- Thank you
- Questions?