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Massachusetts Legislature Reforms Medical Malpractice Legislation to Promote Apologies and Encourage Settlements

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On November 4, 2012, a number of statutory provisions reforming the medical malpractice system in Massachusetts became effective. Two of these provisions are clearly intended to reduce the number of medical malpractice actions brought by encouraging early resolution.

The first reform, enacted as Mass. Gen. Laws ch. 231 § 60L, imposes a 182 day so-called "cooling off" period on claimants.[1] Before a medical malpractice action may be filed, section 60L (a) requires that the claimant give the health care provider 182 days written notice of his/her intent to commence an action.[2] The written notice must include information including, without limitation:

> (1) the factual basis for the claim;
> (2) the applicable standard of care alleged by the claimant;
> (3) the manner in which it is claimed that the applicable standard of care was breached by the health care provider;
> (4) the alleged action that should have been taken to achieve compliance with the alleged standard of care;
> (5) the manner in which it is alleged the breach of the standard of care was the proximate cause of the injury claimed in the notice; and
> (6) the names of all health care providers that the claimant intends

1. Lawsuits filed against health care providers within the 6 months prior to the expiration of the statute of limitations, or the year prior to the expiration of the statute of repose are exempt from compliance with Mass. Gen. Laws ch. 231 § 60L. Mass. Gen. Laws ch. 231 § 60L (j). Mass. Gen. Laws ch. 260 § 4, the statute of repose, provides that:

> Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

2. This notice period can be shortened to 90 days in the following circumstances:

> (c) The 182-day notice period in subsection (a) shall be shortened to 90 days if:
> (1) the claimant has previously filed the 182-day notice required against another health care provider involved in the claim; or
> (2) the claimant has filed a complaint and commenced an action alleging medical malpractice against any health care provider involved in the claim.

Mass. Gen. Laws. Ch. 231 § 60L (c) (2012).

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> to notify under this section in relation to a claim.

Mass. Gen. Laws ch. 231 § 60L (e). Once notified, the health care provider has 150 days in which to provide a written response to the claimant.[3] Mass. Gen. Laws ch. 231 § 60L (e). This written response must include:

> (1) the factual basis for the defense, if any, to the claim;
> (2) the standard of care that the health care provider claims to be applicable to the action;
> (3) the manner in which it is claimed by the health care provider that there was or was not compliance with the applicable standard of care; and
> (4) the manner in which the health care provider contends that the alleged negligence of the health care provider was or was not a proximate cause of the claimant's alleged injury or alleged damage.

Mass. Gen. Laws ch. 231 § 60L (g).

The statutory goal of promoting settlement is clearly served by the detailed disclosures required from both sides.[4] These disclosures require that both parties engage in a meaningful analysis and evaluation of the strengths and weaknesses of their cases earlier than they might normally do so. In addition, the disclosures prompt the communication necessary to settle the claims.

Some of the disclosures may require the input of consulting experts. Not only is the claimant required to state the applicable standard of care and the manner in which it was breached, but he/she is also required to enumerate how the health care provider's breach of the standard of care caused the injury in question. Similarly, the health care provider is required to set forth what he/she believes to be the applicable standard of care, how

3. If the health care provider does not respond within the 150 day period, the claimant can file a medical malpractice action immediately upon the expiration of the 150 days. Mass. Gen. Laws ch. 231 § 60L (h). In order to encourage timely responses, the statute provides that if a health care provider fails to respond within 150 days, prejudgment interest will be calculated from the date that the notice was given, rather than the date that suit was filed. Id.

4. Indeed, while the legislature has provided a mechanism by which the statutory cooling off period can be shortened, Mass. Gen. Laws ch. 231 § 60L (i), it does not appear that this provision relieves a provider from his/her duty to respond under § 60 L (e).

he/she complied with this standard of care and how the alleged breach was or, as is much more likely, was not the proximate cause of the injury. While the claimant's need for consulting experts is likely greater, potential defendants may want to obtain expert opinions before responding to the claimant's notice. Further, the statute provides for limited discovery of the putative plaintiff's medical records. The claimant is required to give the health care provider access to the medical records relating to his/her claim. These medical records may be made available directly or through releases. Mass. Gen. Laws ch. 231 § 60L (f).

By providing the health care provider with the claimant's medical records and requiring detailed disclosures from both parties the statute promotes an honest appraisal of the relative merits of the claims. Other states have found that similar "cooling off" periods have contributed to a reduction in medical malpractice actions. For example, the University of Michigan Health System attributes some of its success in reducing medical malpractice litigation to constructive engagement during the 182 day cooling off period required under Michigan law.

Constructive engagement between health care providers and/or health care facilities and claimants requires a productive working relationship. The coordination between the parties during the six month cooling off period is likely to be fostered and encouraged by the second statutory reform: apology legislation. Although somewhat controversial, a number of commentators have resoundingly endorsed apology legislation because it encourages apologies and several studies have shown that apologies improve the provider-patient relationship and reduce litigation.

Mass Gen. Laws ch. 233 § 79L provides broad protection for apologies after "unanticipated outcomes:" [5]

> In any claim, complaint or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error or a general

5. Unanticipated outcomes are defined as "outcome[s] of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an intended result of such medical treatment or procedure." Mass Gen. Laws Ch 233 § 79L (a)

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> sense of concern which are made by a health care provider, facility or an employee or agent of a health care provider or facility, to the patient, a relative of the patient or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence in any judicial or administrative proceeding, *unless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the mistake or error shall be admissible for all purposes.* In situations where a patient suffers an unanticipated outcome with significant medical complication resulting from the provider's mistake, the health care provider, facility or an employee or agent of a health care provider or facility shall fully inform the patient and, when appropriate, the patient's family, about said unanticipated outcome.

Mass. Gen. Laws ch. 233 § 79L (b) (emphasis added).

At first blush, this statute suggests that any health care provider, or an agent or employee of a health care provider or health care facility, can apologize for an unanticipated outcome or adverse event, express condolences and admit a mistake, secure in the knowledge that his/her statements will be inadmissible in court. While this protection is to be welcomed, especially in light of the important function that a prompt apology serves in maintaining good relationships with patients and minimizing the risk of exposure to litigation, those making an apology should still exercise caution.

Caution is necessary, first, because the statute provides that statements made in the course of apologizing could become admissible where there is contradictory or inconsistent testimony from the person making the apology or from an expert witness. For example, a health care provider who apologizes at the time of the adverse event and admits responsibility, but later learns through further investigation or expert opinion that there were other more likely causes of the adverse event cannot later testify that he/she was not responsible for the adverse event without risking having the statement of fault admitted at trial.

Second, caution is also warranted because the full parameters of the stat-

utory protections have not been clarified by Massachusetts courts. Although the Massachusetts legislation appears to afford broad protection to statements made in the course of apologizing for adverse events, it is possible that Massachusetts courts could interpret the statute restrictively, thus undermining some of the protections afforded.

Third, while the statute protects statements of mistake or error, providers should be cautious about apologizing, in the sense of admitting fault at a time when the facts are not fully established. An apology cannot be undone, even though a provider later learns that the patient was not harmed or that the provider did not violate the standard of care.

Therefore, while the Massachusetts apology legislation is to be welcomed, health care providers, health care facilities and risk managers need to be aware of the potential pitfalls of apologies. In light of the fact that early apologies may help to maintain provider patient relationships and reduce medical malpractice suits, they ought to be encouraged, but time must be taken to understand the circumstances surrounding the adverse event so statements made during an apology do not do damage in any potential future litigation.

The "cooling off" period and the protections afforded to health care providers provide important steps in reducing medical malpractice litigation and promoting early settlements. These provisions should help maintain good patient-provider relationships and reduce litigation costs.

In addition to the notice requirement and apology protections, there were other statutory amendments in the same legislation. One of the more important revisions was an increase to the limitation of liability for non-profit health care facilities from $20,000 to $100,000. Mass. Gen. Laws ch. 231 § 85K.

The legislation also included a proposal to end joint and several liability and instead apportion damages according to the proportionate fault of each Defendant. This provision was not passed.

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