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Massachusetts' New "Disclosure, Apology and Offer Law": A Prescription for Caution

On August 6, 2012, Massachusetts Governor Deval Patrick signed into law Senate Bill No. 2400, entitled, An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency, and Innovation. This legislation, which will go into effect ninety days from the date of the Governor's signature, affects numerous aspects of the health care delivery system in Massachusetts.

Imbedded deep within this 349 page omnibus bill are a series of provisions which address medical malpractice litigation. These provisions were the product of what has been described as "an historic and unprecedented partnership" between the Massachusetts Medical Association, the Massachusetts Bar Association, and the Massachusetts Academy of Trial Lawyers (an organization of plaintiffs' lawyers). Known collectively as the "Disclosure, Apology and Offer Law," these provisions are intended to represent a marked break from the "deny and defend" strategy said to have historically described the response of physicians and hospitals to instances of patient injury.

Pre-Litigation Resolution Period

Section 221 of the Act amends Massachusetts General Laws, Chapter 231 ("Pleadings and Practice"), to include a new Section 60L. This section changes the manner in which most medical malpractice cases are filed in Massachusetts. It envisions a six-month pre-litigation period in which providers and patients attempt to resolve potential claims. Before a prospective plaintiff may file a medical malpractice action, they must notify the health care provider of the claim, in writing, 182 days before commencing suit.[1] The notice must include, (1) the factual basis for the claim; (2) the applicable standard of care alleged by the claimant; (3) the manner in which the applicable standard of care was breached by the provider; (4) the alleged action that the provider should have taken to comply with the standard of care; (5) how the breach of the standard of care proximately resulted in injury to the claimant; and (6) the names of all health care providers that the claimant intends to notify of the claim.

Within 56 days after having provided notice of the claim, the claimant must give the health care provider access to all related medical records that are in the claimants control, and furnish releases for any related records known to the claimant that are not in the claimant's possession. The statute provides no enforcement mechanism or identifiable means of sanctioning claimants who fail to disclose relevant medical records.

After the health care provider receives

[1] *The new statute does not explicitly state how this provision is to be enforced; however, the presumption is that a defendant provider is entitled to have the court dismiss any malpractice action that was filed without the prerequisite notice.*

notice of the claim, they, or their representative, have 150 days to draft a written response. This statement must contain, (1) the factual basis of the defense, if any; (2) the standard of care that the health care provider alleges was applicable; (3) how it was that the health care provider complied or failed to comply with the standard of care; and (4) the manner in which the health care provider contends the alleged negligence was or was not the proximate cause of the claimant's alleged injury.

If the claimant does not receive a written response from the provider within 150 days, the claimant "may" file suit. If the claimant alleges in his or her complaint that the health care provider failed to respond to their notice, prejudgment interest[2] on any potential judgment will be calculated from the date upon which notice was served, rather than from the date upon which the complaint was filed, as is the usual case. However, nothing in this provision suggests that the claimant must file suit immediately upon the expiration of the 150 day period. In theory, a claimant who notifies a provider of a potential claim immediately upon its occurrence, and then does not receive a response within the allotted time period, may wait until the eve of the expiration of three year statue of limitations, and have a full three years of pre-judgment interest added to any potential judgment.

If, after receiving notice of a potential claim, the health care provider informs the claimant in writing that they have no intention of settling the claim, the claimant may then file suit immediately, as long as the claim is not barred by the three year statute of limitations or the seven year statute of repose. Presumably, rejecting a claim, as opposed to ignoring a claim, will not increase the rate of pre-judgment interest assessed against a health care provider, should the claimant ultimately prevail at trial (i.e., prejudgment interest will begin to run upon the filing of the complaint, rather than at the time notice of the claim was provided). However, the health care provider's rejection of a claim must presumably address all of the elements discussed above, e.g., the factual basis of the defense, the applicable standard of care, *et cetera*. In the event of a plaintiff's verdict, the defendant should expect the plaintiff's attorney to file post-trial motions alleging inadequacies in the rejection letter in an attempt to take advantage of the earlier accrual date on the prejudgment interest.

Interestingly, section 60L(j) provides that none of the provisions discussed in the preceding paragraphs apply in instances where a lawsuit against a health care provider is filed within six months of the expiration of the statute of limitations, or within one year of the expiration of the statute of repose. To be clear, this is not a "discovery rule" because it is not limited to cases in which the plaintiff only learns that she may have been harmed by defendant's conduct shortly before the running of the limitations or repose period.[3] Nothing in section 60L(j) prevents a plaintiff from ignoring the notice requirements, and sitting on their rights until the eve the expiration of the limitations period, if they believe it is in their strategic interest to do so.

Apology and Disclosure

It has become widely accepted that many medical malpractice lawsuits could be avoided if a negligent provider simply owns up to it and apologizes to the patient. The patient may then forego retaining counsel to either learn the truth or force the provider to face it. Section 223 of the Act addresses this issue by amending Mass. General Laws, Chapter 233 ("Witnesses and Evidence"), to include a new Section 79L. This section of the statute applies to statements made by a health care provider to a patient with regard to an unanticipated outcome involving medical treatment or a procedure. In theory, the "apology and disclosure" language in this section is designed to protect health care providers who make disclosures to patients. However, there are reasons for being wary.

The statute defines an "unanticipated outcome" as a medical treatment or procedure that differs from the intended result, regardless of whether or not it was an intentional act. In those instances where the unanticipated outcome results in a "significant medical complication" and is the product of the provider's "mistake," the provider or their representative "shall fully inform the patient and, when appropriate, the patient's family" about the unanticipated outcome. "[S]ignificant medical complication" and "mistake," are not defined by the statute, and will presumably need to be fleshed out by judicial interpretation on a case by case basis.

The new statute provides no enforcement mechanism to sanction providers who fail to disclose medical errors; however, look for plaintiff's attorneys to fashion their own. In particular, expect plaintiff's attorneys to allege that a failure to disclose a mistake is a violation of the Massachusetts Consumer Protection Act (Chapter 93A), and that they are therefore entitled to the multiple damages and attorney's fees provided for under that statute.[4]

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[2] Massachusetts generally applies prejudgment interest at a rate of 12 percent per annum. However, in medical malpractice actions, the rate is presently calculated by taking the weekly average one-year constant maturity Treasury yield and adding four percent. Under Section 220 of the new act however, this rate will now be reduced to the average Treasury yield plus two percent.

[3] If the malpractice is not known or reasonably knowable, then the action does not accrue until the plaintiff should know that she was harmed by the medical malpractice. The three year statue then begins to run. This is known as the "discovery rule."

[4] For example, 940 Code. Mass. Regs, § 3.16(3) provides that, "an act or practice is a violation of M.G.L. c. 93A, § 2 if, . . . [i]t fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare . . .." The argument could be made that this new statute is meant to protect the public's health, safety and welfare, and, therefore, a failure to disclose a medical error is a violation of c. 93A.

In addition to the mandatory disclosure language, Section 223 of the Act also says that statements made by providers to patient and family members "expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of concern" about an unanticipated outcome, are inadmissible in judicial or administrative proceedings. However, any such statement will become fully admissible "for all purposes," if, under oath, the health care provider or a defendant's expert witness makes a statement that is "contradictory or inconsistent" with the otherwise inadmissible statement of regret, mistake, error, *et cetera*.

Taken together, the two prongs of the statutes Section 223, put health care providers between Scylla and Charybdis. On one hand, providers are obligated to inform patient's of medical errors, and if they do not, they should expect some nature of a sanction to follow. On the other hand, if they are going to advise patients of errors, they must be certain that the statements they make are fully informed statements. If they apologize for a particular outcome, but later testify that they believe they satisfied the standard of care, any statements that accompanied the apology may become admissible, not just for impeachment purposes, but to establish the truth of the matter asserted in the original statement.

It is unfortunate that the drafters of the bill did not include a provision that would render statements made with such apologies inadmissible at trial or in any administrate proceeding. The purpose of the bill is to encourage candor by providers, but the high level of uncertainty over what statements might later be used against the provider will likely inhibit frank discussion at the time of the apology. The drafters could have borrowed a principle from the Massachusetts mediation law that provides that statements made during a mediation cannot be admitted into evidence in any judicial or administrative matter. See Mass.Gen.L. c.233, Sec.23C. Both the mediation and disclosure, apology and offer laws share the goal of eliminating disputes by encouraging candid discussions, but they do not share the protections needed to facilitate that end.

Charitable Immunity

Finally, Section 222 of the Act increases the cap on damages provided by the Massachusetts' charitable immunity statute. Under current law, damages in a suit against a non-profit organization are limited to $20,000.00. However, under this new law, when a lawsuit alleges that a non-profit entity committed medical negligence, the limit on damages will now be $100,000.00, exclusive of interest and costs. This provision will undoubtedly lead to more lawsuits against hospitals and other non-profit medical entities in cases in which plaintiffs' lawyers would have otherwise omitted them as defendants.

"Can we all get along?"

Massachusetts' novel Disclosure, Apology and Offer Law, envisions a new "less hostile" way for physicians and plaintiff's attorneys to collaboratively address medical errors and malpractice claims. Only time will tell if the drafters' vision of litigation-free harmony will be fulfilled. The fact of the matter is that the American legal system is adversarial by its very nature, and nothing in this Act changes that basic truth. Consequently, a heavy dose of caution is in order. ■