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HEALTH LAW NOTES

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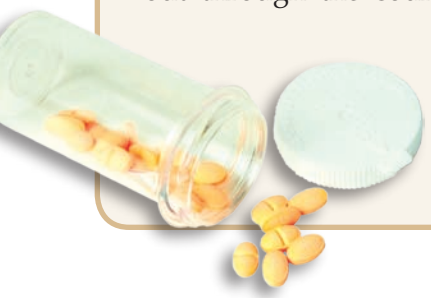
What's Inside

THE "SAY-YOU'RE-SORRY" MOVEMENT

Some malpractice-reform advocates say an apology can help doctors avoid getting sued, especially when combined with an upfront settlement offer. It's all part of a new movement called "Sorry Works!" or "Say-You're-Sorry". In recent years, some fourteen states have passed laws allowing physicians and hospitals to apologize to patients for making mistakes without the fear of such apologies being used as admissions of guilt in subsequent litigation. States, including Illinois, North Carolina, Oregon, Texas and Arizona, have done so to try to gain control over the medical malpractice crisis now spreading nationwide, which has forced many physicians to move or cease practicing entirely. The rationale behind this movement is that anger is often the motivator for many lawsuits. The physician who expresses empathy and an apology to his patients along with open communication about medical errors when they occur will reduce the number of medical malpractice lawsuits and lower settlement costs.

> *"...an apology to his patients along with open communication about medical errors... will reduce the number of medical malpractice lawsuits..."*

Louisiana has recently passed this type of legislation. On June 16, 2005, Governor Blanco signed Act 63, making empathetic statements or statements expressing or conveying apology, regret, grief, sympathy or condolence to patients or their families by health care providers inadmissible in a medical malpractice action. Act 63, however, does not make inadmissible statements of fault which are part of, or in addition to, such communication. The new law takes effect on August 15, 2005. While proponents of Act 63 hope that it will promote more open communication between physicians and patients, differentiating statements of fault from statements of apology or regret may be sorted out through the court system and may deter the willingness of physicians and other health care providers from saying anything.



In addition to the inadmissibility of empathetic statements, Act 63 contains specific provisions for medical professional liability insurers, the office of risk management and the Patient's Compensation Fund to use professional liability claims information to conduct studies, review data, and identify the underlying causes of unanticipated, adverse patient outcomes. Such information can be used to promote practice changes for the purpose of improving patient health care quality and reducing professional liability claims. Act 63 deems this information confidential, thus it is not subject to discovery, nor can it be admitted into evidence in any medical malpractice action. Moreover, no one involved in creating, generating, compiling or analyzing the information can be forced to testify in any medical review panel proceeding, arbitration proceeding or civil action.

The goal of Act 63 is to reduce the number of medical errors and medical malpractice lawsuits both by using information and data to prevent similar occurrences and by affording families with an apology from their medical providers when such events occur. Whether the new legislation will be successful or not is an open question, but similar programs adopted at the Veterans Affairs Hospital in Lexington, Ky. and the University of Michigan Health System have seen significant decreases in their liability costs and the average number of lawsuits filed since adopting programs that promote apologies by physicians. Act 63 now provides the legal protection that many physicians were seeking.

Jennifer F. DeCuir
225.389.3748
jennifer.decuir@keanmiller.com

NEW LAW ESTABLISHES NATIONAL DATABASE FOR REPORTING MEDICAL ERRORS

In 1999, the Institute of Medicine reported that an estimated 98,000 people die each year as a result of medical errors. On July 29, 2005, nearly six years after that notable report, President Bush signed into law the Patient Safety and Quality Improvement Act of 2005 (the "Act"). This new legislation seeks to reduce the number of future medical errors by creating a national medical error reporting system.

The Act authorizes the Department of Health and Human Service ("HHS") to certify independent patient safety organizations. Health care providers would voluntarily report medical errors to the patient safety organization, who would compile the information into a national database, analyze the data and recommend ways to avoid future mistakes.

To encourage voluntary reporting, the law protects the identity of individuals or entities that report medical errors. Moreover, the Act prohibits the use of any reported data as evidence in a malpractice suit. As Senate Majority Leader Bill Frist previously explained in the July 27, 2005 issue of CQ Today, "Fear of litigation has kept many health care providers . . . from sharing information if a mistake is inadvertently made. People are afraid to share their internal data. It might expose them to a ruinous lawsuit. And that drives reporting of the medical errors underground . . . This bill will change all that, will lift this threat of litigation."

In addition to barring the use of reported information for lawsuits, the new law also prohibits accrediting bodies and regulatory agencies from taking action against a provider based on reported data. Furthermore, the law forbids an employer from taking any retaliatory action against an employee for reporting medical errors.

Following the bill signing ceremony, J. Edward Hill, M.D., President of the American Bar Association, expressed support for the Act. "The health care community has long been committed to improving patient safety, and significant progress has been made through new technology, research and education," said Dr. Hill. "This patient safety law is the catalyst we need to transform the current culture of blame and punishment into one of open communication and prevention . . . . The true winners today are out patients, who will benefit from improved safety and quality health care nationwide."

Lyn S. Savoie
225.389.3709
lyn.savoie@keanmiller.com

HIPAA PRIVACY AND DISCLOSURES IN EMERGENCY SITUATIONS

The Department of Health and Human Services, Office of Civil Rights ("OCR"), published two bulletins on September 2, 2005 and September 9, 2005 to discuss the application of HIPAA in the wake of Hurricane Katrina. The bulletins expressed the need for persons displaced by the hurricane to obtain ready access to health care and a means of contacting family and caregivers.

OCR stated that the HIPAA Privacy Rule allows the sharing of patient information to assist in disaster relief efforts, and to assist patients in receiving the care they need.

In order to facilitate this purpose, OCR explained that patient information could be shared by health care providers as necessary to provide treatment; to identify, locate and notify family members, guardians, or anyone else responsible for the individual's care of the individual's location, general condition, or death. Additionally, providers do not need a patient's permission to share his/her personal health information ("PHI") with disaster relief organizations, such as the American Red Cross, if doing so would interfere with the organization's ability to respond to the emergency. OCR reconfirmed that the HIPAA Privacy Rule only applies to covered entities and does not restrict organizations such as the American Red Cross from sharing patient information.

Finally, OCR stated that HHS may not impose a civil money penalty where failure to comply with the provisions of the Privacy Rule are based on reasonable causes and are not due to willful neglect, and the failure to comply is cured within a 30-day period, unless HHS has granted an extension.

For more information on the bulletins described above, please visit http://www.hhs.gov/ocr/hipaa/EnforcementStatement.pdf

To obtain more information, please contact a member of the Kean Miller Health Law Team

DEVALUATION OF THE DOLLAR: IS THE $500K "CAP" ADEQUATE REMEDY?

In a recent decision, the Louisiana Supreme Court denied a request from the lower court to review the constitutionality of the $500,000 limitation on recovery (the "cap"), based on devaluation of the dollar. The plaintiffs argued that the limitation on recovery did not provide Louisiana citizens with an "adequate remedy" as required by the Louisiana Constitution. Considering the devaluation of the dollar during the thirty years since the cap was imposed in 1975, plaintiffs introduced evidence to establish the $500,000 limitation was now worth only $160,000. The lower court requested the instructions or opinion of the Louisiana Supreme Court related to this argument, but the Supreme Court denied the request.

"We anticipate this unique argument will be raised again in future cases."

While the Supreme Court denied the request to address this argument, the challenge does not end here. We anticipate this unique argument will be raised again in future cases. Of primary concern is whether a similar challenge will be raised in the State Legislature and whether our legislators believe the limitation needs to be increased to adjust for devaluation of the dollar. We will continue to monitor these arguments and challenges to the limitation on recovery and will keep you informed of any important developments as they arise.

Jason R. Cashio
225.389.3708
jason.cashio@keanmiller.com

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