MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
June 17, 2013
THE DOLAN COMPANY

Bar moves to stem skepticism as med-mal reforms take effect

Gets seat on panel overseeing process

By Brandon Gee
brandon.gee@lawyersweekly.com

The Massachusetts Bar Association has taken action to head off lingering skepticism over the landmark medical liability reform known as "disclosure, apology and offer."

Aimed at settling medical-malpractice claims, the law is off to a slow start after going into effect six months ago. Proponents remain enthusiastic about its potential, including one plaintiffs' lawyer who lobbied to get the MBA a seat on the organization spearheading the reforms in an effort to ensure they do not result in an end run around attorneys.

Last year, three principal groups — the MBA, Massachusetts Medical Society and Massachusetts Academy of Trial Attorneys — struck a deal on enabling legislation that provides for a 150-day pre-litigation period following a required notice to providers of a patient's intent to sue (unless the statute of limitations is nearing); the sharing of all pertinent medical records between patients and providers; full disclosure of medical errors by providers; and the inadmissibility in court of statements of apology by providers (unless they later make a contradictory statement under oath).

The twofold hope was that malpractice claims could be quickly and satisfactorily resolved before costly and lengthy litigation, and that open disclosure and discussion of medical errors — in contrast to the medical community's acknowledged "deny-and-defend" posture — would help reduce future mistakes.


Jeffrey N. Catalano

"When you put all your mistakes on the table, it forces you to look at it and say, 'This happened. How do we prevent it from happening again?'" said Jeffrey N. Catalano, a plaintiffs' attorney at Todd & Weld in Boston and proponent of the model in Massachusetts known as "Communication, Apology and Resolution," or CARe. "That used to only happen with the filing of a lawsuit."

However, the approach has been slow to get off the ground. The state's largest medical professional liability carrier, CRICO, has received 45 of the now requisite pre-litigation notices since the law took effect in November but has successfully resolved only one, said Elizabeth A. Cushing, the company's vice president of claims.

Cushing said she expects more cases to settle before their 150-day notice periods conclude. Other claims have been denied, and in some instances, she said, 150 days was not enough time to evaluate certain claims, and patients exercised their right to file a lawsuit.

Rachel E. Moynihan, a professional liability defense attorney at Morrison Mahoney in Boston, said the only effect she has seen so far is the driving up of defense costs on the front-end.

According Moynihan, as soon as a claim letter arrives, limited discovery and the engagement of experts take place "at the outset."

"This is necessary as our response letters are potentially leading to a tipping of our defense as we respond to the claimant, without even having the benefit of a plaintiff's expert letter or full discovery," she said.

Further, Moynihan said, the "true breadth" of the admissibility or inadmissibility of a response to a claim is not known until there is judicial review on the subject.

"Specifically, we don't know if any response or apology could be used as an inconsistent statement — which can have a chilling effect. At this point, I would think anyone on defense counsel side is weary of making precedent on this issue."

Both Cushing and Moynihan stressed that it is hard to pass judgment since the law is still so new; the very first 150-day pre-litigation notice periods are only recently concluding.

James G. Wagner, a litigator at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston, expressed concern over the legislation shortly after it took effect. He said his concern has been neither allayed nor confirmed.

Wagner has a nursing home client with 200 facilities nationwide that implemented a similar voluntary program about two years ago. It is not yet clear whether the policy has avoided claims, he said, though "doing the right thing" is always a good idea.

The experience of the University of

Michigan Health System, which served as a model for Massachusetts, is promising. A decade after a disclosure, apology and offer program was put into place, the Michigan health system reports that its opening-to-closing time for claims and legal costs are both down by half; the severity of claims is rising by just 2.6 percent compared to 10 percent nationally; and it has just over 100 pre-suit claims and lawsuits pending, down from more than 260 in July 2001.

More important, Catalano said, is the potential for the CARe model to reduce medical errors. According to statistics Catalano cited, such errors result in 100,000 to 200,000 deaths a year; those resulting in harm but not death cost society $29 billion to $38 billion in future care, treatment and medications.

"Anything that reduce[s] medical injuries, without reducing patient rights, is a good thing," Catalano said.

However, other plaintiffs' lawyers fear that the approach will, indeed, put patients' rights at risk.

"I'm an optimist about how it's going to work," said Melissa A. White, a registered nurse and plaintiffs' attorney at Pasquale & White in Boston. "Others don't seem to be quite as optimistic. There's distrust among the plaintiffs' bar that health care providers won't see it through."

'Perspective of counsel'

In an effort to ensure the integrity of the process, Catalano successfully lobbied for MBA representation on the board of the Massachusetts Alliance for Communication and Resolution following Medical Injury, or MACRMI, a group that is helping implement the CARe model and developing best practices to be used by health care providers across the state.

"Originally, the alliance didn't have a lawyer who could represent the diversified interests of the bar in order to ensure that patients' legal rights are adequately represented," said Catalano, who will serve as the MBA's first representative on the alliance. "There is that potential for skepticism, which is why it's so important for the MBA to be a participant."

> "Anything that reduce[s] medical injuries, without reducing patient rights, is a good thing."
>
> — Jeffrey N. Catalano

Just as some plaintiffs' lawyers fear the CARe model is designed to cut them out of the process, Catalano told the MBA House of Delegates that some insurers suspected a hidden agenda when he began lobbying to join MACRMI. But in a later interview with Lawyers Weekly, Catalano stressed that the group overall was receptive to including MBA representation.

"We're very interested in having the perspective of counsel," said Alan C. Woodward of the Massachusetts Medical Society. "That's a critical piece to make sure attorneys are engaged and they understand this approach and the benefits of this approach. It's clearly the right thing to do for patients, and it's obviously what you would want as a patient. There's always people questioning the motivations, but my perspective is it's always better to be inclusive."

Suffolk University Law School professor Gabriel H. Teninbaum was an initial critic of the medical liability reforms — particularly the lack of a requirement advising injured patients to seek legal advice — and is comforted by Catalano's efforts.

"No doubt, there are those who would rather not have a patient safety advocate participate in MACRMI, and it's precisely for that reason that folks like Jeff Catalano are needed," Teninbaum said. "It's vital to make sure that patient safety and consumer rights advocates are part of this ongoing conversation, not just hospital executives and insurance companies."

Catalano said making sure that patients are encouraged, not discouraged from getting a lawyer will be one of his main objectives on MACRMI. Patients who are harmed or lose a loved one due to a medical error are very vulnerable, he said, and might be willing to accept "a small amount of money that seems like a lot of money when it is first offered."

A lawyer can help those claimants understand what their long-term costs will be and what is truly fair, Catalano said.

"It's important to have a lawyer at the table," White agreed, "not to be an antagonist or subvert the process, but to counsel patient through process." MLW