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## HEALTH CARE LAW

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### New Legislation Could Foster the Filing of Fewer Medical Malpractice Complaints

Espousing earlier physician review of cases and tougher standards for physicians testifying as experts

**T**he conflict between physicians and attorneys concerning the cost of medical malpractice insurance has continued to escalate, culminating in a recent work stoppage by New Jersey's physicians. On the heels of that work stoppage, a bipartisan group of legislators has stated that a compromise bill will be introduced into the Legislature that would shield physicians and their malpractice insurers from paying more than \$300,000 for pain and suffering to victims of a medical mistake.

If a patient wins a jury award for more than that amount, a second insurance policy, bought by the state, would cover the excess award. While this is the latest proposal in the ongoing debate over which legislation should be enacted, one legislative proposal already made could garner support from both

sides.

The Legislature has heard extensive testimony and received conflicting information about whether there is a medical malpractice crisis. The state's health care providers have stated that they cannot purchase affordable medical malpractice insurance, placing the Legislature in a quandary as to how to address this crisis. Many physicians, arguing that excessive damages awards are the cause of the increases, have rallied throughout the state to urge the enactment of tort reforms to place caps on lawsuit awards.

Other groups have predictably stated that tort reform will not result in the lowering of any medical malpractice premiums and are maintaining that the premium increases are due to other, unrelated factors. What does seem clear is that New Jersey has relatively few medical malpractice carriers offering policies and that some specialties are finding it more expensive and difficult to find a carrier that will provide them with coverage.

The New Jersey State Board of Medical Examiners mandates that a physician may not practice medicine

without medical malpractice insurance or a letter of credit. N.J.A.C. 13:35-6.18. Most physicians carry the mandated minimum \$1 million/\$3 million coverage. The effect of the increases, coupled with the fact that revenues have decreased for physicians under New Jersey's predominately managed care marketplace, are catching physicians in a tight squeeze.

This vise is particularly harsh for physicians in certain specialties, including obstetrics and radiology, that are prone to be named in litigation. Specialists who have had a past claim are facing especially steep increases in their premiums.

In light of the undeniable effect that litigation has on the price of malpractice insurance premiums, an issue exists as to whether there are measures that the Legislature could enact that would foster the filing of fewer complaints. Without taking a position on whether malpractice awards are pushing insurance premiums higher, we can examine measures that focus on the expert testimony requirement as a means of decreasing the number of medical malpractice complaints patients make against physicians.

At the outset, it is important to understand that there is a significant difference between committing medical negligence and possible risks from a medical procedure. In general, negligence may be viewed as a breach of the physician's duty to exercise reasonable skill and care in the treatment of a patient. For a patient to prevail in an action, he or she must prove all of the

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following:

- physician had a duty to the patient;
- there was a breach of that duty;
- there is a reasonable causal connection between the act of the physician and the injury; and
- the patient or the patient's estate suffered damages.

The establishment of negligence is based on the patient's proof that the physician deviated from the standard of care.

#### Paradigm Shift

Dr. Lucian Leape, adjunct Professor of Health Policy at the Harvard School of Public Health and member of the Institute of Medicine Quality of Care in America Committee, has pioneered the patient safety movement through his research in medical errors. Leape has noted "very few errors are due to misconduct. Most errors are caused by systems failures, not people failures."

We're all taught just exactly the opposite of that. Probably the single biggest barrier is getting over that conceptual hurdle. Once you do, the world opens up because you begin to see how systems fail. Once you take a systems view, then a whole lot of things become pretty obvious to you.

See "A Conversation with Lucian Leape, M.D.," *Forum*, Summer 2001, Vol. 21, No. 2.

In view of this information it seems reasonable to investigate methods for having earlier physician review of cases and tougher standards for physicians testifying as experts to ensure that charges of physician negligence are properly supported.

The number of medical malpractice cases filed in New Jersey has decreased since the enactment of the Affidavit of Merit statute, codified at N.J.S.A. 2A:53A-27, in June of 1995. Statistics maintained by the Administrative Office of the Courts show that, during the five-year period from 1997 through 2001, the number of medical malpractice complaints filed in the Law Division declined by 18 percent.

Comparing the filing rates in the single years ending June 30, 1997, and June 30, 2001, these same statistics show malpractice complaints decreasing from 1,971 to 1,613. The Association of Trial Lawyers of America is using similar figures to counter allegations that increased medical malpractice insur-

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## One weakness in the application of the Affidavit of Merit statute arises from the low standards sometimes applied to the qualifications of an expert.

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ance premiums are the result of frivolous lawsuits being filed by the plaintiff's bar. See "Arguing That Lawyers Are to Blame," 168 N.J.L.J. 1107, June 17, 2002.

Furthermore, Sen. Joseph F. Vitale, D-Middlesex, announced on Feb. 4, 2002 that New Jersey court records showed that of the cases against health care providers that went to trial last year, plaintiffs "came out as losers in court" almost 75 percent of the time.

Although lawyers thereby rely on and cite a decline in the number of filings, health care professionals, as well as insurers, have argued that premium increases are already related to the magnitude of amounts and the greater total number of million dollar cases. In light of the statistics indicating a decrease in the number of filings since this statute was enacted, the following query naturally arises: Would strengthening the Affidavit of Merit procedures further decrease the number of cases filed?

New Jersey's Affidavit of Merit statute states:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. ... The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action ... for a period of at least five years.

The statute was enacted as a tort reform measure. Its underlying purpose is to compel a plaintiff in a medical malpractice case to make a threshold showing that the claims asserted are meritorious. *Galik v. Clara Maass Medical Center*, 167 N.J. 341 (2001). The Legislature designed the statute to weed out frivolous medical malpractice lawsuits at an early stage while simultaneously allowing those cases with merit to go forward.

However, the statute is not concerned with the ability of medical malpractice plaintiffs to prove the allegation contained in the complaint but, rather, to demonstrate whether the allegations have some objective threshold merit. *Hubbard v. Reed*, 331 N.J. Super. 283 (App. Div. 2000).

To achieve these purposes, the statute requires a malpractice plaintiff to file an affidavit from another professional certifying that the defendant's treatment or skill fell outside accepted professional standards. The mandates of the statute serve a gatekeeping function, whereby frivolous lawsuits may be removed from the courts early in the litigation while, at the same time, ensur-

ing that plaintiffs with meritorious claims will have their day in court. *Cornblatt v. Barow*, 153 N.J. 218 (1998).

Because the expert affidavit states that there is reasonable probability that the defendant's care fell below acceptable standards, and the plaintiff must make a threshold showing that the claim is meritorious, it permits meritless lawsuits to be identified at an early stage. *Kindig v. Gooberman*, 149 F. Supp. 2d 159 (D.N.J. 2001).

Despite the clear mandates of the Affidavit of Merit statute, there are nonetheless situations where strict compliance is not required, most notably in conjunction with application of the "substantial compliance" test.

This test is satisfied when the plaintiff is able to show five factors: (1) a lack of prejudice to the defendant party; (2) a series of steps were taken to comply with the statute; (3) there is general compliance with the purpose of the statute; (4) the defendant received reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not strict compliance with statute. See *Kindig and Fink v. Thompson*, 167 N.J. 551(2001). This broad interpretation of the law might allow certain cases to proceed too far without the requisite medical scrutiny, in contravention of the purposes of the statute.

An additional weakness in the application of the statute arises from the low standards sometimes applied to the qualifications of the expert giving the opinion. Under the law, an expert providing an opinion that a physician has committed malpractice does not need to have the same qualifications as the defendant physician. It is sufficient that the expert is qualified to supply the required basis for medical malpractice. Even though the expert's qualifications do not need to be included in the affidavit, a description of the qualifications must be presented in conjunction with the affidavit.

The statute recognizes that there are overlaps in practice between and among the various medical professions and specialties. Thus, the statute allows a physician in one field to render an opinion as to the performance of a physician in another with respect to their common

areas of practice. New Jersey courts have also stated that the expert who files an affidavit may practice in a different state than the physician who is charged with malpractice.

Because of these weaknesses in expert qualifications, several bills have been introduced in the Legislature that would impose stricter standards upon the experts. Specifically, two of the bills are sponsored by Assemblymen Herbert Conaway, D-Burlington, and Eric Munoz, R-Union, the Legislature's only two physician members. Their bills propose to amend the Affidavit of Merit statute by setting standards for expert witnesses.

Assembly Bill 3080, sponsored by Conaway, provides that, to qualify as an expert witness, a physician must: (i) have been in practice for at least five years; (ii) have a current registration from the BME; and (iii) be in the same general practice or specialty as the defendant.

Every affidavit of a physician and court transcript containing expert testimony of a physician must be delivered to the BME for review of their accuracy and consistency with other testimony given or affidavits executed in the past. If the BME determines after a hearing that the testimony or the affidavit does not conform to appropriate standards of practice or care, the physician will be deemed to have engaged in gross malpractice or incompetence.

Munoz's bill, *A-3198*, and *S-2226*, sponsored by Senators Robert Singer, R-Ocean, and Diane Allen, R-Burlington, requires that the plaintiff in a medical malpractice case file an Affidavit of Merit within 30 days of filing the complaint, contrary to the current statutory requirements. The defendant also has the right to receive a copy of the affidavit and to file his own affidavit in response. To qualify as an expert to file an affidavit, the bill requires that the individual be in the same type of practice and possess the same certifications as the defendant.

Other legislation governing expert testimony has been introduced by Assemblyman Neil Cohen, D-Union, (*A-2880*), and Senators Joseph Kyrillos, R-Monmouth, and William Gormley, R-Atlantic (*S-1902*). These bills would

require the plaintiff in a medical malpractice action to file an Affidavit of Merit that complies with the statute requirements at the same time as the filing of the complaint, and not 60 days later as currently allowed.

Then, the defendant would file an answer to the complaint within 21 days of the filing of the complaint and the affidavit of merit and, within 90 days from that filing date, file an affidavit of meritorious defense by a person who the defense believes meets the qualifications for an expert witness as established by the legislation. Essentially, to qualify as an expert or execute an affidavit, the individual would have to be in the same type of practice and possess the same certifications, as applicable, as the defendant. Other requirements for expert and scientific opinions are also spelled out.

Assembly Bill 3294, sponsored by Assemblyman Sam Thompson, R-Monmouth, and *S-2298*, sponsored by Kyrillos and Gormley, contain similar provisions. This legislation also requires that the affidavit of merit be filed at the same time as the complaint. The defendant also has the right to file his own affidavit when he answers the complaint. In addition, the expert must be in the same type of practice and possess the same certifications as the defendant.

### **Holding Experts Accountable**

Another significant bill states that a physician — who either gives expert testimony in a malpractice case that is inconsistent or not in accordance with the accepted standard of care or who provides testimony that varies with that same physician's prior testimony — is subject to discipline and a finding of malpractice. Senate Bill 1850 is pending in committee and is sponsored by Senator Martha Bark, R-Burlington, while a related bill, *A-2762*, is sponsored by Assemblymen Francis Bodine, R-Burlington, and Larry Chatzidakis, R-Burlington.

Both bills include provisions that set standards for expert testimony and provide penalties for violating those standards. Bark's legislation states that any health care provider who: (1) gives

testimony as an expert witness in an action concerning the professional negligence of a defendant or executes an affidavit that does not conform to currently recognized protocols or currently accepted medical standards for the applicable profession; or (2) gives testimony as an expert witness in actions concerning the professional negligence of defendants or executes affidavits that vary with testimony of that same individual in other cases of professional negligence, shall have engaged in gross malpractice or incompetence.

In determining whether a health care provider giving testimony or executing an affidavit is an expert witness, standards shall apply including whether the testimony is from a specialist and whether the person providing the testimony was a specialist at the time of the occurrence. During the year immediately preceding the date of the occurrence that is the basis for the claim or action, the expert witness or the person executing the affidavit shall have devoted a majority of his professional time to either the active clinical practice of the same health care profession in which the defendant is licensed or the instruction of students in an accredited medical school.

A similar bill pending on expert testimony, *S-1977*, sponsored by Senator Gerald Cardinale, R-Bergen, also proposes that an expert rendering conflicting testimony shall have committed "gross malpractice or incompetence," although it does not contain the detailed standards of *S-1850*. According to Cardinale:

[t]here have been circumstances in which certain medical professionals have testified, given depositions or filed affidavits in medical malpractice cases, which testimony is at variance with recognized protocols of their professional

boards. In some circumstances the testimony of certain 'professional' witnesses is at marked variance with testimony those same persons have given in other cases. This creates a difficult circumstance for those seeking justice before our courts. It is confusing to juries and judges alike. While some fact circumstances may alter testimony, the standards of the appropriate profession are best known and most uniformly kept by the professional boards of the licensed medical professionals.

While the legislation grants the BME the authority to discipline physicians, there is no current appropriation for the BME to hire additional staff to evaluate these potential cases. The establishment of standards for physicians who render expert testimony could only be workable by providing the BME with sufficient resources to investigate and take the appropriate disciplinary action against a physician.

Legislation is needed since the case law concerning what is considered medical malpractice or gross negligence currently does not encompass this type of infraction. Therefore, it is not surprising that, to date, the BME has never filed a complaint against a physician for rendering conflicting opinions in a legal matter.

The BME's procedure is to investigate a physician through the use of statements under oath (at a hearing or in writing) and then, in many cases, a deputy attorney general negotiates a consent order with the physician's counsel on behalf of the BME to avoid the filing of a formal complaint. If a formal complaint is filed, the matter is transmitted to the BME for a hearing.

Very few matters are transmitted to the Office of Administrative Law for a

hearing on the BME's complaint. Legislation would need to clearly inform the BME and its staff as to what the Legislature considers to be unlawful professional conduct.

Emerging national evidence supports enacting a law disciplining a physician for providing expert testimony that is in conflict with his prior testimony as to the standard of care. The American Medical Association has issued Resolution 221, which states that "expert witness testimony [should] be considered the practice of medicine subject to peer review." The Resolution also contains a section on the imposition of meaningful sanctions.

Furthermore, a federal appellate court ruled in 2001 that a medical society was allowed to discipline a physician concerning his expert testimony. The U.S. Supreme Court did not grant certiorari in the case, thereby allowing the decision below to stand. Most important, in what may be the first case in the nation, the North Carolina Medical Board decided to revoke a physician's license over expert witness testimony. See "Physician Loses License over Expert Testimony," *American Medical News*, Aug. 19, 2002. The board found that the neurosurgeon engaged in unprofessional conduct by misstating facts and the appropriate standard of care in North Carolina when giving expert testimony.

These cases point to a growing trend toward holding physicians more accountable for the testimony they give as expert witnesses. As demonstrated by currently pending legislation, New Jersey is also looking into this possibility as a means of controlling its medical malpractice insurance crisis. Although the legislation represents a step in the right direction, New Jersey needs to do more to tighten its expert testimony requirements and strengthen its Affidavit of Merit statute. ■