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APOLOGIES, UNANTICIPATED OUTCOMES, AND MISTAKES

MASSACHUSETTS GENERAL LAWS CHAPTER 233 SECTION 79L: HAS ANYTHING CHANGED?

HISTORICALLY, ATTORNEYS HAVE disfavored apologies by doctors out of concern that an apology could be interpreted as an admission of liability. At trial, evidence of an apology may lead jurors to ask why a defendant doctor apologized if he or she did what was appropriate, and this may create an inference that the defendant was negligent. While doctors have their own ethical principles for honesty^{1,2} and must testify truthfully under oath, the impact of apologies in the legal setting may have created a perception that transparency in medicine was somehow lacking. Allowing doctors to make apologies without negative legal consequences might improve this perception. Massachusetts General Laws Chapter 233 Section 79L relates to the admissibility of apologies and the disclosure of unanticipated outcomes resulting from mistakes (see sidebar on p. 11).

Under Section 79L, all expressions of apology are inadmissible in judicial or administrated proceeding, providing doctors with *some* protection from the negative legal consequences of making apologies. This inadmissibility is not absolute. Statements and opinions about a mistake or error shall be admissible for all purposes if the maker of the statement, or a defense expert witness, when questioned under oath about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions. The apology is inadmissible, so long as the facts about which the doctor testifies at trial are consistent with the facts that transpired at the time of care. If the doctor makes inconsistent statements about the care, then the doctor's apology is admissible.

While Section 79L makes the *apology* inadmissible, the statute does not make the *fact* that a mistake occurred inadmissible and, as written, does not prohibit a doctor from being asked at trial whether he or she made a mistake. Suppose a doctor made a mistake and apologized to the patient for making the mistake and a malpractice lawsuit followed. If asked at trial, the doctor would be required to testify that he or she made a mistake for the



testimony to be consistent (and truthful). If the doctor denied making a mistake, the denial would be an inconsistent statement and Section 79L would then allow evidence of the doctor's apology. Testimony by the doctor that he or she made a mistake has the same practical effect as permitting evidence of the apology. Accordingly, Section 79L appears to offer limited legal benefit to the doctor if an apology is made.

Although Section 79L does not require an apology to be made, the statute does require information to be disclosed under certain circumstances. Section 79L requires full disclosure to the patient or family when there has been an "unanticipated outcome with significant medical complication resulting from a provider's mistake." If these conditions are met, the health care provider, facility, or employee "shall fully inform the patient" about the unanticipated outcome.

Section 79L does not define "significant medical complication." It is unknown whether a failed restoration could be considered "significant," even if it were caused by a mistake. It has yet to be determined whether "significant" implies a more serious outcome, such as death, disfigurement, or disability. In addition, Section 79L does not define "mistake." Merriam-Webster defines the word "mistake" as a wrong judgment; a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or intention. In litigation, "negligence" is defined as a deviation in the standard of care of the average qualified doctor practicing in the specialty at the time, and in most instances must be established by expert testimony. It is unclear whether Section 79L intends "mistake" to be synonymous with "negligence."

Whether a mistake occurred can be subject to dispute and differing expert opinions, as well as a doctor's own subjective belief. Care should be taken when more than one health care provider is involved. Differences in opinion may arise as to whether a mistake occurred or whether disclosure pursuant to this statute is required. There may also be situations when all the necessary information is not available. Statements should be avoided when there is incomplete information. It is unknown whether

having any discussion after an unanticipated outcome will create an inference that the discussion took place solely because of the statutory requirement for disclosure. If an apology or Section 79L disclosure is to be made, care should be taken to accurately document the conversation. Parties in litigation rarely agree as to what was said about medical events years later, when memories may have faded. Careful documentation may reduce the risk of discussions being mischaracterized at some later date.

Section 79L does not identify the consequences, if any, for failing to make a required disclosure. Given the legislative intent of the statute,^{*} the Board of Registration in Dentistry might consider Section 79L to be a statute regarding the practice of dentistry that must be followed by dentists and dental directors pursuant to 234 CMR 5.02(3). If so, failure to comply with this statute might be considered a violation of law governing the practice of dentistry and/or conduct undermining public confidence in the integrity of the dental profession and serve as a basis for discipline. (See 234 CMR 9.05.) It is also unknown whether the Board will interpret a Section 79L disclosure to be part of the minimal information required to be included in a patient's dental record pursuant to 234 CMR 5.14 & 5.15. Given the statutory mandate of the Board, these considerations cannot be discounted.

The Text of Massachusetts General Laws Chapter 233 Section 79L Is as Follows:

(a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Facility", a hospital, clinic, or nursing home licensed under chapter 111, a psychiatric facility licensed under chapter 19 or a home health agency; provided, however, that "facility" shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority or other entity comprised of such facilities.

"Health care provider", any of the following health care professionals licensed under chapter 112: a physician, podiatrist, physical therapist, occupational therapist, dentist, dental hygienist, optometrist, nurse, nurse practitioner, physician assistant, chiropractor, psychologist, independent clinical social worker, speech-language pathologist, audiologist, marriage and family therapist or mental health counselor; provided, however, that "health care provider" shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

"Unanticipated outcome", the outcome 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.

(b) 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 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.

Conclusion

There is much uncertainty regarding how Section 79L will be interpreted and what impact, if any, it may have on the practice of dentistry and the defense of malpractice claims. Awareness of Section 79L may avoid pitfalls in litigation, as well as possible issues with the Board of Registration in Dentistry. With appropriate informed consent, careful treatment, and ethical discussions with patients when unanticipated outcomes occur, the practice of dentistry should not be significantly impacted by Section 79L. From a legal and risk management perspective, Section 79L creates more questions at this time than answers. The scope and limitations of this statute should be understood. Each situation should be considered and evaluated separately. If questions arise, your professional liability insurer or attorney may have further guidance and recommendations once this law has been interpreted by the courts. ■

^{*}Massachusetts General Laws Chapter 233 Section 79L was created by enactment of *An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency and Innovation* on November 4, 2012. See St.2012, c. 224, §223, eff. Nov. 4, 2012.

References

1. American Medical Association. AMA code of medical ethics. Principles of medical ethics Sections II, III, & V. 2006-2007. Chicago (IL): American Medical Association.
2. American Dental Association. ADA principles of ethics and code of professional conduct (ADA Code). Section 5—Principle: Veracity ("truthfulness"). 2012. Chicago (IL): American Dental Association.

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