

## SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

**A.5281**

**M. of A. Gottfried**

AN ACT to amend the public health law, in relation to requiring health care providers to inform patients or their representatives of certain errors in diagnosis, treatment or other services.

### **THIS BILL IS OPPOSED**

This proposed legislation would amend the Public Health Law by adding section 2805-r. If passed, this legislation will require any “health care provider”, as defined in section 2805-r 1, to “...disclose to his, her, or its patient...any error...(that) has caused substantial harm or significant risk of substantial harm to the patient”. The justification for proposing the legislation is based on the concept that a patient has a right to be fully informed of his /her medical condition. The idea that a patient has the right to the pertinent information to understand their medical condition is unassailable, and that obligation now exists.

The proposed legislation, however, goes beyond providing understandable information to the patient. It mandates that health care providers confess to a medical “error” that has “substantially harmed” the patient. It further provides a presumption that the health care provider knew or should have known of the “error” and the connected “harm”.

### **Position:**

We recognize that how society addresses medical errors is a complex subject, and we are continuing to review its various aspects. However, we believe that A.5281 as written is not a constructive means of dealing with medical errors the problem and may cause serious problems. Indeed, it has the potential for pushing well-settled law governing professional liability into a troublesome, highly uncertain area. Key words are undefined. Is an “error” the same as “a departure from practice”? Who determines what

is “substantial harm”; the health care provider, the patient or an independent third party? Is this “disclosure” of an “error” an “admission” that is admissible at a future trial?

This legislation would put an unreasonable burden on all health care professionals. A health care professional must ask if he/she will be required to deal with every poor result or complication as an “error” to be “disclosed”. There is a practical problem as to whether an immediate disclosure of an “error” is a breach of the health care provider’s liability insurance policy, which typically prohibits an admission or a payment that may compromise the defense.

Some situations, such as the administration of the wrong medication or the wrong dose of the correct medication, are obvious “error”, and providing information to the patient is obviously required. However, those who deal with bringing and those who defend against claims of medical negligence are aware that most of these cases fall into a gray area in which the negligence ( the error) and the proximate cause (the connected harm) are in serious dispute. Is the obstetrician to concede an “error” at every birth where the child has a neurological disability even though he/she sincerely believes that the delivery was correctly performed?

The legislation is further flawed in that it does not contribute to the resolution of the issues it precipitates. It requires a health care provider to admit an “error” to a patient, and then provides no suggestion on how to resolve the dispute that is likely to occur. The “confessed” health care provider is left defenseless. Other jurisdictions that have adopted the concept of requiring a patient be informed of a medical “error” have incorporated that step into a complete process to attempt to quickly resolve issues. In addition, if the process does not resolve the dispute, all the negotiations and the disclosure are privileged.

It is easy to agree that patients, or their representative, should be kept informed about their medical condition, the treatment and the consequences of the treatment. The added burden of requiring an instant decision by the health care provider as to whether an “error” was or was not committed and whether that “error” did or did not cause “substantial harm”, is not only unreasonable; it is also a violation of basic tenets of common law jurisprudence.

Consequently, we oppose this legislation.

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