IADC COMMITTEE NEWSLETTER
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MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Robert G. Smith summarizes a few examples of liability protections for health care providers and risk management and defense strategies in the context of the COVID-19 crisis.

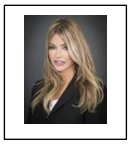
Viral Impact: Liability Protections and Considerations in a Pandemic

ABOUT THE AUTHOR

Robert G. Smith is a shareholder of Lorance Thompson PC in Houston, Texas. Rob currently serves as the Vice Chair of Programs and Projects for the International Association of Defense Counsel Medical Defense & Health Law Committee, and is a member of the Product Liability and Business Litigation Committees. Rob has worked on many types of health care related matters, including defending medical device manufacturers and distributors against product liability claims as well as defending physicians, hospitals, and nursing homes in medical liability lawsuits. Rob graduated Phi Beta Kappa with a degree in mathematics from Louisiana State University and attended law school at the University of Houston College of Law. He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and has tried a wide variety of cases during his 24+ years of practice. He can be reached at rgs@lorancethompson.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



Constance A. Endelicato
Vice Chair of Newsletters
Wood Smith Henning & Berman
cendelicato@wshblaw.com

The COVID-19 pandemic has impacted health care practice and medical liability in countless ways, many of which may not be appreciated for months or years. This brief summary provides a glimpse of statutory, regulatory, and practical changes caused by the virus that may impact your medical practice and/or health law practice.

Liability Protection for Health Care Providers

CARE Act Protection for Volunteer Health Care Workers

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") includes liability protection to volunteer health care professionals providing health care services during the current public health emergency from liability under federal or state law for harm caused by an act or omission, unless caused by willful or criminal misconduct, gross negligence, reckless misconduct, conscious flagrant indifference, or under the influence of alcohol or intoxicating drugs. *See* Section 3215, Coronavirus Aid, Relief and Economic Security Act, Pub. L. 116-136 (March 27, 2020).

PREP Act Protection for Health Care Providers Providing Countermeasures to the Pandemic

The 2005 Public Readiness and Emergency Preparedness Act ("PREP Act") provides that the Secretary of Health and Human Services may issue a written Declaration that a qualified person who prescribes, administers, or dispenses pandemic countermeasures shall be immune from liability under State or Federal law for claim arising out of, related to, or resulting from the administration to or the use by an individual of a covered countermeasure during a declared disease-related public health emergency. *See* 42 U.S.C. 247d-6d. Countermeasures include qualified pandemic products such as drugs or devices (both FDA-approved or authorized for investigational or emergency use), and biological products manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or limit the harm such a pandemic or epidemic might otherwise cause. A Declaration was issued by the Secretary of HHS on February 4, 2020 invoking the PREP Act and providing immunity to qualified persons against claims related to covered countermeasures other than claims involving willful misconduct.

State Statutes may Provide Some Protection

Texas' Medical Liability Act, for example, provides that a person who administers emergency care in good faith is not liable for civil damages unless the act was done with willful or wanton negligence (except where the person's act caused the emergence for which care is being administered or where the act was in expectation for remuneration). *See* Tex. Civ. Prac. & Rem. Code Sec. 74.151. In a health care liability claim against a health care provider arising from the provision of emergency medical

care in a hospital emergency department, OB unit, or surgical suite immediately following evaluation or treatment in the ER, the willful and wanton negligence standard applies (except where the health care provider's negligence caused the patient to need emergency care). *See* Tex. Civ. Prac. & Rem. Code Sec. 74.153.

Many States have Issued Executive Orders that Provide Protection

For example, in New York, Executive Order No. 202.10, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, provides that as of March 7, 2020, health care providers shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission in the course of providing medical services in support of the State's response to the COVID-19 outbreak unless caused by gross negligence.

The nursing home industry is seeking immunity from lawsuits related to COVID-19, arguing they are more understaffed than normal, there is not a thorough understanding as to how COVID-19 is spread and prevented, and they do not want to be liable for unpreventable events. Some form of legal immunity has already been implemented in Connecticut, Illinois, Massachusetts, Michigan, New Jersey, and New York.

Risk Management Considerations

The pandemic has, in many instances, impacted the environment in which health care providers practice to such an extent that the standard of care is arguably different. On March 18, the Centers for Medicare & Medicaid Services (CMS) announced that elective surgeries, non-essential medical, surgical, and dental procedures be delayed during the COVID-19 outbreak. For example, New York's Executive Order No. 202.10 provides that health care providers are relieved of recordkeeping requirements to the extent necessary to perform tasks necessary to respond to the COVID-19 outbreak, including requirements to maintain medical records that accurately reflect the evaluation and treatment of patients or requirements to assign diagnostic codes or maintain records for billing purposes. Health care workers acting in good faith under this provision shall be afforded absolute immunity from liability for any failure to comply with any recordkeeping requirement. Texas' governor directed the Texas Medical Board and Texas Board of Nursing to fast-track temporary licensing of out of state physicians and nurses, and on March 22 issued an executive order that health care providers shall postpone surgeries and procedures that are not immediately medically necessary to correct a serious medical condition or to preserve life until April 21, which has been extended to May 8 subject to hospital capacity.

Where a health care provider has revised their procedures or methods because of the pandemic, or they are acting pursuant to an executive order, etc., it is important to document why their actions or techniques are different, *i.e.*, what is the basis or authority for their departure from normal protocol. If a medical malpractice lawsuit is filed a year and a half from now, the plaintiff attorney may argue a health care provider postponed a surgery that should have been considered immediately medically necessary, or failed to provide appropriate care, order a test, etc. because there is no record. It would be helpful to the defense of a civil lawsuit if the medical chart included information the health care provider considered in deciding a course of action, when to schedule a surgery, or that the records may not reflect all medical care provided pursuant to Executive Order No. 202.10.

There are so many executive orders, emergency legislative changes, rule suspensions, etc. at the federal, state, and local level that it is critical to document what may have been considered when making a medical decision at a particular place and time.

Lawsuit Considerations

The COVID-19 pandemic affects how medical liability cases are filed and defended. For example, the Supreme Court of Texas has issued orders as of April 27, 2020 that include:

"3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public— without a participant's consent:

> b. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, or grand juror, but not including a petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means;
>
> c. Consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means;
>
> d. Conduct proceedings away from the court's usual location with reasonable notice and access to the participants and the public;

4. Courts must not conduct in-person proceedings contrary to guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions. Courts should use all reasonable efforts to conduct proceedings remotely.

5. Any deadline for the filing or service of any civil case that falls on a day between March 13, 2020, and June 1, 2020, is extended until July 15, 2020."

See Twelfth Emergency Order Regarding the COVID-19 State of Disaster (Misc. Dkt. No. 20-9059).

This order effectively extends the statute of limitations for two and half months and provides that courts can require remote hearings and depositions. Based on this order, on April 22, 2020, a Harris County District Court judge in Houston, Texas conducted a one-day bench trial on the videoconferencing service, Zoom. The judge reported that over 2,000 viewers watched parts of the trial.

This crisis will cause many lawsuits to be filed and now is the time to anticipate new theories of liability and damages. A plaintiff frequently alleges lost wages. There are many occupations that will be negatively impacted by the pandemic generally and may prevent someone from working without regard to any claimed injury.

There are many reports of anxiety and depression related to the virus and it may be difficult for a plaintiff to convince a jury that they are suffering mental anguish because of a defendant health care provider rather than the pandemic and subsequent loss of a job, or illness or death of a friend or loved one.

This is an opportunity for all of us to pause and reconsider how we think and why we do certain things. As communities begin to open up, people may reset their priorities to focus more on family, relationships, and staying closer to home. The pandemic may change jurors' attitudes in ways we cannot anticipate today.

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