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WATCH YOUR STEP

Navigating The Medical Malpractice Act Minefield

Reformed state law intended to bolster the integrity of the malpractice system

By JOEL T. FAXON

The recently passed medical malpractice reform bill, Public Act No. 05-275, requires a victim's lawyer to carefully navigate through a minefield prior to filing suit, during pretrial discovery and even after trial. The Act's changes covering all aspects of a malpractice case–from the initial client meeting through post-trial motions–will be examined.

Pre-suit considerations. Section 1 of the Act regulates contingent fee agreements. Connecticut General Statutes § 52-251c provides a waivable fee structure, ranging from one-third to as little as ten percent of an award. The Act makes clear that a one-third fee is proper if certain conditions are met.

Importantly, the agreement must contain a statement, in compliance with § 1(e) of the Act, regarding the client's informed consent. Unless the requirements are met, no fee can be paid to the attorney. Notably, these requirements apply to cases accruing on or after Oct. 1, 2005; thus, if the plaintiff discovered the cause of action prior to Oct. 1, 2005, the old version of C.G.S.§ 52-251c applies.

Since the written opinion is generally not discoverable, consulting physicians may retain anonymity.

Section 2 of the act, applicable to all cases filed on or after Oct. 1, 2005, deals with the Good Faith Certificate, which previously required the lawyer to attest that reasonable inquiry of a health care provider similar to the target defendant had occurred and the basis for a claim existed.

Now, the plaintiff must file in court with the Certificate an opinion letter signed by the plaintiff's expert containing "a detailed basis for the formation of such opinion." The opinion letter can be redacted to remove the physician's name and identifying information.

This section also applies the Good Faith Certificate requirements to apportionment complaints filed pursuant to C.G.S. §§ 52-102b and 52-572h. The failure to obtain and file a written opinion "shall be grounds for dismissal of the action."

While more expensive to prosecute, for tactical reasons it is advisable to use different physicians for your Good Faith Certificate and as testifying experts, because as the case develops there may be inconsistencies between the opinion letter of the good faith expert and the expert ultimately disclosed on the issue of liability. Since the written opinion is generally not discoverable, consulting physicians may retain anonymity. Further, the opinion letters are probably not admissible at trial, thus, retaining separate experts is the preferred practice. The ninety-day extension of the statute of limitations contained in C.G.S.§52-190a(b), remains unchanged.

Compliance with the Act's provisions requires additional time to process cases, thus those that arrive on the eve of the statute of limitations will be more difficult to file. Developing a system to handle last minute pleas from deserving clients will permit the filing of valid eve-of-the-statute complaints.

Pretrial procedures. A pretrial must occur within six months of filing to determine if the matter is eligible for the Complex Litigation docket. In our experience about half of the cases are transferred to Complex Litigation and half remain pending in the original venue.

The next crucial change–which covers all civil cases, not just medical malpractice claims—deals with the Offer of Compromise (O.C.), f/k/a an Offer of Judgment (O.J.)—C.G.S. § 52-192a, *et seq.* The legislature has clarified that the O.J. provisions in effect as of Oct. 1, 2005, apply to all cases accruing before that date.

By contrast, the O.C. provisions apply to all cases *accruing on or after* Oct. 1, 2005. The O.C. has an interest rate of eight percent applied where the verdict exceeds the O.C. figure. The time for acceptance by the

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defendant is reduced from sixty to thirty days, but you must delay filing until one hundred and eighty days from service of process.

As with the O.J., if the verdict exceeds the O.C., interest is calculated from the date suit is filed—as long as the O.C. was filed within eighteen months of that date; otherwise, interest is calculated from the date the O.C. was filed. If enticed, the defendant files an acceptance of the O.C. and the action is thereafter withdrawn. If the defendant files an O.C. the plaintiff has sixty days to accept instead of ten, and the same withdrawal requirements as the plaintiff's O.C. apply.

The court sua sponte shall determine whether the verdict of non-economic damages shocks the conscience of the court.

Section 4 of the Act is specific to O.C. filings in medical malpractice cases. A plaintiff's medical malpractice O.C. is only valid if at least sixty days prior to filing, the plaintiff provided the defendant with HIPAA medical releases, disclosed liability experts, and includes with the O.C. a statement "with specificity" of "all damages then known to the plaintiff or the plaintiff's attorney upon which the action is based." The Act puts the onus on the plaintiff if that party seeks to recover offer of judgment interest after trial.

Regarding evidentiary issues, Section 9 of the Act provides that statements of apology or regret concerning an unanticipated outcome are inadmissible at trial. Further, if a plaintiff sues several doctors and settles with one or more of them, the remaining defendants can introduce evidence of the settlements with the other doctors at trial. Thus, the merit of partial settlements have to be examined very closely.

Post-trial procedures. Section 10 of the Act, which is effective from passage, provides that if the jury returns a verdict specifying non-economic damages exceeding one million dollars, the court *sua sponte* shall determine whether the verdict of non-economic damages shocks the conscience and is excessive as a matter of law. The standard applied is consistent with present practice, except it requires the court to address the issue *sua sponte* as opposed to on a motion for remittitur.

The Act's changes make prosecuting a medical malpractice case in Connecticut more difficult; however, at the same time they should bolster the integrity of the system such that truly meritorious claims are tried, and the threat of imposing arbitrary damages caps to cure a manufactured "malpractice crisis" is abandoned once and for all. ■