A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word From the Practice Group Chair

Our legislature pumped out 200+ laws in 2016. Our courts of record produced a similar number of rulings that are even more definitive statements of law because the legislature does not have a reciprocal privilege to interpret those court decisions. Some wag suggested that all that law making without a budget might be the reason Illinois led the nation in population loss in 2016 (37,000).

In this edition John Hoelzer of Heyl Royster Springfield and Amee Lakhani of Heyl Royster Chicago help you make sense of some important parts of our monolithic Illinois law. John takes a learned look at the very sensitive question of whether an Illinois physician is obligated to let every patient know about his/her level of experience and/or prior outcomes for a proposed treatment or procedure that requires informed consent. Amee gives us a look at the edgy détente that exists between federal agencies and our federal courts on the question of whether federal agencies have rule making power to bar arbitration clauses in contracts between nursing homes and new residents. Apparently our federal courts have the same suspicions about federal agencies that were expressed in the Broadway musical, *Fiddler on the Roof*, when a villager asked the local Rabbi: "Rabbi, is there a proper blessing for the Czar?" After a pregnant pause the Rabbi repeated the question and answered: "Yes, may God bless and keep the Czar as far away from here as possible."

If the law is crowding you with its good intentions, you have friends at Heyl Royster who would love to help you navigate your way to a legal and satisfactory solution. We wish you good health and good fortune and perhaps a little less governmental oversight in 2017.

David R. Sinn
Chair, Professional Liability Practice Group
dsinn@heylroyster.com

Informed Consent for Surgery: Does a Surgeon's Experience Level Matter?

By John Hoelzer - *jhoelzer@heylroyster.com*

If a surgeon fails to tell his patient about the material risks of a procedure, thereby causing the patient to consent to treatment that the patient otherwise would not have consented to, then the surgeon could be accused of malpractice in the event that the patient is injured. In such a situation, the patient would likely pursue a malpractice action based on the doctrine of informed consent. To succeed, the patient would have to prove, among other things, that the surgeon failed to disclose "material risks" regarding the proposed treatment. *Coryell v. Smith*, 274 Ill. App. 3d 543, 546 (1st Dist. 1995).

But what exactly is a material risk? Does it go beyond the inherent risks of surgery (infection, blood loss, complications with anesthesia, etc.) and include information personal to the surgeon, such as the surgeon's experience level? There are no published opinions in Illinois that directly address whether a surgeon has a duty to disclose his experience level in order to obtain informed consent. However, Illinois' approach to the doctrine of informed consent, and case law from states with similar approaches, strongly suggests that a surgeon has no affirmative duty to disclose his\her experience level to a patient.

There are essentially two approaches, or standards, regarding the duty to disclose: the reasonable physician standard, and the reasonable patient standard. The reasonable physician standard is the rule in the majority of states, including Illinois. *Guebard v. Jabaay*, 117 Ill. App. 3d 1, 8-9 (2d Dist. 1983). Under this standard, a physician must disclose the risks that a reasonable medical professional would have disclosed under similar circumstances. "The physician's duty extends to disclosure of those risks, results, or alternatives that a

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reasonable medical practitioner of the same school, in the same or similar circumstances, would have made known." *Hansbrough v. Kosyak*, 141 Ill. App. 3d 538, 551 (4th Dist. 1986). This standard looks to what physicians commonly disclose when handling a similar case.

The minority approach is the reasonable patient standard, which looks to "whether a reasonable person in the patient's position would consider the information material to his decision as to whether to agree to allow the physician to perform the surgery upon him." *Willis v. Bender*, 596 F.3d 1244, 1256 (10th Cir. 2010). "Obviously, what a reasonable person in the patient's position would find relevant in deciding whether to proceed with a particular procedure by a specific doctor is not necessarily what a reasonable practitioner of like training and experience would have disclosed in the same circumstances." *Willis,* 596 F. 3d at 1256.

In applying the reasonable physician standard, Illinois courts have indicated that the duty to disclose applies to the material risks inherent in the surgical procedure itself, as opposed to professional-background information about the surgeon. *Coryell*, 274 Ill. App. 3d at 546, 549 (the duty to disclose applies to "the diagnosis, the general nature of the contemplated procedure, the risks involved, the prospects of success, the prognosis if the procedure is not performed and alternative medical treatment;" *i.e.*, significant information "relating to the treatment") (quotation omitted); *see also Crim v. Dietrich*, 2016 IL App (4th) 150843, ¶ 7.

States that follow Illinois' reasonable physician standard include Vermont, New York, and Wyoming. In each of those states, the courts have held that physicians and surgeons do not have an affirmative duty to disclose their experience in order to obtain informed consent. *See, e.g., Wissell v. Fletcher Allen Health Care, Inc.*, No. 232-2-12, 2014 Vt. Super. LEXIS 89, *40 (Vt. Super. Ct. May 22, 2014) (observing that Vermont and New York apply the traditional standard, under which "[p]hysicians and medical practitioners do not have an affirmative duty to disclose physician-specific information to the patient, such as a physician's statistical success/complication rate concerning a particular procedure, the existence of more experienced physicians who could perform the procedure, or the availability of other facilities better equipped to handle the procedure"); *Johnson v. Jacobowitz*, 65 A.D.3d 610, 614 (N.Y. App. Div. 2009) (court correctly precluded evidence that surgeon did not have proper credentials to perform heartport procedure because informed consent does not require disclosure of treatment provider's qualifications); *Willis*, 596 F.3d at 1256 (under Wyoming law, informed consent does not require a physician to affirmatively disclose his experience).

Several states that apply the patient-based approach, which asks what a reasonable person in the patient's position would consider in deciding whether to consent to proceed with a particular procedure, have reached the opposition conclusion. For example, courts in Maryland and Wisconsin have recognized that a surgeon's experience level may be a fact that a reasonable patient would consider material to the decision-making process. *See, e.g., Goldberg v. Boone*, 396 Md. 94, 123-27 (2006); *Johnson ex rel. Adler v. Kokemoor,* 199 Wis. 2d 615, 636-48 (1996).

In sum, while many states have specifically considered whether a surgeon has an affirmative duty to disclose his experience level in order to obtain informed consent, Illinois has not. However, Illinois' reasonable physician standard strongly hedges against such a duty. But as a word of caution, if a patient asks the surgeon about his experience, the surgeon should answer honestly. Deliberate misrepresentations serve no purpose in the informed consent process; rather, an open and honest dialogue with the patient about his concerns, coupled with adequate documentation of the discussion, puts the surgeon on the best footing in the event that there is a dispute about informed consent.

John Hoelzer's practice focuses on defending: healthcare professionals in cases alleging medical malpractice, law enforcement officers and correctional service providers against charges of constitutional rights violations, and business owners against claims of negligence involving personal injury and property damage. John joined Heyl Royster after seven years of public service – first as an Assistant Attorney General for the State of Missouri, and then as a Special Agent with the United States Drug Enforcement Administration.

Federal Judge Blocks Rule That Would Ban Arbitration in Nursing Home Disputes

By Amee Lakhani - *alakhani@heylroyster.com*

A federal district court recently issued a preliminary injunction barring enforcement of a rule prohibiting the use of pre-dispute arbitration agreements with patients in long-term care facilities that participate in Medicare and Medicaid programs.

The new rule, promulgated by the Centers for Medicare and Medicaid Services (CMS), would have taken effect on November 28, 2016. It would have prohibited (1) entering into pre-dispute arbitration agreements and, (2) requiring the signing of an arbitration agreement as a condition of admission. The injunction was granted by U.S. District Court Judge Michael P. Mills, who sits in the Northern District of Mississippi, at the request of members of the nursing home industry to stop the rule from taking effect while it is being challenged in court. In their lawsuit, the American Health Care Association and four other state and local health care groups are claiming that CMS and the Department of Health and Human Services are overstepping their authority in issuing the rule. Specifically, the plaintiffs contend that Congress has repeatedly rejected legislation to invalidate arbitration agreements, and further argue that the rule isn't necessary to protect the health and safety of nursing home residents.

In entering his order, Judge Mills did concede that the CMS rule does appear to be based on "sound public policy." As some residents of nursing homes suffering from ailments such as dementia and the like might not have the capacity to grasp what an arbitration agreement entails, in addition to the fact that there is stress upon nursing home residents and their families that is inherent to the admissions process, it can be argued that arbitration and the nursing home admissions process do not belong together.

However, in granting the injunction, Judge Mills stated that, as sympathetic as the court may be to the public policy considerations that motivated the rule, it is not willing to allow the federal agency to overstep its executive authority and "engage in a rather unprecedented exercise of agency power. The court is unwilling to play a role in countenancing the incremental 'creep' of federal agency authority beyond that envisioned by the U.S. Constitution."

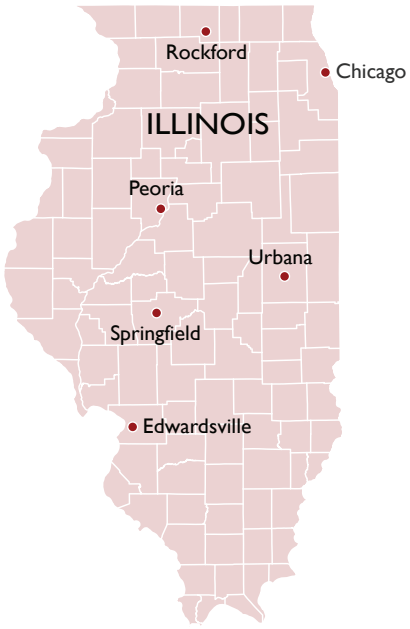
The nursing home industry has said that arbitration offers a less costly alternative to court. Facilitating more lawsuits, the industry has said, could drive up costs, forcing some nursing homes to close. Lawyers representing residents, however, state that people being admitted to nursing homes are often at the most stressful juncture of their lives, and are not equipped or capable of understanding what it is they are being asked to sign. Regardless of whether one believes striking down the rule would help the nursing home industry reduce its legal costs, or that the rule assists the families of nursing home residents in getting justice, it is clear that the court's grant of the injunction as well as the impending decision in the underlying case will have an impact upon the future of the nursing home industry.

Amee Lakhani concentrates her practice on civil litigation defense, with a large focus on the representation of healthcare professionals and organizations in a broad range of issues. In addition to defending professional liability cases, Amee counsels healthcare clients on issues relating to risk management, contracting, accreditation and licensure, policies and procedures, regulation and compliance, and fraud and abuse. Her experience includes serving as a Director of Risk Management for an Illinois healthcare clinic. Amee's clients have included physicians, physician's assistants, nurses, mental health providers, nursing home caregivers, healthcare administrators, as well as hospitals, long-term care facilities, home healthcare services, networks, and other healthcare organizations.

For More Information

If you have questions about this newsletter, please contact:

David R. Sinn
Heyl, Royster, Voelker & Allen, P.C.
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199
Phone (309) 676-0400; Fax: (309) 676-3374
E-mail: dsinn@heylroyster.com



Heyl Royster serves clients in every county in Illinois. We have offices in six major population centers in Illinois - Peoria, Chicago, Edwardsville, Rockford, Springfield, and Urbana - which allows us to appear in any Illinois state or federal court quickly, effectively, and cost-efficiently for our clients. Our offices collaborate with each other and with our clients to achieve client goals. Our statewide practice has earned Heyl Royster a reputation for innovation, excellence, and professionalism and brings our clients a specialized knowledge of the courts and adversaries we face.

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