SENATE DOCKET, NO. 1858 FILED ON: 1/21/2011

SENATE . . . . . No. 834

The Commonwealth of Massachusetts

PRESENTED BY:

Richard T. Moore

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act reforming the medical malpractice system.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Richard T. Moore	
Bruce E. Tarr	
Daniel A. Wolf	

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SENATE . . . . . No. 834

By Mr. Moore, a petition (accompanied by bill, Senate, No. 834) of Richard T. Moore, Bruce E. Tarr and Daniel A. Wolf for legislation to reform the medical malpractice system. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act reforming the medical malpractice system.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 6A of the general laws, as appearing in the 2008 Official Edition, is hereby amended by adding the following new section:

Section 16E1/2. Adverse event disclosure and compensation program

Definitions

"Database", the patient safety database established within the Betsy Lehman center.

"Adverse event", an event which results in a serious adverse patient outcome that is clearly identifiable and measurable.

"Patient safety data", information requested by the program coordinator to be submitted by the patient safety officer of a program participant.

"Patient safety officer", the individual designated by a program participant as being responsible for ensuring that the conditions for participation in the program are met.

"Program", the adverse event disclosure and compensation program.

"Program coordinator", the individual designated by the Betsy Lehman center to manage the affairs of the adverse event disclosure and compensation program.

"Program participant", a participant that meets the requirements of subsection (d).

"Root cause analysis", an examination or investigation of an adverse event to determine if a preventable medical error took place or if the standard of care was not followed and to identify the causal factors that led to the adverse event.

The director of the Betsy Lehman center is hereby authorized to appoint a program coordinator to manage the affairs of the adverse event disclosure and compensation program. The program coordinator shall:

(1) establish an adverse event and compensation program to provide for the disclosure of adverse events among program participants to patients and families and to reduce the incidence of events that adversely affect patient safety, improve patient's access to timely compensation, and reduce medical liability costs to health care providers;

(2) determine who is eligible for participation in the program;

(3) develop a standardized application to be submitted by interested parties for entry into the program;

(4) oversee the application process for entry into the program and provide technical assistance to applicants and program participants;

(5) establish and maintain a patient safety database to compile patient safety data from unidentifiable patients and physicians which is reported by program participants;

(6) analyze medical error trends and prepare annual reports in consultation with the director to be submitted to the joint committee on health care financing and the house and senate committees on ways and means;

(7) develop annual safety and training recommendations program participants that focus on the reduction of medical errors, improved patient safety, and increased quality of care;

(8) perform any other duties as determined necessary by the director of the Betsy Lehman center.

The program coordinator shall award grants to program participants to enable such participants to:

(1) organize teams of providers to respond to situations requiring the communication of adverse events to patients and families, as well as to provide support to the health care providers involved. The teams will also provide for a liaison to maintain continuous contact with the patient and family upon determination of an adverse event, until the review and negotiation process is completed;

(2) make a determination of all adverse events that are to be disclosed to patients and families;

(3) develop training and education for all providers on the disclosure of adverse events;

(4) employ a patient safety officer responsible for monitoring the early disclosure program; and

(5) procure information technology products, including hardware, software, and support services, to facilitate the reporting, collection and analysis of patient safety data as required.

Participation in the program is subject to eligibility and appropriations, and the program coordinator shall have sole authority to select participants.

(1) To be eligible to participate in the program, an entity shall be a hospital licensed under section 51 of chapter 111 of the general laws and shall meet the following criteria:

a. The hospital's primary coverage is self insured, or

b. The hospital's and physicians' insurance carriers, including risk retention groups and similar organizations, agree to participate in the program.

(2) An eligible hospital shall:

a. submit a completed application which includes a detailed comprehensive plan for implementation of the adverse event disclosure model to the Betsy Lehman center at such time, in such manner, and containing such information as the program coordinator may require; and

b. agree to comply with the conditions of participation under subsection (e).

A program participant shall:

(1) designate a patient safety officer to ensure that the conditions of participation described herein are met;

(2) submit cost analysis statements, in such manner as determined by the program coordinator, for the 2 fiscal years prior to the year of expected entry into the program at the time of application and at the end of every year of participation in the program, that outline all real and projected costs and savings related to the liability coverage and legal defense costs of doctors and other health care providers;

(3) adhere to the parameters of an adverse event disclosure model, as follows:

a. an adverse event shall be disclosed to the patient no later than 15 working days after its discovery;

b. following disclosure, the hospital and health care providers involved in the adverse event shall promptly offer a statement of apology;

c. following discovery of an adverse event, the team of providers shall immediately convene a root cause analysis;

d. upon completion of the root cause analysis, which shall be completed no more than 3 months after the occurrence of an adverse event, disclose any relevant information obtained in the course of the investigation to the patient and report that:

(1) that the hospital was not at fault in the occurrence of the adverse event and therefore no compensation shall be offered; or

(2) that the patient was harmed or injured as a result of a medical error or as a result of the relevant standard of care not being followed.

e. offer, at the time of disclosure of an incident or occurrence in which it was determined that a patient was harmed or injured as a result of medical error or as a result of the relevant standard of care not being followed, to:

(1) negotiate compensation with the patient involved in accordance with subsection (f);

(2) share, where practicable, any efforts the health care provider will undertake to prevent reoccurrence.

f. If at the time of the disclosure of an incident or occurrence in which it was determined that a patient was harmed or injured as a result of medical error or as a result of the relevant standard of care not being followed, a patient elects to enter into an agreement for negotiations with a program participant as provided for in subsection (e), such negotiations shall, at a minimum, provide for the following:

(1) the confidentiality of the proceedings;

(2) written notification of a patient's right to legal counsel, which shall include an affirmative declaration that no coercive or otherwise inappropriate action was taken to dissuade a patient from utilizing counsel for the negotiations;

(3) an agreement that if such negotiations end without an offer of compensation that is acceptable to both parties, any expression of regret or apology made by any member of the licensed hospital in the course of the negotiations, including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability for any purpose in any subsequent civil or administrative action.

(4) both parties may use legal representation to facilitate the negotiation of the terms of the settlement.

(5) the parties shall agree that if an agreement on the terms of compensation is not reached within 6 months from the date of the disclosure:

a. the patient may proceed directly to the judicial system for a resolution of the issues involved; or

b. the parties may sign an extension of the agreement to provide an additional 3-month negotiation period.

(6) upon receipt of the final payment of the accepted settlement as negotiated under this subsection, the patient shall agree to the final settlement of the incident described in the report and findings of the root cause analysis and further litigation with respect to such matter shall be prohibited in federal or state court.

If at the time of the disclosure of an incident or occurrence in which it was determined that a patient was harmed or injured as a result of medical error or as a result of the relevant standard of care not being followed, a patient does not elect to enter into an agreement for negotiations with a program participant as provided for in subsection (e), any expression of regret or apology made by any member of the licensed hospital, including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability for any purpose in any subsequent civil or administrative action.

(1) The purpose of creating a patient safety database is to:

a. promote patient safety by identifying preventable errors and adverse events, and develop process changes to reduce their incidence in the future; and

b. encourage better exchange between health care providers and patients regarding preventable medical errors and transparency in the practice of medicine-including apologizing for errors - consistent with the goals of enhancing patient safety.

(2) The Betsy Lehman center shall establish a patient safety database, and the patient safety officer of a program participant shall be required to prepare and submit to the database:

a. any adverse events that occur within the hospital;

b. any legal action related to the medical liability of a hospital;

c. a summary of any report submitted to a program participant's patient safety officer following a root cause analysis;

d. the terms of any agreement reached either through negotiations under subsection (f) or by other means;

e. any disciplinary actions taken against a physician or licensed hospital as a result of involvement in any incident or occurrence that is found to be the result of a medical error or the relevant standard of care not being followed; and

f. any other data as determined appropriate by the Betsy Lehman center.

(3) Information submitted to the database related to patients, physicians, and health care providers shall be kept strictly confidential.

(4) Access to the patient safety database shall only be granted to the Betsy Lehman center and the department of public health.

Beginning not more than 12 months after the implementation of an adverse event disclosure and compensation pilot program, the Betsy Lehman center shall conduct an evaluation regarding the overall effectiveness of the program and grant and prepare a report for the center. The evaluation shall include:

(1) an analysis of the effect of the system on the number, nature, and costs of compensated events, as well as health care liability claims, and a comparison of this information among all program participants; and

(2) a recommendation for an expansion of the program, a continuation of the program as is, or its discontinuation.

There is hereby are hereby authorized to be appropriated, subject to appropriation, sums of $250,000 per program participant, not to exceed a maximum of 4 programs, to carry out this section.

SECTION 2. Chapter 233 of the general laws, as appearing in the 2008 official edition, is hereby amended by inserting, after section 79K, the following new section: -

Section 79L. (a) As used in this section the following terms shall have the following meanings unless the context clearly indicates otherwise:

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

"Facility", a hospital, clinic or nursing home licensed pursuant to chapter 111 or a home health agency. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such facilities.

"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, any and 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 and shall not constitute an admission of liability or an admission against interest.

SECTION 3. Chapter 231 of the general laws, as appearing in the 2008 official edition, is hereby amended by adding the following new section:-

Section 60L.

(a) Except as provided in this section a person shall not commence an action against a provider of health care as defined in paragraph 7 of section 60 B of chapter 231 unless the person has given the health care provider written notice under this section of not less than 182 days notice before the action is commenced.

(b) The notice of intent to file a claim required under section 1 shall be mailed to the last known professional business address or residential address of the health care provider who is the subject of the claim.

(c) The 182 day notice period in section 1 is shortened to 91 days if all of the following conditions exist:

(1) The claimant has previously filed the 182 day notice required in subsection (a) against another health care provider involved in the claim.

(2) The 182 day notice period has expired as to the health care providers described in subsection (a).

(3) The claimant has filed a complaint and commenced an action alleging medical malpractice against one or more of the health care providers described in paragraph (1).

(4) The claimant did not identify and could not have reasonably have identified a health care provider to which notice must be sent under subsection (a) as a potential party to the action before filing the complaint.

(d) The notice given to a health care provider under this section shall contain a statement of at least all of the following:

(1) The factual basis for the claim.

(2) The applicable standard of care alleged by the claimant.

(3) The manner in which it is claimed that the applicable standard of care was breached by the health care provider.

(4) The alleged action that should have been taken to achieve compliance with the alleged standard of care.

(5) The manner in which it is alleged the breach of the standard of care was the proximate cause of the injury claimed in the notice.

(6) The names of all health care providers the claimant is notifying under this section in relation to the claim.

(e) 56 days after giving notice under this section, the claimant shall allow the health care provider receiving the notice access to all of the medical records related to the claim that are in the claimants control, and shall furnish release for any medical records related to the claim that are not in the claimants control, but of which the claimant has knowledge. This subsection does not restrict a health care provider receiving notice under this section from communicating with other health care providers and acquiring medical records as permitted in

section 291f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

(f) Within 154 days after receipt of notice under this section, the health care provider against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(1) The factual basis for the defense to the claim.

(2) The standard of care that the health care provider claims to be applicable to the action and that the health care provider complied with that standard.

(3) The manner in which it is claimed by the health care provider that there was compliance with the applicable standard of care.

(4) The manner in which the health care provider contends that the alleged negligence of the health care provider was not the proximate cause of the claimant's alleged injury or alleged damage.

(g) If the claimant does not receive the written response required under Section 5 within the required 154 day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154 day period.

(h) If at any time during the applicable notice period under this section a health care provider receiving notice under this section informs the claimant in writing that the health care provider does not intend to settle the claim s within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health care provider, so long as the claim is not barred by the statue of limitations.

SECTION 4. Chapter 231 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by adding the following new section:

Section 60M. In any action for malpractice, error, omission, mistake or the unauthorized rendering of professional services against a provider of health care, the liability of each defendant for damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

SECTION 5. Section 60G of chapter 231 of General Laws, as appearing in the 2008 official edition, is hereby amended by the insertion of the words ", or which will be incurred," after the word "judgment" in line 11, and by the insertion of the words "or is anticipated to be" after the word "was" in line 11.

SECTION 6. Section 60B of chapter 231 of the General Laws, as appearing in the 2008 official edition, is hereby amended by striking the fifth paragraph in its entirety and replacing it with the following text:

Section 60B. Each such action for malpractice shall be heard by said tribunal within fifteen days after the defendant's answer has been filed. Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts who (1)

hold a non-restricted license from a state licensing board recognized by the federation of state medical boards; (2) are currently board certified by a specialty board approved by the American board of medical specialties or of the advisory board of osteopathic specialists from the major areas of clinical services as the defendant physician; and (3) actively practice in the same specialty as the defendant physician, without the necessity of such experts appearing at said hearing. Statements by said experts shall be admissible at trial and said experts shall be required to testify at trial. The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto. Such a witness shall be allowed traveling expenses and a reasonable fee to be fixed by the tribunal which shall be assessed as costs. The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.

SECTION 7. Section 60B of chapter 231, as appearing in the 2008 official edition, is hereby amended by adding at the end of the sixth paragraph, the following:-

The tribunal, where it determines the circumstances of the case may be resolved more appropriately, may also refer any case to mediation or arbitration.

SECTION 8. Chapter 231 of the General Laws, as appearing in the 2008 official edition, is hereby amended by adding the following new section:

Section 60N. In any action for malpractice, error or mistake against a provider of health licensed pursuant to section 2 of chapter 112, including actions pursuant to section 60B of this

chapter, expert witnesses are those who (1) hold a non-restricted license from a state licensing board recognized by the Federation of State Medical Boards; (2) are currently board certified by a specialty board approved by the American board of medical specialties or of the advisory board of osteopathic specialists from the major areas of clinical services as the defendant physician, and (3) actively practice in the same specialty as the defendant physician.

SECTION 9. Section 60K of chapter 231of the general laws, as appearing in the 2008 official edition, is hereby amended in line 14 by striking the following language:- “plus 4 per cent”.

SECTION 10. Effective dates.

Sections 2 and 3 of this act shall take effect on January 1, 2013.

All other sections shall take effect immediately upon passage.