Legislative Update

The Good, the Bad and the Not so Much

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Required End-of-Life information---background

• The proponents of End-of-Life education quote studies that state:
  – *Most patients prefer to die at home, without pain and with comfort care.*
  – *California patients with advanced cancer have a higher rate of dying in the hospital than other States and they receive more aggressive life-saving measures in the final weeks of life.*
Existing law: Patient Request for End-of-Life Care Options

- When a health care provider makes a diagnosis that a patient has a terminal illness, state law requires that the provider must provide specified information and counseling regarding legal end-of-life care options upon the patient’s request.

- If the patient doesn’t make this request, the law described in this section does not apply.

- The information may be given verbally or in writing.
  - Health & Safety Code section 442.5 et. seq.
New Law: AB 2139

• The obligation to provide end of life care options is now REQUIRED:
  – At the time of diagnosis or a subsequent visit when treatment options are discussed
  – Provided to patient or surrogate
  – Not required if already given
  – Must be done in a culturally sensitive manner
  – Provider retains right to use clinical judgment in recommending course of care (amendments sought by Oncologists and CMA prior to withdrawing opposition to bill)
End-of-Life Information to Be Provided

1. Information about hospice care at home or in a health care setting
2. A prognosis with and without the continuation of disease-targeted treatment
3. The patient’s right to refusal of or withdrawal from life-sustaining treatment
4. The patient’s right to continue to pursue disease-targeted treatment, with or without concurrent palliative care
End-of-Life Information to Be Provided (cont.)

5. The patient’s right to comprehensive pain and symptom management at the end of life,

6. The patient’s right to give an individual health care instruction pursuant to Probate Code Section 4670, (Advance Directive)
Notary Form Changes—SB 1050

- Legislative history: bill introduced because of concern about fraud—the naïve conclusion that because the document is notarized it is “authentic”. Bill mandates the notary certificate to include a box with the following language.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy or validity of that document.

Civil Code section 1189, 1195
Gov’t Code section 8202
Telehealth Consent AB 809

- Old law: Verbal consent (but documented in the medical record) must be obtained by the provider at the originating site (where the patient is located).
- New: Provider *initiating the use of telehealth* is required to obtain the patient’s consent for telehealth.
- May apply the consent to future uses of telehealth.
Telehealth

- Consent may be verbal or written
- Must be documented, but no mandate that it be in the medical record (but where?).
- By agreeing to telehealth, the patient does not waive right to in-person health care.

- Solution: add to your terms and conditions.
- Have your providers use “smart text” if using electronic health record?
Death Certificates—Gender Identity

- AB 1577 “Respect After Death Act”
- Effective July 1, 2015
- Requires an individual completing a death certificate record of a decedent’s sex to reflect gender identity as reported by the person or source best qualified to provide this information.
- Exceptions: Legal documents that identify the decedent’s gender—legal documents will dictate.
Gender Identity

• This bill provides immunity from liability for damages or costs arising from claims related to the sex of the decedent as entered on the certificate.

• Determine gender identity from informant unless shown otherwise in:
  – Birth certificate
  – Driver’s license
  – SS#
  – Court order approving name or gender change
  – Passport
  – Advance Directive
  – Clinical treatment for gender transition
Gender Identity: Democracy

• Resolution of disputes when no documentation of gender identity is presented:
  – **Majority wins**: If no documents are presented and there is disagreement among those who have equal rights related to disposition of remains under H & S 7100, the majority opinion controls how the gender will be reported.
  – **Court intervention**: If there is disagreement and no majority, then anyone with rights under section 7100 may petition the court for an order determining who shall decide.

  • Notice to all person with rights required
  • Court simply says who can decide (as opposed to deciding gender)
Interpreter Services for Medi-Cal patients: AB 505

- Bill intends to strengthen consumer protections for Medi-Cal limited English proficient patients.
- Department of Health Care Services will require all managed care plans that provide Medi-Cal services to offer language assistance services to limited-English-Proficient patients.
- Includes oral interpretation services in any language on a 24 hour basis at key points of contact.
  - Welfare and Institutions Code section 14029.91
Antimicrobial Stewardship program: SB 1311

- Existing law: requires hospitals to develop a process for evaluating the judicious use of antibiotics.

- Due to continued concern that antibiotics prescribing is not appropriate, by July 1, 2015: hospitals must:
  - implement an antimicrobial stewardship policy per federal guidelines—
    - Policies to monitor judicious use
    - Workgroup or committee must be physician supervised (with requisite background)
    - Must report in quality data
    - \textit{H & S section 1288.85}
Reporting of occupational injury: AB 326

• Old law: employers are obligated to report certain employee injuries to OSHA by “telephone or telegraph”.
• This bill substitutes “e-mail” for “telegraph”
  • Labor Code section 6409.1
Privacy Breach and identity theft prevention  AB 1710

- In the aftermath of the Target and Neiman Marcus security breaches, there was extensive legislative discussion of remedies.
- This bill requires a person or business that was the source of a breach of a social security or driver’s license number to offer appropriate identity theft prevention and mitigation services, if any, at no cost to the affected person for at least 12 months.
- The bill does not clarify when these services are appropriate and may not really mandate it.

>Civil Code section 1798.82
Privacy Breaches AB 1755

• Original purpose of this bill was to align state breach reporting law with HIPAA.

• Privacy advocates’ opposition narrowed the bill:
  – Lengthened time to report a breach to CDPH from 5 to 15 business days
  – Allows notification to patient to be done by e-mail IF the patient agreed in writing to electronic notice by email.

> H & S section 1280.15
Privacy Case Law—California law

- To succeed in a CMIA lawsuit, plaintiffs must prove that an unauthorized person actually viewed the medical information.
  - Theft of encrypted hard drive with encryption key near by on an index card—no evidence that information viewed
Privacy Case Law—California law

- Some element of information “regarding a patient’s medical history, mental or physical condition, or treatment” is needed to constitute “medical information”.
  - Stolen computer with MRN, age, DOB, last 4 digits of SS#
    - Eisenhower v. Superior Court  WL 2115216
Disclosure under CMIA requires an affirmative communicative act by the provider, not merely being the victim of a theft. Possession of the physical form without actually viewing it does not violate CMIA.

- *Stolen computer containing medical records resulted in class action under CMIA*
  - *Sutter v Superior Court (2014) 227 Cal App 4th 1546*

**NOTE:** These cases address attempted causes of action under CMIA, not HIPAA and do not further define PHI, or “disclosure” under HIPAA.
Privacy and the Paparazzi - AB 1256

• Bill sponsored by the Paparazzi Reform Initiative.

• Expands the scope of liability for physical invasion of privacy when someone is engaged in private or personal activity (Civil Code section 1708.8).

• Adds Civil Code section 1708.9 making it unlawful to:
  – By force, threat of force, or physical obstruction….to actually or attempt to intentionally injure, intimidate or interfere with any person attempting to enter or exit a health facility or school grounds, or
  – By nonviolent physical obstruction, to actually or attempt to intentionally injury, intimidate or interfere with any person attempting to enter or exit, a health facility or school grounds.
Privacy and the Paparazzi

• Violators may be subject to civil liability, including:
  – Injunction
  – Compensatory or punitive damages $5k/1K
  – Attorney and expert fees

• Action may be brought by AG/district or City attorney.

• Aimed at photojournalists, but could apply to anyone----
Sex Crime Victim Counseling
SB 978

• Victims of specific sex crimes have the right to have a sexual assault counselor present at any medical or physical exam.

• Prior law mandated law enforcement to notify the local rape victim counseling center whenever they transport a victim to the hospital.
Sex Crime Victim Counseling
SB 978

• New: A hospital, with the approval of the victim, may now also notify the local rape victim counseling center.
  – Penal Code section 264.2 (b)

• Rationale: Hospitals are often the first point of contact for the victim and hospitals should have the right to get assistance without going thru law enforcement.
Required training re Abusive Conduct AB 2053

• Union sponsored bill: proponents state that “abusive work environments are unfortunately a growing epidemic throughout the nation and can reduce productivity and morale, which lead to higher absenteeism rates, frequent turn over and increased medical and worker comp costs”.

• In addition to sexual harassment training, employers with 50+ employees must add training and education on “abusive conduct” for managers.
  • Government Code section 12950.0
Abusive conduct training

• Definition: Abusive conduct of an employer or employee is conduct:
  – *In the workplace*
  – *With malice*
  – *That a reasonable person (RR) would find hostile, offensive and unrelated to an employer’s legitimate business interests, eg.*
    • Repeated infliction of verbal abuse (derogatory remarks, insults, epithets)
    • Verbal or physical conduct that a RR would find threatening, intimidating or humiliating
    • Gratuitous sabotage or undermining of a person’s work performance
Extension of California’s employment law-FEHA: AB 1443

• California’s Fair Employment and Housing Act provides protection to employees, applicants and certain contractors
  – (Gov’t Code section 12940).

• New: unpaid interns and volunteers are now protected under this law.
  – Prohibits discrimination in selection, termination, training or other treatment
  – Prohibits harassment
Workplace violence Prevention Plans: SB 1299

• Hospitals are currently required to have programs to reduce workplace injuries.

• Cal/OSHA must issue regulations by July 1, 2016 related to hospital requirements on workplace violence protection plans. (WVPP)

• WVPP must be in effect at all times in all patient care units.

• The employer cannot retaliate against any employee for seeking assistance and intervention from local law enforcement when a violent incident occurs.
Definition of workplace violence

- Use of physical force against a hospital employee by a patient or visitor that causes or has a high likelihood of causing, injury, psychological trauma or stress regardless of whether the employee sustains injury.
- Incident involving the use of a firearm or other dangerous weapon, regardless of whether employee sustains an injury.
  - Labor Code section 6401.8
Workplace Violence Protection
Plans must include:

- Annual personnel education and training policies (for both permanent and temporary employees) on:
  - Recognizing potential for violence and how to seek assistance and respond
  - How to report to law enforcement
  - Availability of coping resources

- Systems for incident handling, investigating etc.

- Annual assessment of plan, looking at staffing, security systems, job design, equipment and facilities and security risk.

- Employees and unions must be involved.
Work Place Violence

- Hospitals will have to report workplace violence incidents as of January 1, 2017 (must also post on its website).
  - Must report violent incidents to Cal/OSHA within 72 hours, but must report within 24 hours if incident:
    - results in injury
    - Involves use of firearm or other dangerous weapon
    - Presents urgent/emergent threat to welfare, health or safety of personnel

- NOTE: will this result in improved mental health services?
Safe Patient Handling--Regulations

- CNA sponsored AB 1136 in 2011 requiring hospitals to adopt a “patient protection and health care worker back and musculoskeletal prevention plan” (MIPP).
- Regulations issued effective October 1, 2014 (8CCR 5120 et seq).
- Applies to all departments on the general acute care hospital license, included ED, outpatient clinics, OR, psych, newborn nursery, home health and hospice.
MIPP Regulations now issued

- Requires replacement of manual lifting and transferring of patients with powered and/or non-powered devices or lift teams as appropriate consistent with hospital policy and professional judgment of RN.

- BUT Manual lifting is still permitted as appropriate.

- RN must:
  - Assess mobility needs of every patient to determine appropriate handling procedures
  - Prepare safe handling instructions for patient
  - Observe and direct patient lifts
MIPP Regulations

- Hospital must train all employees
  - Those who lift—initial and annual and when new equipment is involved
  - Awareness training for those who don’t lift
  - Many elements to the training

- Hospital must train employees of other employers who are present on patient units—EMTs, paramedics, physicians.

- California Hospital Association has a guidebook.
Change in Charity Care rules: SB1276

• **Background:** in 2006, Charity Care law passed requiring hospitals to develop policies and discount billing—to limit what uninsured patients could be charged.

• With the enactment of the Affordable Care Act, many of the previously uninsured patients got insurance; but even though they still met the income requirements for charity care or discounts, they were no longer eligible because they were insured.

• New legislation aimed to modify definitions of eligibility for charity care and discount.
Charity Care legislation

- California’s fair pricing law (B & P section 127400) revised:
  - *For hospitals,* it expands the scope of patients who are eligible for charity care--- “patients with high medical costs” include individuals who receive a discounted rate thru insurance.
  - *Emergency Physicians:* no expansion of the term, but hospitals and ED physicians are now required to negotiate the terms of a payment plan.
  - *In determining plan,* the patient’s family income and “essential living expenses”.
  - *If payment plan disputed,* then monthly payments do not exceed 10% of the patient’s family monthly net income (after essential living expenses).
Charity Care Legislation

• Collection actions cannot deviate from the payment plan

• ED physicians
  – minimum payment of $10/month
  – May rely on formula used by hospital for income/essential living expenses
  – May accept attestation from patient

• Hospitals must revise policies (submit to OSHPD if significant changes), handouts to patients and refer to a local consumer assistance center
Skilled Nursing Facility approval for Special services: AB 1974

- Old law: SNF’s would have to get approval from CDPH to offer “special services” like PT, OT, speech therapy—includes application, survey of the facility.

- This law is outdated because under Medicare, SNFs have to offer PT, OT and speech therapy.

- This bill eliminates the need for CDPH approval to offer these services.

- Bill makes it clear that CDPH can still evaluate compliance with Title 22 therapy requirements.
  - H & S Code section 1252
Scope of Practice of Dieticians

• Purpose of legislation: to clarify confusing and outdated scope of practice requirements that have resulting in DPH citations.

• New: Registered Dieticians are allowed to perform medical nutritional therapy in collaboration with the physician and team.

• Example: make minor changes within the existing MD orders without waiting for the physician to modify the order.
  – B & P Code section 2586
New Case Law

• Payment of Medical Expenses
  – *After the patient developed an infection, a surgery center paid $4,118.23 in expenses to the patient, who was not represented by counsel.*
  – *There was no release signed or notification of the applicable statute of limitation.*
  – *15 months later, the patient filed a lawsuit.*
  – *Court ruled that payment of the medical expenses, without advising of the S/L tolled the statute of limitations up to the 3 year limit*

• **Note:** be careful when you are paying expenses to unrepresented patients
Elder Abuse Cases

- *Patient fell and broke hip at home; admitted to hospital for hip surgery*
- *While in transitional care unit, she fell and broke her arm and re-broke her hip; The patient alleged negligence and elder abuse based in part on inadequate staffing and training*
- *Court ruled that elder abuse pleading was defective and that it was simply a case of negligence because it related to the undertaking of medical care.*
- Elder abuse relates to the failure to “provide medical care”
- Thus chronic known understaffing does not itself create a basis for elder abuse
  - *Worsham v. O’Connor (2014) 226 Cal App 4th 331*
New Case Law

• Sexual misconduct at work
  – *Massage therapist sexually assaulted a client while performing a massage*
  – *Court held that sexual misconduct at work cannot be said to occur “while performing duties related to the conduct of the company’s business” even if the assault occurs at the place of work and during the work day*
New Case Law

• Mandated reporting and the privilege
  – Criminal defendant arrested for molestation of his stepdaughter.
  – Defendant threatened suicide and was sent to hospital where he was interviewed by psychiatrist and nurse. During the interview, details of the abuse were revealed and a CPS report was made by the nurse.
  – At trial the defendant argued that the interview was covered by privilege.
  – Court ruled that because the reporter had a legal obligation to report, the information which is the subject of the report is not privileged.

• People v Cannata (2015) 233 Cal App 4th 1113
New Case Law

- **Expert Disclosure:**
  - Plaintiff’s counsel late in disclosing experts and delayed being available for deposition.
  - Defense attorney declined to take the depositions because the disclosure was late.
  - Defense attorney made a motion in limine to bar plaintiff’s experts—trial court granted and plaintiffs appealed.
  - Court of appeal reversed trial court—undermining the ability to assert or rely on deadlines for expert witness disclosure.
New Case Law

- **MICRA non-economic damages cap**
  - Patient underwent surgery to reduce nose bleeds; surgery involved use of a device
  - Patient had complication involving blindness; hospital, surgeon and device manufacturer sued
  - Hospital settled for $350k; manufacturer for $2 million
  - Doctor wanted a set off for these settlements
  - Court ruled that no set off unless the defendant presented evidence of negligence of the settling defendants at trial – thus encouraging finger pointing
    - Rashidi v. Moser (2014) 14 CDOS 13880