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COVID-19: Duties of Medical and Dental Providers to Patients

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The number of cases of the coronavirus (COVID-19) in New York is currently over 25,000 and is expected to continue to rise. The CDC has issued interim guidelines for employers regarding COVID-19. The full CDC guidelines are available online at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html. While all business areas have been affected, Medical and Dental providers are impacted in a unique way due to their duty of care requirement. The duties of medical and dental providers to their patients when either another patient or an employee of the provider has tested positive for COVID-19 are discussed below. The CDC's general guidelines for healthcare facilities are available at https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html.

Duty of Care

Under New York law, doctors owe a duty of care to their patients. Additionally, doctors have been found to owe a duty of care to nonpatients when the nonpatient's injury was a result of the doctor's performance of the duty of care owed to the patient. Under this duty, doctors must act as a reasonable and prudent doctor would in similar circumstances; in other words, they must follow accepted medical practice. This same standard applies to dentists. If a doctor or dentist deviates from accepted medical practice and the deviation causes an injury, that doctor or dentist may be civilly liable for malpractice or negligence. What is considered accepted medical practice can vary depending on location; for example, what is accepted in one area would likely be different from what is accepted in a different area with far less resources.

A key factor of a duty is that one party's relationship with the other places them in the best position to protect the other party against the risk of harm. For example, doctors have been found to have a duty to warn their patient about the effects of her medication, which included impairing her ability to drive, in order to protect other (nonpatient) drivers in the vicinity. Thus, doctors and dentists would likely have a general duty to warn their patients about any possible contact with COVID-19 at the medical or dental facility in order to prevent the spread of the disease to either those patients or nonpatients who may come into contact with those patients.

Duty of Care to Patients Once Someone Has Tested Positive for COVID-19

Though the normal civil liability risk may not attach to cases dealing with COVID-19 treatment (see the section on Executive Order 202.10 below), health care professionals should still strive to uphold their duty of care to their

patients. COVID-19 is a relatively new disease, and therefore it may be more difficult to determine the accepted medical practice regarding it. However, the CDC's guidelines and the New York Department of Health can provide guidance on this topic. The CDC's general guidelines for minimizing exposure are available at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html. Information from the New York Department of Health regarding COVID-19 is available at https://coronavirus.health.ny.gov/home.

A. If An Employee of the Healthcare Facility Tests Positive for COVID-19

The CDC has issued guidelines regarding sick employees. If an employee is confirmed to have COVID-19, employers are instructed to inform fellow employees of their possible exposure to COVID-19, though the confidentiality requirement of the Americans with Disabilities Act still applies. The fellow employees are to then self-monitor for COVID-19 symptoms, including fever, coughing, and shortness of breath, and should be isolated and sent home if any symptoms develop. Additionally, the areas in the facility where the infected individual has been should be cleaned in accordance with the CDC guidelines. The CDC's disinfecting guidelines are available at https://www.cdc.gov/coronavirus/2019-ncov/prepare/disinfecting-building-facility.htm.

The New York Health Department states that if you have had contact (defined as being within 6 feet) with someone who has tested positive for COVID-19, you are to call your local health department and then self-quarantine at home for 14 days after that date of your last exposure. Thus, anyone, including patients, who may have come into contact with that sick employee at your facility should be warned of their possible exposure and to self-monitor for symptoms. Additionally, patients should not be brought to areas where the sick employee has been until the area has been cleaned in accordance with the CDC guidelines. Personal protective equipment gear should also be worn by employees in accordance with the CDC guidelines in order to minimize the chances of transmitting the infection.

B. If A Patient Of The Healthcare Facility Tests Positive For COVID-19

If a patient of the healthcare facility who has been there recently tests positive for COVID-19, the principles above regarding warning other patients as well as staff who came into contact with the infected patient apply. Thus, the other patients and employees that were at the facility at the time of the infected person's visit or, at a minimum, over the subsequent two weeks (unless the office has been cleaned pursuant to CDC guidelines in the meantime) should be warned that they have had contact with an individual who tested positive for COVID-19 and encouraged to self-monitor and self-isolate for 14 days, though the confidentiality requirement of HIPPA still applies. Additionally, the areas where the infected patient was should be cleaned in accordance with CDC guidelines.

If a patient who has already tested positive for COVID-19 and who cannot receive treatment via telecast is scheduled to come to the facility, the CDC recommends steps to minimize risks of transmission. For example, the patient should be isolated from other patients in the waiting room. The CDC's full recommendations are available at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.

In this case, when the facility knows ahead of time, the facility is in the best position to protect its other patients from being infected by COVID-19 and therefore owes a duty to its patients to take precautions. Following the CDC and State instructions discussed above, as well as those discussed on their websites, are a way to protect the facility from accusations of deviation from acceptable medical and dental practice.

Executive Order 202.10

On March 23, 2020, Governor Cuomo signed Executive Order 202.10, which, in part, temporarily modified sections of the New York Education Law and NYCRR that pertain to health care professionals through April 22, 2020. The full text of the order is available at https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency. Executive Order 202.10 stated, in pertinent part, that civil liability related to COVID-19 treatment would be more limited than usual in the healthcare profession. Specifically, under Executive Order 202.10:

> all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses 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 by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional.

Therefore, under the Order, the gross negligence standard is applied to the healthcare professionals named in the Order even when they are rendering professional services in the ordinary course of their practice. In order to qualify as gross negligence, the conduct must be egregious. This means that the civil liability for a healthcare professional providing medical services in support of the State's response to the COVID-19 outbreak, which notably is a somewhat vague classification, is now much more limited than it otherwise would be under New York Law.

Additionally, in the same Order, Governor Cuomo relieved health care providers of recordkeeping requirements "to the extent necessary for health care providers to perform tasks as may be necessary to respond to the COVID-19 outbreak." Now, anyone acting reasonably and in good faith with that section of the Order "shall be afforded absolute immunity from liability for any failure to comply with any recordkeeping requirement," although the practitioner is urged to maintain standard recordkeeping as normally required. Thus, the civil liability for health care providers who are providing services in relation to the COVID-19 outbreak is further limited.

Further Information

If you have questions regarding any implications the COVID-19 virus has caused or will cause to your medical or dental facility, feel free to contact Andrew P. Nitkewicz at (516) 357-3895 or via email at ANitkewicz@cullenllp.com or Jennifer E. Seeba at (516) 296-9173 or via email at JSeeba@cullenllp.com.

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Practices

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