

PA Senate Bill 761 Introduced to Address the Task of Obtaining a Patient's Informed Consent

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On June 12, 2019, the Pennsylvania General Assembly introduced Senate Bill No. 761, sponsored by Senator John R. Gordner (R-Columbia), in response to a 2017 decision from the Pennsylvania Supreme Court—*Shinal v. Toms*. *Shinal* addresses whether a physician may delegate the task of obtaining a patient's informed consent to a qualified assistant.

The Medical Care Availability and Reduction of Error (MCARE) Act codified the law of informed consent in 2002. The MCARE Act provides, in relevant part, that a patient who undergoes certain medical procedures, including surgery, must be given a description of the procedure along with the risks and alternatives that a reasonably prudent patient would require to make an informed decision as to that procedure.

In 2017, the Pennsylvania Supreme Court held in *Shinal* that the duty to obtain informed consent belongs *solely* to the physician performing the procedure. The court reasoned that informed consent requires direct communication between physician and patient and contemplates a back-and-forth, face-to-face exchange in order for the patient to be informed and willing to consent.

As a legislative response to *Shinal*, Senate Bill No. 761 seeks to restore the "team-based" approach to modern healthcare by giving physicians the flexibility to delegate the informed consent task to other qualified medical providers. According to the Bill's sponsor, it also restores a physician's medical expertise and judgment in determining how best to serve his or her patients. In advocating for passage of the Bill, the sponsor cited the following from the dissenting opinion in *Shinal*:

"For fear of legal liability, physicians now must be involved with every aspect of informing their patients' consent, thus delaying seriously ill patients access to physicians and the critical services that they provide."

If enacted, Senate Bill No. 761 would amend the MCARE Act to allow a physician to delegate the task of obtaining informed consent to a "qualified practitioner." The Bill defines a "qualified practitioner" as any physician participating in a residency or fellowship training program, physician assistant, nurse practitioner, midwife or registered nurse. Additionally, the "qualified practitioner" must be knowledgeable about the patient's condition and the proposed procedure. While the Bill makes clear that a physician may delegate the task of informed consent to another "qualified practitioner," the physician remains responsible for the overall care of his or her patient.

The overarching goal of the proposed legislation, as described by the Bill's sponsor, is to enable physicians "to determine when to employ the assistance of other qualified practitioners within a framework that still ensures patients are protected and have access to information they need to make informed decisions"

White and Williams LLP will continue to track and report on this important legislative response to the *Shinal* decision. If you have questions or would like more information, please contact Dan Ferhat (ferhatd@whiteandwilliams.com; 215.864.6297), Russ Lieberman (liebermanr@whiteandwilliams.com; 215.864.6285) or another member of the Healthcare Group.

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