

**Medical Liability Task Force
Meeting #5 DRAFT Summary**

Wednesday, October 6, 2010
1:00-3:00 pm

Work Group Members in Attendance

Michael Alexander, Co-Chair
Peter Bernardo MD
Jeffrey Bildstein
Janet Billups (by phone)
Jim Dameron
Scott Gallant
Robert Holland MD
Jodie Mooney (by phone)
Christoffer Poulson MD
Mark Stevenson
Lawrence Wobbrock

Work Group Members Absent

Rick Bennett
Joseph Siemienczuk MD, Co-Chair
Craig Fausel MD
Laura Potter

OHPR Staff in Attendance

Lynn-Marie Crider
Carrie Parrish

Meeting Summary (actions in bold)

The meeting was called to order at 1:03 pm.

Review of meeting summary

The meeting summary for the September 8 meeting was approved with the addition of language in the first full paragraph on page 2 clarifying that only task force members present at the meeting agreed with the points that follow.

Discussion of Draft Recommendation on Disclosure and Offer Programs

Lynn-Marie Crider said that to the best of her understanding, the Task Force has not reached agreement on recommendations on disclosure and offer programs. Therefore, she prepared a draft to get the discussion moving. On the first page of the draft are what she believed to be relatively non-controversial recommendations. On the back, she listed as concepts noted but not recommended for adoption. The task force may wish to consider those concepts before reaching a decision.

Discussion noted that the draft recommendations assume that reporting requirements encourage disclosure and disclosure encourages early offer and settlement. There was some disagreement about those links. Agreed: Recommendations ought to discuss the distinctions and linkages between reporting, disclosure, and offer.

The Task Force discussed the following ideas at some length:

1. Making physician practices eligible to participate in the Patient Safety Commission's reporting program, which includes a disclosure component.

Agreed: This should be considered, recognizing that:

- Independent physician offices, unlike those that belong to a self-insured integrated system, cannot make an offer to settle even if they disclosure errors. However, it was

noted that disclosure to patients is right and should be encouraged even if independent physicians who are represented by an insurance company will not have the power to offer to settle a claim.

- If disclosure is required as part of a reporting program, some believe there may need to be protection against use of the disclosure in litigation. Others disagree.

2. Encouraging the Patient Safety Commission to work with facilities to experiment with sharing the root cause analysis with the patient.

There was some opposition expressed.

3. Mandatory reporting of adverse events.

Both support and opposition was expressed.

4. Excess liability funds.

Agreed: Previously rejected.

The chair proposed and Task Force members present agreed that the following concepts be included in a recommendation that provides the reader with a flavor of the concerns discussed in the meeting:

- Explicitly providing in statute that disclosing an error to a patient is not non-cooperation with the insurer.
- Encouraging the Patient Safety Commission to work with facilities to experiment with sharing the root cause analysis with the patient.
- Making physician practices eligible to participate in the Patient Safety Commission's reporting program, which includes a disclosure component.
- Amending the state's apology law to clarify what statements are inadmissible and in what suits.
- Requiring disclosure of all unanticipated outcomes or medical errors.

Discussion of Draft Recommendation on Evidence-Based Guideline Safe Harbors

The Chair opened the discussion. In response to a question, he clarified that the safe harbor concept does not mean the statutory definition of the standard of care goes away; it just means that in specific areas, a guideline would be the standard.

Jim Dameron noted that OHPR and the Patient Safety Commission have been awarded a grant to study the concept and they will do so. Later on, folks will be able to say "we're interested" or they can ignore it.

Some of the issues touched on in the discussion included:

- Guidelines won't eliminate the need for expert witnesses
- Guidelines can help physicians manage patients but may not have a place in the liability system.
- Mello article is useful and should be noted in the recommendations.

Agreed: Eliminate language from the draft that discusses the potential value of the concept for improving patient safety and reducing costs.

Discussion of Draft Recommendation on an Administrative System of Compensation

The chair opened the discussion of the draft by suggesting that the recommendation should capture what the study should do and what concerns should be addressed.

The group discussed how a study could be done in the absence of a pilot. There was discussion of the reasons pilots are unlikely to accurately reflect what would happen if an administrative system were adopted on-scale statewide.

The group discussed the possibility of a system where the patient could chose to opt for the administrative system or the tort system. Scott Gallant suggested that would give patients the best of both worlds—at a high cost. Mic noted that there would be no question of its constitutionality. Several members of the Task Force said they would like the study to examine voluntary programs as well as programs that fully replace the tort system.

The group identified the following key issues for study:

- Financial feasibility, including both the cost of the system and how it should be financed.
- Potential for compensating more patients while not increasing the total cost of the liability system.
- The crafting of the compensability standard or what the patient must prove in order to recover
- Constitutional issues, including whether it is necessary to go to a strict no-fault system to eliminate the jury trial.

Agreed: Recommend study. Be clear that not all Task Force members believe there is need for a study.

Next steps:

- Mic and Joe will present the Task Force’s recommendations to the Health Policy Board on November 9. It is not necessary to finalize a full written report before the Board meeting. The Board will not act on the recommendations until the following meeting. The Board sometimes asks staff for further research before it acts.
- Staff will circulate draft recommendations so they can be approved and distributed to the Board well in advance of our presentation to the Health Policy Board on November 9.
- Staff will circulate a draft full report as soon as possible given other priorities.

Final requests of staff:

- Learn more about any health courts pilots being done in New York.
- Distribute a study on financial feasibility of a no-fault system to Task Force members.

The Task Force adjourned at 3:10 pm.

The next committee meeting is scheduled for November 3, 2010 from 1-3 pm in Wilsonville.