

OREGON HEALTH AUTHORITY

Medical Liability Task Force

Report and Recommendations

*Oregon Health Policy Board
November 9, 2010*

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The Board's Charge to the Task Force

- Investigate the current medical liability system
- Suggest opportunities for reform
- Prioritize patient safety and reduction of medical errors
- Encourage better physician-patient communication
- Reduce frequency of frivolous lawsuits
- Ensure patients are compensated adequately

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The Enormity of the Challenge

- Strongly held points of view
- Decades-long battle over tort reform proposals
- Commitment to a high-road, patient-centered approach

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Framework for Task Force Deliberations

Task Force Goals for results of reform:

- The medical liability system becomes a more effective tool for improving patient safety
- The medical liability system more effectively compensates individuals who are injured as a result of medical error
- The collateral costs associated with the liability system are reduced (including costs of insurance administration, litigation, and defensive medicine)

Patient safety

The starting point:

- As many as 98,000 people die in American hospitals every year due to medical errors (Institute of Medicine)
- Oregon hospitals reported 32 deaths from medical errors in their facilities last year (Patient Safety Commission)
- Thousands are probably harmed due to medical errors in Oregon hospitals alone every year (State Health Officer)
- Fear of malpractice claims interferes with efforts to prevent errors from happening over and over again

Compensating patients harmed by medical errors

The starting point:

- The medical liability (tort) system is designed to compensate patients harmed by negligence—not patients harmed by preventable errors
 - Definitions: “Medical negligence” means failure to provide the standard of care that would be provided by like professionals
 - “Preventable error” means provide medical care consistent with best practices.
- Only about 2% of patients injured due to medical negligence in the United States even file a claim

The collateral costs associated with the liability system

The starting point:

- Cost of payments to Oregon patients - About \$46 million (=0.24% of health care spending)
- Cost of malpractice insurance administration and defense of claims – About \$34 million (=0.18% of health care spending)
- Cost of defensive medicine – National estimates range from 0.3% to more than 7% of health care spending
 - Definition: Defensive medicine is tests and procedures performed primarily to protect the provider against malpractice claims.

Issues Selected for Study

- Disclosure and offer programs
 - Concept: Health care providers and facilities disclose errors, investigate cause, and make early offer of payment when negligence is clear.
- Evidence-based guideline safe harbors
 - Concept: Physicians are expected to follow state-designated evidence-based guidelines; if they do, they cannot be found liable for malpractice.
- Health courts
 - Concept: Specialized courts or an administrative system replaces the tort system for compensating victims of negligence. New system would involve a trade-off: Tort system would be eliminated but more patients injured by errors would be compensated.

Concepts not selected for development

- Many traditional tort reform concepts not selected because they would not advance the three key goals.
- Caps on damages
 - Caps limit amounts that can be awarded in a case
 - Evidence suggests caps may reduce premiums but they don't accomplish other goals
 - Caps cannot be imposed without amending Oregon's constitution (and voters have refused to do it)
- Excess liability fund
 - A state fund would pay verdicts in excess of insurance limits, relieving physicians of exposure
 - Fund is not realistic in current budget environment

Disclosure and Offer

- **Concept:** Health care providers and facilities disclose errors, investigate cause, and make early offer of payment when negligence is clear.
- **Rationale:**
 - Disclosing errors to patients is a must for patient-centered care
 - Prompt investigation of the cause of adverse events supports patient safety
 - Offering payment up-front speeds up compensation and reduces litigation costs
 - Some evidence suggests paying up-front actually reduces total costs for the provider

Disclosure and Offer

Recommendations:

- Enact new law: Disclosing an error to a patient is not non-cooperation with insurer.
- Consider amending “apology” law: Protect facilities (not just physicians) and clarify what is not admissible
- Consider enacting new law: Physicians must disclose to patients adverse events that occur as a consequence of their care and explain what happened
- Clarify what it means to disclose an adverse event: The Patient Safety Commission should experiment with disclosure protocols
- Consider amending the Patient Safety Law: Allow physician practices to participate in the voluntary reporting program (which includes a requirement to disclose reportable errors)

Evidence-based Guideline Safe Harbor

- **Concept:** Physicians are expected to follow state-designated evidence-based guidelines; if they do, they cannot be found liable for malpractice.
- **Rationale:**
 - If more providers followed evidence-based guidelines, fewer medical errors would occur
 - By designating guidelines, the malpractice system would give providers clearer direction
 - By providing physicians who follow designated guidelines protection from malpractice liability, we could encourage physicians to practice good medicine and reduce defensive medicine

Evidence-based Guideline Safe Harbor

Recommendations:

- Support completion of AHRQ planning grant activity
- Include broadly representative set of individuals in planning.

Replace medical liability system with an administrative compensation system

- **Concept:** Implement administrative method for compensating patients harmed by medical errors.
 - Compensate more injured patients, including patients who could not prove medical negligence.
 - Compensate both economic and non-economic injury.
 - Probably eliminate right to sue for negligence in court.
- **Rationale:**
 - Trade-off is compensating more people and (probably) eliminating right to sue
 - (Probably) reduced insurance administration and litigation expense
 - Could facilitate medical error reporting and prevention programs
 - Elimination of "fault" basis for compensation might encourage disclosure of errors, foster prevention efforts, and reduce defensive medicine.

Replace medical liability system with an administrative compensation system

Recommendation:

- Sponsor an adequately funded study to address:
 - How to design an administrative system for compensating patients harmed by medical errors to replace the legal and insurance systems for address medical malpractice
 - Financial, legal, and politically feasibility of both voluntary and mandatory programs

Summary

As the Board considers its recommendations, we encourage you to use the framework adopted by the Task Force. Reforms should:

- Help reduce injuries to patients
- Help get assistance to patients who are injured
- Reduce collateral system costs
