
Oregon Health Policy Board
Office for
Oregon Health Policy and Research



Oregon Medical Liability Task Force
Report and Recommendations

Submitted to the Oregon Health Policy Board:
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Executive Summary

The Medical Liability Task Force was appointed by the Oregon Health Policy Board in March 2010 to develop medical liability reform proposals for consideration by the Policy Board and the Legislature.

The Task Force identified three patient-centered goals for system improvement and agreed that successful medical liability reform should further those goals. They are:

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

The Task Force prioritized three reform concepts for consideration because they seemed to hold some promise for helping achieve the goals for system improvement: Disclosure and offer programs, evidence-based guideline safe harbors, and health courts.

The Task Force chose not to look for ways to reduce indemnity payments (that is, payments to injured patients) primarily because non-economic damage caps—which have been imposed in some states to reduce indemnity payments—cannot be imposed in Oregon without a constitutional change that the state’s voters have rejected twice. In addition, many members of the Task Force believe that the system should compensate more, not fewer, individuals harmed by medical errors.

The Task Force makes the following recommendations designed to spur providers and facilities to disclose medical errors to their patients and, where possible, to offer compensation to patients harmed by those errors:

- The legislature should enact a statute explicitly providing that a health care facility or provider’s duty to cooperate with an insurer does not preclude disclosure of an adverse event or the reasons underlying it to a patient or the patient’s family and that such disclosure may not be the grounds for refusal to defend or for cancellation or nonrenewal of coverage. This should remove insurance concerns as a barrier to full disclosure.
- The legislature should consider amending Oregon’s “apology” law, which precludes use of statements made to a patient that express “regret or apology” for harm that occurred during treatment to prove liability in a negligence case so that the law clearly protects facilities in addition to physicians and more clearly describes what statements are included in its protection.

- The legislature should consider requiring professionals and facilities to disclose to patients adverse events occurring as a consequence of their treatment and to provide explanations for them.
- The Oregon Patient Safety Commission should work with health care facilities that participate in its voluntary error reporting program to experiment with disclosure protocols that specify what they should disclose to patients under the reporting program.
- The legislature should consider expanding Oregon’s voluntary reporting program to permit physician practices to participate, recognizing that confidential reporting of medical errors serves a different although complementary purpose than disclosure of errors to patients.

The Task Force makes the following recommendation concerning the work that has been funded by a grant from the Agency for Healthcare Research and Quality to develop a “safe harbor” program that changes medical liability rules to encourage physicians to use evidence-based practice guidelines:

- To explore the potential value of using evidence-based guidelines as the legal standard of care, policymakers should support the completion of the grant activity.
- As the grant moves forward, a broadly representative set of individuals should be included in the planning process.

The Task Force considered proposals to replace the existing medical liability system with a new system for compensating patients harmed by medical treatment, even if their care was not negligent. It is assumed that such a program would compensate more individuals than the current system and would involve an administrative rather than a court-based system for adjudicating claims. The Task Force reached this conclusion:

- It would be worthwhile for the Legislature or the Oregon Health Authority to sponsor a study to determine whether or not an administrative system could be designed that would achieve the reform objectives the Task Force has enunciated and if so, whether implementation is financially, legally, and politically feasible. The study should be overseen by an unbiased entity that has not taken a position for or against the health courts concept. It should be conducted by a well-qualified team with knowledge of the existing medical liability system, knowledge of administrative compensation systems in the United States and elsewhere, skill in economic and social research and modeling, legal and actuarial expertise, and funding sufficient to do a thorough job.

The Task Force appreciates the opportunity to study these issues and encourages the board to continue this work.

I. Charge to the Task Force

The Medical Liability Task Force was appointed by the Oregon Health Policy Board in March 2010 to develop medical liability reform proposals for consideration by the Policy Board and the Legislature.

The Board instructed the Task Force to be guided by the Triple Aim, seeking to improve population health by “improving access to care;” improve access to and experience of care by “assuring healthcare providers do not cease to provide specific services in response to liability concerns;” and reduce per capita costs by “reducing the costs associated with defensive medicine.”

The charter read:

“The Medical Liability Task Force will investigate the current medical liability system and suggest opportunities for reform in Oregon including, but not limited to, caps on non-economic damage awards, disclosure-and-offer programs, shifting the adjudication of medical malpractice claims to administrative panels or specialized judicial courts, and the creation of “safe harbors” where physicians are insulated from liability if they adhere to evidence-based practices or practice according to findings from credible comparative-effectiveness research (CER).

* * *

“Recommendations should prioritize patient safety and the reduction of medical errors, encourage better communication between physicians and patients, reduce the occurrence of frivolous lawsuits, and reduce liability premiums, while also ensuring that patients are compensated in an equitable and timely way for medical injuries.”

II. Framework for Deliberations

The Task Force chose to focus its attention on finding ways to further three goals for system improvement. The goals were identified with the Policy Board’s patient-centric focus in mind. Successful reform will mean

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

The Task Force identified five questions that should be asked about any proposal to change the medical liability system. They are:

1. What is the likely effect of the proposal on patient safety?
2. What is the likely effect of the proposal on access to compensation for patient injury?
3. What is the likely effect of the proposal on health care costs?
4. Is the proposal feasible?
5. Can the proposal be implemented without statutory or constitutional changes? If not, what changes are necessary?

III. Background

The Task Force would have preferred to begin its work with a complete understanding of the problem of medical errors in Oregon, the performance and costs of the medical liability system in Oregon, and the collateral costs of the medical liability system, including costs of administration, litigation, and defensive medicine.

Unfortunately, the Task Force found that information is not available to support a thorough understanding of the systems we have today—which may be one reason there is no consensus around proposals for change. Oregon does not track medical errors in a comprehensive way. The Oregon Medical Board tracks payments in claims against physicians, but the state does not track payments in claims against institutions or other licensed professionals. Oregon knows something about the cost to physicians of the liability system because medical liability insurers licensed in Oregon must file premium rates and total premium written; but increasing numbers of physicians are employed by self-insured health care institutions. This confounds efforts to trend cost or generate aggregate cost figures.

The Task Force proceeded with its work based on the personal knowledge of participants, national estimates of errors and liability system costs, and preliminary information supplied by staff from public and insurer sources. We offer the following paragraphs to help inform our readers.

A. Patient Safety

The seminal authority on the issue of medical errors remains the 1999 Institute of Medicine's landmark report entitled "To Err Is Human". Relying on the Harvard Medical

Practice Study's review of a random sample of 1984 hospital records in New York State,¹ the IOM estimated that as many as 98,000 individuals die every year from preventable medical errors in American hospitals.² The Harvard Medical Practice Study count included patients who died in hospitals due to diagnostic and other errors that occurred on an outpatient basis.

The Harvard research team estimated the national economic burden of 1984 medical errors at \$50 billion in 1989 dollars. About half the cost was for additional health services; about half for lost earnings and household productivity.³ A similar study was done using 1992 hospital records from Colorado and Utah. An article describing the study estimated the national burden of 1992 medical errors in 1996 dollars at \$37.6 billion for all adverse events and \$17 billion for preventable ones. Again, about half of the costs were for additional health services and half for lost earnings and productivity.⁴

No study comparable to the New York or Colorado/Utah studies has been done to measure the frequency or cost of medical errors in Oregon. The Oregon Patient Safety Commission (OPSC) operates medical error reporting programs. While the programs provide important information to support facility improvement programs, they cannot yet generate a comprehensive picture of the medical errors that occur. Hospitals, nursing homes, ambulatory surgery centers, and pharmacies may participate in the OPSC programs, but physician practices may not. In 2009, the Patient Safety Commission received reports of 32 medical errors resulting in patient death.⁵ Relying on data from Pennsylvania, where a mandatory hospital error reporting system has been in place since 2004, Oregon's Public Health Officer estimated that 1600 serious adverse events resulting in patient harm occurred in 2008 in Oregon hospitals alone.⁶ Many of these injuries can and should be prevented.

¹ Brennan, T.A., Leape, L.L., Laird, N.M., Hebert, L., Localio, A.R., Lawthers, A.G., Newhouse, J.P., Weiler, P.C., & Hiatt, H.H. (1991, February 7). Incidence of adverse events and negligence in hospitalized patients: results of the Harvard Medical Practice Study I. *New England Journal of Medicine*, 324(6):370-6.

² Kohn, L.T., Corrigan, J.M., & Donaldson, M.S. (1999). *To Err Is Human: Building a Safer Health System*. Institute of Medicine. Washington, DC: National Academy Press.

³ Johnson, W.G., Brennan, T.A., Newhouse, J.P., Leape, L.L., Lawthers, A.G., Hiatt, H.H., & Weiler, P.C. (1992, May 13). The Economic Consequences of Medical Injuries. *The Journal of the American Medical Association*. 267(18):2487–2492.

⁴ Thomas, E.J., Studdert, D.M., Newhouse, J.P., Zbar, B.I.W., Howard, K.M., Williams, E.J., & Brennan, T.A. (1999, Fall). Costs of Medical Injuries in Utah and Colorado. *Inquiry*.

⁵ In 2009, Oregon hospitals reported 127 serious adverse events, 32 of which resulted in death. Oregon Patient Safety Commission. (2010, August). Hospital Report. Available: <http://oregon.gov/OPSC/docs/Reports/Hospital-Report-081910.pdf> [2010, October 14]

⁶ Oregon Department of Human Services, Public Health Division. (2009, August). Public Health Officer Certification Report 2008 – Oregon Patient Safety Commission Adverse Event Reporting Programs. Available: http://oregon.gov/PHOCertificationReport2008_Final_1.pdf [2010, October 14]

B. Access to Compensation

Our current tort system's principal purpose is to provide compensation to victims of negligence. As it applies to medical claims, it is a fault-based system, meaning that compensation may be awarded only if the medical provider is shown to have rendered unreasonable care. Because there is no comprehensive data on the numbers of *negligent* medical errors occurring in Oregon each year, it is impossible to calculate the degree to which the tort system accomplishes its goal.

There is no question, however, that many people who are harmed by medical negligence do not receive compensation through the tort system. Several studies using data from other states have been conducted. For each, physicians examined hospital records to identify adverse events caused by medical negligence. Researchers then map the events against records of malpractice claims. The studies have found that 97.5-98% of patients injured by medical negligence did not file claims.⁷

This suggests that the system as it now functions is a less-than-perfect vehicle for compensating victims of medical negligence and probably an even less satisfactory vehicle for compensation victims of preventable medical errors—that is, errors that could have been prevented had best practices been followed. The reasons why so few are compensated, however, is an issue requiring further study.

C. Collateral Costs

1. Total system costs

The costs of the medical liability system (as opposed to economic burden of the treatment-related injuries themselves) include both compensation paid for injury and the system's collateral costs—primarily the costs of insurance administration and litigation and costs associated with diagnostic and treatment activities undertaken primarily to avoid malpractice liability or claims (that is, “defensive medicine”).

At least three estimates of the national cost of the medical liability system have been published recently. The estimates of “direct cost” range from .43% to 2% of national health care spending. Public Citizen, relying on estimates of malpractice premiums alone, estimated direct costs at 0.46% of health care spending.⁸ Michelle Mello and colleagues at the Harvard School of Public Health estimated total direct costs (that is, indemnity

⁷ Localio, A.R., Lawthers, A.G., Brennan, T.A., Laird, N.M., Hebert, L.E., Peterson, L.M., Newhouse, J.P., Weiler, P.C., & Hiatt, H.H. (1991, July 25). Relation Between Malpractice Claims and Adverse Events Due to Negligence. *New England Journal of Medicine*. 325(4):245-251. Studdert, D.M., Thomas, E.J., Burstin, H.R., Zbar, B.I.W., Orav, E.J., & Brennan, T.A. (2000, March). Negligent Care and Malpractice Claiming Behavior in Utah and Colorado. *Medical Care*. 38(3):250-60.

⁸ Public Citizen. (2010, March 3). Medical Malpractice Payments Fall Again in 2009. Available: www.citizen.org/documents/NPDBFinal.pdf [2010, October 14]

payments plus administrative costs) at \$9.85 billion in 2008—or 0.43% of total health care spending. Their estimate was based on data on payments, studies of defense costs, and studies of insurance overhead costs—all cited in a paper published in *Health Affairs*.⁹ The Congressional Budget Office offered a much larger estimate of direct cost in a letter concerning the potential savings from specific tort reform proposals. The method CBO used to generate its estimate of \$35 billion—or about 2% of health care spending—is not explained in detail.¹⁰

Mello and colleagues sought to estimate the indirect as well as the direct costs of the medical liability system. To do that, they added estimates of lost physician productivity and defensive medicine to their estimates for direct costs. They pegged total cost at \$55.6 billion a year—with almost 80% of it resulting from defensive medicine. If their estimate is correct, the direct and indirect costs of the liability system are 2.4% of total health care spending.

The problem with all of these estimates is that they include both compensation and collateral cost; so while they are a good measure of the burden of the system on health care practitioners, they are not particularly useful in identifying the collateral costs that the Task Force seeks to reduce. Therefore, we turn to studies that seek to parse these costs.

2. Cost of indemnity payments

Mello et al estimated the total national cost of indemnity payments—that is payments to compensate for the economic and noneconomic consequences of patient injuries -- at \$5.7 billion a year or 0.25% of national health care spending. The calculation started with the total indemnity payments reported to the National Practitioner Data Bank and a multiplier developed from the literature and insurer records to account for indemnity payments on behalf of institutions (which are not reported to the data bank).

Using Mello's methodology and National Practitioner Data Bank figures for Oregon, the Office for Oregon Health Policy & Research estimates that indemnity payments paid in claims against professionals and facilities in Oregon totaled about \$46.4 million in 2008 -- that is, 0.24% of estimated Oregon health care spending.¹¹

Total indemnity payments made for incidents involving claims against Oregon physicians appears to have trended upward over the last decade according to data reported to the Oregon Medical Board. Whether this truly reflects a growing cost burden, however, would require adjusting these payments for inflation and for growth in population or in volume of

⁹ Mello, M.M., Chandra, A., Gawande, A.A., & Studdert, D.M. (2010, September.) National Costs of the Medical Liability System. *Health Affairs*. 29(9):1569-77.

¹⁰ Congressional Budget Office. (2009, October 9). Letter to Honorable Orrin G. Hatch. Available: www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf [2010, October 14]

¹¹ The Office for Oregon Health Policy and Research has estimated total health care spending for 2008 at \$19.3 billion.

health services provided—an exercise the Task Force did not undertake. For more detail on trends in claim frequency and indemnity payments, see Appendix 1.

3. Costs of insurance administration and litigation

Mello et al estimated the total national cost of insurance administration and defendant legal expenses at \$4.13 billion in 2008—with an additional \$2.0 billion in legal costs borne by injured patients out of their recoveries.¹²

If the relationship between indemnity cost and administration and litigation costs in the Mello estimates holds true for Oregon, malpractice insurance administration and defense litigation costs would have consumed about \$33.6 million in Oregon in 2008.

4. Costs of defensive medicine

Increased health care costs associated with defensive medicine are notoriously difficult to measure. Estimates of share of health care spending attributable to defensive medicine range from about 0.3% to more than 7%.

Defensive medicine results in performance of tests and procedures primarily to avoid malpractice liability. Measuring it requires assessing why physicians make the diagnostic and treatment decisions they make. It would be difficult enough to determine in any particular case whether a decision to order a particular diagnostic imaging study was made primarily because the physician believed it to be necessary for the patient's care or primarily to ensure that his diagnosis would not be questioned in a malpractice suit. The analysis is yet more difficult because good patient care and fear of malpractice suits are not the only factors affecting physician decision-making. For example, fee-for-service payment incentives can reinforce medical malpractice incentives to order unnecessary services. Because of the difficulty of measuring the extent of defensive medicine, members of the Task Force agreed not to attempt to agree on its prevalence. Nevertheless, because defensive medicine is a large component of most estimates of total medical liability cost, we address it briefly here.

In a 2006 paper published by the Robert Wood Johnson Foundation, Michelle Mello, wrote:

“There are no reliable estimates of the national costs of defensive medicine. Many analysts have attempted to estimate these costs; all have failed to do so reliably. All of the available measurement methodologies have serious shortcomings (10, 18). For example, some national estimates are based on the incremental cost increases associated with just two or three medical procedures or diagnoses. It is simply not possible to extrapolate so widely to other procedures, because some are more amenable to defensive medical practice than others. The Office of Technology

¹² See footnote 9.

Assessment conducted a comprehensive review of the evidence about defensive medicine costs in 1994 and concluded that none of available estimates were reliable (32). Much additional research has been conducted since then, but the conclusion remains the same.”¹³

Nevertheless, a number of attempts have been made to quantify the defensive medicine phenomenon. We mention several below.

One of the larger estimates is described by the Stuart L. Weinstein, past president of the American Society of Orthopedists, in a posting on the society’s website. He writes:

“The study quoted most often is by Daniel P. Kessler and Mark B. McClellan. To really understand actual costs, Kessler and McClellan analyzed the effects of malpractice liability reforms using data on Medicare beneficiaries who were treated for serious heart disease. They found that liability reforms could reduce defensive medicine practices, leading to a 5 percent to 9 percent reduction in medical expenditures without any effect on mortality or medical complications.

“If the Kessler and McClellan estimates were applied to total U.S. healthcare spending in 2005, the defensive medicine costs would total between \$100 billion and \$178 billion per year.”¹⁴

Most experts would concede that Weinstein’s is a high estimate, built on an assumption that findings of Kessler and McClellan with respect to a small class of cases can be extrapolated to the system as a whole.

More conservative estimates have been authored by the Congressional Budget Office and J. William Thomas and colleagues at the Cutler Institute for Health and Social Policy. The Congressional Budget Office, based on a review of published research, estimated that enactment of a package of traditional tort reforms—including caps on damages—would reduce total health spending by 0.3%.¹⁵ Thomas et al, based on an extensive analysis of health insurance claims data, predicted that while reductions in medical liability premiums would result in a significant reduction in costs for 2% of conditions, “across all thirty-five specialties [studied], savings associated with a 10% percent reduction in medical malpractice premiums would be just 0.132 percent.”¹⁶

¹³ Mello, M.M. (2006, January). Understanding Malpractice Insurance: A Primer. Robert Wood Johnson Foundation. Available: www.rwjf.org/pr/synthesis/reports_and_briefs/pdf/no10_primer.pdf [2010, October 14]

¹⁴ Weinstein, S.L., The Cost of Defensive Medicine. Available: <http://www.aaos.org/news/aaosnow/nov08/managing7.asp> [October 21, 2010]

¹⁵ See footnote 10.

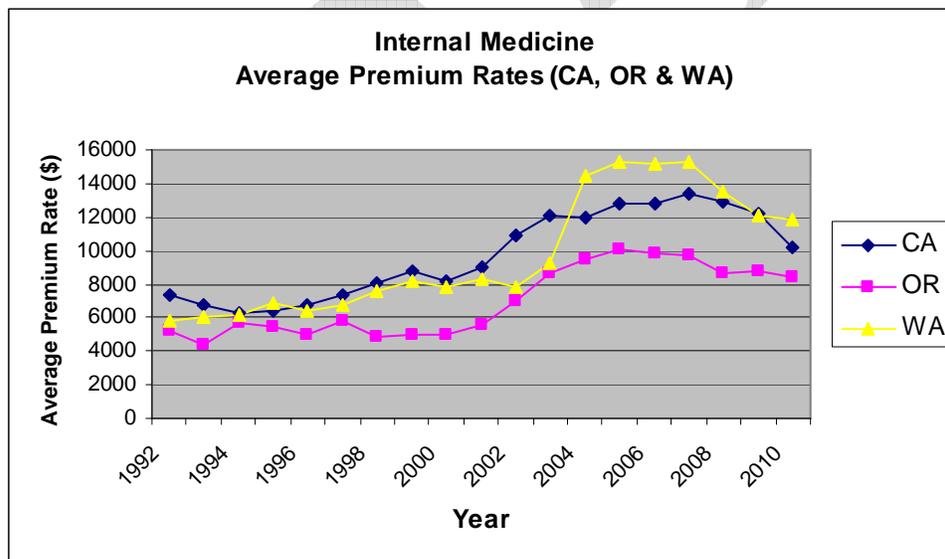
¹⁶ Thomas, J.W., Ziller, E.C., and Thayer, D.A. (2010, September). Low Costs of Defensive Medicine, Small Savings From Tort Reform. *Health Affairs* 29(9):1578-1584.

As part of their 2010 study of the costs of the medical liability system, Mello and colleagues also attempted to estimate the cost of defensive medicine. Relying on the Kessler study and others, they pegged annual defensive medicine costs for hospitals and physicians at \$45.49 billion—or about 1.97% of total health care costs. They warned, however, that “Although our figure was based on methodologically strong studies, because the hospital spending estimates were derived from a narrow range of diagnoses, the quality of evidence supporting our system-wide estimate is best characterized as low.”¹⁷

D. Medical Liability Premiums in Oregon

Medical liability premium levels are set by insurers. Rates differ greatly by provider specialty. We examined premium trend and Oregon premiums compared with premiums in neighboring states.

The Medical Liability Monitor reports premium rates for major carriers by state for three specialties—internal medicine, obstetrics and gynecology, and general surgery. Comparing average rates for these specialties in Oregon, Washington, and California shows premiums have been lower in Oregon than in neighboring states for every year of the last two decades with the exception of three years, when average Oregon rates for obstetrics and gynecology exceeded California rates, and one year, when average Oregon rates for general surgery were the same as California’s. To illustrate, see the chart below. For additional charts and an explanation of the Monitor’s reporting, see Appendix 2.



Although Oregon medical liability premium rates are low relative to rates in neighboring states, premium rates tend to be volatile, reflecting what is known as the insurance cycle. This volatility makes it difficult for physicians to predict their costs. During “soft” phases of

¹⁷ See footnote 9.

the cycle, insurers keep premiums low in an effort to build market share. During “hard” phases of the cycle, premiums rise as insurers protect their profitability, often during periods where investment returns are low.¹⁸ Oregon is currently in the soft phase of the cycle. Some national commentators are predicting increases in claims frequency and costs, however, which could presage a return to the hard phase of the cycle.

According to the Department of Consumer and Business Services, Oregon’s insurance regulator, Oregon’s two dominant medical liability carriers, representing 57% of the professional liability market in Oregon, have dropped their premiums an average of 20% over the past five years.¹⁹ The chart below is taken from a DCBS press release:

Medical Liability Premium Rate Trends in Oregon

Year	NPIC/Doctors Company*	CNA
2006	-8.3%	+1.9%
2007	-10.2%	-3.2%
2008	-8.9%	-7.6%
2009	0%	-2.5%
2010	-5.1%	0%

During the last hard phase of the cycle, Oregon physicians delivering babies in rural Oregon reported soaring premiums. The legislature responded by creating a malpractice premium subsidy program for rural physicians in 2003. The program is scheduled to expire in 2011. For more detail about the program, see Appendix 3.

IV. Reform Concepts Selected for Consideration

The Task Force prioritized three reform concepts for consideration. They were disclosure and offer programs; evidence-based guideline safe harbors; and health courts. These concepts are discussed in detail below.

The Task Force chose not to look for ways to reduce indemnity payments (that is, payments to injured patients) for at least three reasons: First and most importantly, non-economic damage caps—although favored by some groups nationally—cannot be imposed in Oregon without a constitutional change that the state’s voters have rejected twice. Therefore, all members of the Task Force agreed that pursuing a caps strategy would not be fruitful. Second, while some Task Force members are more comfortable than others with who gets compensated and how much in today’s liability environment, most members of the group

¹⁸ Mello, M.M. (2006, January). Understanding Malpractice Insurance: A Primer. Robert Wood Johnson Foundation. Available: www.rwjf.org/pr/synthesis/reports_and_briefs/pdf/no10_primer.pdf [2010, October 14]

¹⁹ Oregon Department of Consumer & Business Services (2010, April 15). Press release: Oregon medical malpractice rates continue to decrease. Available: http://egov.oregon.gov/DCBS/docs/news_releases/2010/nr_ins_04_15_10.pdf [2010, October 14]

do not believe the total amount of money spent to compensate victims of medical negligence is excessive. Most believe that more people should be compensated. Third, some physician members of the Task Force noted that while the volatility of medical liability premiums is troublesome for health care professionals, most have been able to manage the current premium levels. According to the Department of Consumer and Business Services, most physicians and surgeons in Oregon have seen declines or no change in medical professional liability insurance rates for the last four years.²⁰

The Task Force also chose not to address the imminent expiration of Oregon's premium subsidy program for rural physicians. The issue is being studied by a legislative committee. Rather than attempting to weigh in on a subject the Task Force has not thoroughly studied, the Task Force chose to defer to that committee.

The following sections of the report summarize the Task Force's recommendations, the thinking behind them, and differences of opinion among members of the Task Force. Recommendations are shown in boldface type.

V. Recommendations to Support and Encourage "Disclosure and Offer" Programs

A. Discussion of Disclosure and "Disclosure and Offer Programs"

Health care providers are trained to tell patients about unanticipated outcomes that occur in the course of their medical care. That means they should explain events that cause their patients harm—including the treating professionals' understanding about the cause of the event: Was it occasioned by progression of the underlying disease process or by the treatment itself? If by medical treatment, was it an anticipated risk of treatment—that is, something that is expected to happen in some but not all cases? Or was it a result of a defect in the care that was provided? Could it have been prevented?

Nevertheless, historically, medical culture coupled with provider fear of medical liability lawsuits has meant that most providers have been reluctant to discuss these issues openly with patients. This culture of nondisclosure has been reinforced by liability insurers, some of whose personnel instruct providers they insure not to discuss adverse events with patients or others.

There is increasing interest, however, in fostering disclosure because it is consistent with a transparent, patient-centered approach to health care. Disclosure is useful whether or not it is required. It facilitates patient participation in decision-making about their care and enables informed consent. In addition, organizations with a culture that fosters discussion of mishaps are better positioned to explore the causes of patient injuries and prevent avoidable recurrences.

²⁰ *Ibid.*

Disclosure may be a good business practice as well: Research suggests that disclosure of errors to patients may reduce rather than increase the incidence of lawsuits; and, when disclosure is coupled with early offers of compensation, it may reduce litigation costs and the size of indemnity payments. An article published in the September issue of *Annals of Internal Medicine* examined the experience of the University of Michigan Health Systems, finding that the number of claims resulting in lawsuits, the cost of compensation, and total program costs declined significantly after adoption of a disclosure and offer program.²¹

Finally, disclosure of some adverse events is required by agencies like the Joint Commission, which accredits hospitals, and the Oregon Patient Safety Commission, which operates a voluntary error reporting program for health care facilities.²²

The Task Force concludes that providers and facilities should be encouraged to disclose adverse treatment events and discuss them openly with patients. They should further be encouraged to offer fair compensation as soon as possible to patients who have clearly been injured due to medical negligence. When patients are asked to give up their right to sue in exchange for an offer of compensation, providers should encourage patients to consult a lawyer to assist them in negotiating a fair agreement. This “disclosure *and* offer” approach has been adopted by some self-insured hospitals and integrated health systems in Oregon. Providers and facilities that do not self-insure, however, will need the cooperation of their insurers to adopt this approach.

State policymakers should remove obstacles to disclosure and consider requiring it in some circumstances. The choice to make early offers of compensation will necessarily remain with individual self-insured entities and insurers.

²¹ Kachalia, A., Kaufman, S.R., Boothman, R., Anderson, S., Welch, K., Saint, S., & Rogers, M.A.M. (2010, August 17). Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program. *Annals of Internal Medicine*. 153(4):213-221. Kraman, S.S., & Hamm, G. (1999, December 21). Risk Management: Extreme Honesty May Be the Best Policy. *Annals of Internal Medicine*. 131(12):963-967.

²² Joint Commission accrediting standards provide that hospitals must inform patients of “unanticipated outcomes of care, treatment, and services that relate to sentinel events considered reviewable by the Commission.” Licensed practitioners responsible for managing a patient’s care (or their designee) must inform “the patient about unanticipated outcomes of care, treatment, and services related to sentinel events when the patient is not already aware of the occurrence or when further discussion is needed.” Joint Commission Standard: RI.01.02.01-21. Oregon statute provides that “After a serious adverse event occurs, a participant [in the Patient Safety Commission’s reporting program] must provide written notification in a timely manner to each patient served by the participant who is affected by the event. Notice provided under this subsection may not be construed as an admission of liability in a civil action.” ORS 442.837(4).

B. Specific Recommendations to Remove Barriers to Disclosure

The Task Force considered three policy concepts for increasing disclosure to patients and thereby facilitating early resolution of malpractice claims. Each would build on the “apology” law enacted in 2003. That law provides that expressions of regret or apology made by physicians or others on their behalf cannot be used to establish liability in a negligence lawsuit against a physician.²³

The apology statute, while useful, has proved insufficient to eliminate liability system barriers to disclosure. Some physicians report that malpractice insurers continue to instruct physicians not to discuss events that could lead to lawsuits. These physicians fear that if they disclose errors they will be guilty of “noncooperation” and their insurers may be entitled to refuse to defend them in court.

To remove insurance concerns as a barrier to full disclosure, the legislature should enact a statute explicitly providing that a health care facility or provider’s duty to cooperate with an insurer does not preclude disclosure of an adverse event or the reasons underlying it to a patient or the patient’s family and that such disclosure may not be the grounds for refusal to defend or for cancellation or nonrenewal of coverage. (For language that could be used, see Appendix 4.)

The legislature should also consider amending the “apology” law to expressly protect facilities as well as physicians and to more clearly describe what statements made to a patient are inadmissible expressions of “regret or apology”.²⁴

The Task Force believes the legislature should also consider requiring professionals and facilities to disclose to patients adverse events occurring as a consequence of their treatment and to provide explanations for them.²⁵ If a mandatory disclosure law were

²³ The law reads:

ORS 677.082 (1) For the purposes of any civil action against a person licensed by the Oregon Medical Board, any expression of regret or apology made by or on behalf of the person, including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability for any purpose.

(2) A person who is licensed by the Oregon Medical Board, or any other person who makes an expression of regret or apology on behalf of a person who is licensed by the Oregon Medical Board, may not be examined by deposition or otherwise in any civil or administrative proceeding, including any arbitration or mediation proceeding, with respect to an expression of regret or apology made by or on behalf of the person, including expressions of regret or apology that are made in writing, orally or by conduct.

²⁴ The general concept of offering broad protection appears in Mastroianni, A.C., Mello, M.M, Sommer, S., Hardy, M., & Gallagher, T.H. (2010, September). The Flaws in State ‘Apology’ and ‘Disclosure’ Laws Dilute Their Intended Impact on Malpractice Suits. *Health Affairs*. 29(9):1611-1619.

²⁵ One member expressed the view, however, that mandatory disclosure should not be considered because the voluntary reporting and disclosure law is working well now.

enacted, Oregon would join seven other states—among them California, Florida, Nevada, New Jersey, Pennsylvania, and Vermont.²⁶

At present, Oregon facilities that choose to participate in the Oregon Patient Safety Commission’s error reporting program are required to disclose reportable adverse events to the patient. ORS 442.837(4). Neither health care facilities declining to participate in the commission’s voluntary program nor individual health care professionals have any legal obligation to make any disclosure. Moreover, the commission has not spelled out what is to be included in the disclosure.

Finally, the Task Force recommends that the Oregon Patient Safety Commission work with health care facilities to experiment with disclosure protocols that specify the elements of the required disclosure to patients.

C. Recommendations Relating to Reporting Laws

Members of the Task Force debated the value of strengthening Oregon’s reporting programs as a strategy for encouraging disclosure.

Oregon law permits but does not require hospitals, ambulatory surgery centers, long term care facilities, outpatient renal dialysis facilities, free-standing birthing centers, and pharmacies to participate in the Patient Safety Commission’s reporting program. Physician practices—regardless of size—may not participate in the program.²⁷

Most states now require health care facilities to report medical errors to a patient safety organization which uses the data to measure the prevalence and type of errors and develop prevention strategies. Most states make the reports confidential to encourage candor. Some reporting programs, like Oregon’s voluntary program, require the error to be disclosed to the patient while protecting the reports themselves from disclosure to either the patient or the public.

Expanding participation in Oregon’s reporting program might result in increased disclosure because the reporting program includes a requirement that facilities notify patients in writing when a serious adverse event occurs. Nevertheless, a disclosure requirement could be enacted independent of the reporting program. Therefore, the Task Force discussed whether an expanded reporting program would have any value as a tool to encourage disclosure apart from the program’s notice requirement.

The values and objectives supported by reporting, disclosure, and disclosure and offer programs are summarized in the table below. (An “x” suggests the program will further the value or objective listed in the left column. The table does not reflect variation in the

²⁶ For a summary of disclosure laws, see Appendix 5.

²⁷ ORS 442.837.

degree to which a program furthers a particular objective. For example, while disclosure by itself may reduce litigation cost, savings are presumably greater if an offer and settlement occur as well.)

	Reporting	Disclosure	Disclosure/offer
Patient right to know		X	X
Improved access to compensation		X	X
Reduced litigation cost		X	X
Support for culture of safety	X	X	X
Support for cross-institutional prevention efforts	X		

Some members of the Task Force believe that reporting requirements have supported development of a culture of openness about medical errors that fosters development of disclosure programs in participating institutions. Some of them are open to the possibility that mandatory reporting laws would increase the practice of disclosure that the Task Force supports.

Others members are reluctant to view reporting laws as tools for encouraging disclosure. Many of them oppose expansion of reporting requirements either by making reporting mandatory or opening the existing voluntary program to participation by additional providers.

The Task Force recommends that the legislature consider expanding Oregon’s voluntary reporting program to permit physician practices to participate, recognizing that this would involve developing approaches to reporting that fit this new site of care and dealing with a large number of separate entities. It would also be a major workload increase for the Commission. Two members expressed reservations, although for differing reasons.²⁸

D. Other measures to encourage disclosure

Some nationally recognized advocates for early disclosure and offer programs have suggested that states offer state-funded financial incentives to facilities adopting the programs. Some suggest creating state reinsurance or excess liability funds for providers

²⁴ Several members of the task force believe that changes in the reporting law should not be considered. One believes a change would be unwise, the other that it is beyond the scope of the task force’s charge.

and facilities that implement model early disclosure and offer programs.²⁹ Such a fund would be designed to protect facilities from the risk that disclosing more errors would increase their medical liability costs. The Task Force does not recommend pursuing this option, primarily because creating a new source of payment for claims would not seem to further the priority objectives adopted as a framework for the Task Force's work. In addition, the evidence to date suggests that disclosure and offer programs may make business sense and expenditure of public dollars may not be needed to encourage them.

VI. Evidence-Based Guideline Safe Harbor Approach

Oregon health care leaders and policy makers have a long history of commitment to evidence-based approaches to health care policy making. This has included use of evidence-based practice guidelines to improve the quality of care and reduce costs in the health care delivery system. The legislature has instructed the Health Resources Commission, Oregon's medical technology assessment entity, to develop evidence-based guidelines for use by providers, consumers, and purchasers in Oregon and directed the health authority to use the guidelines in purchasing for care in all of the programs it manages. We believe that increased use of evidence-based clinical practice guidelines and process standards by providers may improve quality and reduce medical errors.

Oregon has been awarded an Agency for Healthcare Research and Quality planning grant to explore evidence-based guidelines as a safe harbor. The grant supports development of a proposal for a specific medical liability reform that is designed to improve patient safety. Over the course of the next year, the Office for Oregon Health Policy and Research – with assistance from the Patient Safety Commission and the Center for Evidence-based Policy at Oregon Health & Sciences University – will lead the planning process.

The purpose of the planning grant is to craft a broadly supported legislative proposal that will encourage use of guidelines by offering a safe harbor from medical liability when they act in reliance on state-endorsed evidence-based guidelines. The project will explore a method for adopting guidelines to address the clinical situations that result in significant numbers of patient injuries or medical liability claims. The project will also explore linking the legal standard of care to compliance with the guidelines to:

- provide physicians with greater clarity about the standard of care expected of them and assure them that, if they adhere to the guidelines, they will not be found liable for harm resulting from failure to do something that is inconsistent with the guidelines,
- give patients greater protection from substandard care, and

²⁹ Winter, A. (2010, April 1). The Medical Malpractice System: A Review of the Evidence. Presentation to the Medicare Payment Advisory Commission. Available: http://www.medpac.gov/transcripts/medical%20malpractice%20April%202010_public.pdf [2010, October 14]. Conversation between the Medical Liability Task Force and Allen Kachalia, MD, Harvard School of Public Health (2010, September 8).

- reduce the frequency of medical liability claims.

To explore the potential value of using evidence-based guidelines as the legal standard of care, the Task Force recommends that policymakers support the completion of the grant activity.

As the grant project moves forward, the Task Force recommends that a broadly representative set of individuals be included in the planning process.

The Task Force has raised some specific questions it expects the grant team to address:

- Are there collections of similar adverse events that could be prevented if a single evidence-based guideline was consistently followed? Have those adverse events historically resulted in significant malpractice cost?
- Would treating a guideline as the standard of care be likely to increase compliance with the guideline? Reduce adverse events? Reduce litigation cost?
- How and by whom should guidelines be selected for special status in the medical liability system? Based on what criteria?
- Although guidelines could not apply to all situations or supplant the traditional standard of care in all instances, could such guidelines establish the standard of care in specific situations? If so, would compliance with such standards insulate a physician from liability or merely be evidence of a lack of negligence? Conversely, would deviation from the guideline establish liability or merely be evidence of negligence?
- Would guidelines used for safe harbors need to be protocols in order to play the role of safe harbor in the legal system?
- How can it be assured that the guidelines will remain up to date and not hold up desirable innovation?

VII. An Administrative System for Compensating Patient Injuries

A. Background

In Oregon and around the country, critics of the medical liability system are proposing to replace the tort system for compensating victims of medical negligence and the medical liability insurance system with what some call “health courts.” Most “health courts” proposals would create an administrative system for compensating injuries to patients from some or all unanticipated adverse outcomes of medical care—not just medical negligence. The Task Force studied the arguments offered by both proponents and opponents of health courts proposals.

The Task Force rejected the concept of creating a new court system but believes there may be value in developing an administrative system for compensating patient injuries. Some believe that the changes in our nation's health care insurance system occasioned by passage of the Patient Protection and Accountable Care Act can be leveraged to improve the liability system and reduce costs.

Proponents of health courts believe implementing an administrative system is likely to significantly improve the collection of data on unanticipated adverse outcomes thereby supporting safety improvement programs; foster development of consensus around best practices for avoiding patient injury; increase the number of individuals compensated by lowering the bar for recovery to something less than negligence; reduce the legal costs incurred by patients to establish their claims; result in speedier resolution of claims; produce more consistent decisions and awards; reduce administrative costs, including defense costs; and reduce overutilization of medical procedures driven by the practice of defensive medicine.³⁰

Commentators critical of health courts share the proponents' desire to improve patient safety programs, improve access to compensation for victims of medical errors, and reduce collateral costs, including insurance-related costs and the costs of defensive medicine; but they doubt that an administrative compensation system will result in the hoped-for improvements. They believe that estimates of defensive medicine are greatly exaggerated. They point out that both deeply rooted medical culture and powerful fee-for-service payment incentives drive overutilization of medical procedures, confounding efforts to measure the effect of fear of lawsuits on utilization. In addition, they are concerned that administrative decision-makers may display pro-physician bias and that benefits available in an administrative system may be inadequate.³¹

Task Force members, for the most part, are neither proponents nor opponents of replacing the tort system with an administrative compensation system. They are persuaded, however, that the magnitude of the benefits envisioned by advocates for replacing the existing system are great and warrant giving the concept a hard look. They also believe that the anticipated benefits are not certain to materialize. The design issues are many and complex and the potential pitfalls are serious.

The value of replacing the existing liability system is probably not something that can be tested through pilot projects because it involves establishing a new and elaborate decision-making infrastructure and identifying new sources of revenue to fund the program. Additionally, experience with Florida's birth injury compensation system suggests that, in a

³⁰ Mello, M.M., & Kachalia, A. (2010, April). Evaluation of Options for Medical Malpractice System Reform. Medpac. Available: www.medpac.gov/documents/Apr10_MedicalMalpractice_CONTRACTOR.pdf [2010, October 14]. Common Good. (2006). Windows of Opportunity. Available: http://commongood.org/assets/attachments/Windows_of_opportunity_web.pdf [2010, October 14]

³¹ Peters Jr., P.G. Health Courts? *Boston University Law Review* 88:227-286 (2008) Available: www.bu.edu/law/central/jd/organizations/.../PETERS.pdf [2010, October 27]

voluntary system, those who cannot establish fault will elect an administrative remedy. However, those who have suffered injuries they believe may stem from negligence may elect the tort remedy, thereby undermining the financial sustainability of the program. Finally, many members of the Task Force believe that the changes in physician culture necessary to support great increases in error disclosure and reduction in defensive medicine are unlikely to occur in a voluntary system. Unless further study suggests that a pilot program would be workable and productive, it appears that replacing the medical liability system with an administrative system to compensate patient injuries will work only if it applies to all patients statewide.

B. Recommendation

The Task Force, with one member in dissent, concludes that it would be worthwhile for the Legislature or the Oregon Health Authority to sponsor a study to determine whether or not an administrative system could be designed that would achieve the reform objectives the Task Force has enunciated and if so, whether implementation is financially, legally, and politically feasible. ³²

The study should be overseen by an unbiased entity that has not taken a position for or against the health courts concept. It should be conducted by a well-qualified team with knowledge of the existing medical liability system, knowledge of administrative compensation systems in the United States and elsewhere, skill in economic and social research and modeling, legal and actuarial expertise, and funding sufficient to do a thorough job.

C. Scope of the recommended study

The primary component of the study should assume that an administrative compensation system would include the following basic features and be implemented statewide:

- Compensable events would embrace a defined class of patient injuries broader than the class of injuries caused by medical negligence. While it may be unlikely that a pure “no-fault” system is economically feasible, a “low-fault” threshold could make more people eligible for benefits. Compensable events might include a very broad class of events arising out of encounters with medical professionals or facilities such as “treatment injuries” (as in New Zealand), “undesired” or “unexpected” outcomes,” or “avoidable” injuries (as in Sweden).³³

³² One member of the Task Force dissents from this recommendation. He believes that the elimination of the jury system for adjudicating claims of medical negligence should not be considered—no matter what the trade-offs.

³³ One member of the Task Force suggests that instead of changing the definition of the harm or wrong for which the administrative system provides a remedy, the medical negligence standard could be retained while reducing the burden of proof from the “preponderance of the evidence” to something less such as “substantial evidence.” Note, however, that the burden of proof applicable to lawsuits for negligence is

- The system would compensate victims for both economic damages and non-economic damages caused by the injury.
- The administrative system would be the exclusive remedy for events that are compensable under the administrative scheme. Individuals injured as a result of medical negligence could no longer bring a suit for negligence in court.

The study should also examine whether a voluntary program can be designed that allows individuals to opt into or out of an administrative adjudication system while achieving the system change objectives of the proposal and managing costs.

A host of system design issues would need to be considered in both the primary study and consideration of voluntary program options. (For a list of some of the design issues that should be studied, see Appendix 6.)

The study should address, first and foremost, the impact of each design choice on the value of the administrative system for achieving the goals for system improvement and the key questions identified by the Task Force at the outset of its work and whether the cost of such a system is sustainable.

D. Timing of the study

For years, Oregonians have discussed the merits and demerits of the medical liability system in the context of proposed legislation and proposed ballot measures to change the system. It is critically important to ground this discussion in fact. A professional study of the feasibility of establishing an administrative compensation system and the effectiveness of such a system as compared with the existing one for improving patient safety, improving access to compensation for injured patients, and reducing collateral costs of the medical liability system will be challenging but, if well done, it will serve the state well. The study should be funded as soon as possible—either by the Legislature or by other parties whose funding would not bias the project.

VIII. Conclusion

The Task Force appreciates the opportunity to study this issue. The recommendations are designed to further the goals of improving patient safety, improving the system for

the same “preponderance of the evidence” standard that is generally employed by finders of fact in Oregon’s administrative agencies; the “substantial evidence” standard is used by reviewing courts to determine whether or not the evidence is sufficient to sustain the decision of an administrative finder of fact. See *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988)(defining substantial evidence) and *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999)(discussing the concepts of burden of proof and standard of review).

compensating injuries sustained as a result of medical errors, and reducing insurance administration, litigation, and defensive medicine costs associated with the medical liability system.

The Task Force hopes that the effort to achieve these goals will continue by adoption of these recommendations, including the development of legislative proposals relating to disclosure, full exploration of the evidence-based guideline safe harbor concept, and commissioning of a study of the design and feasibility of an administrative substitute for the medical liability system.

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