

Future Directions in Professional Liability

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Introduction

- Challenges
- The Washington Approach
- Alternatives
- Patient Safety and Legal Reform
- Defensive Medicine

Challenges

- Endless expansion of rights and attendant liabilities
 - Deep pocket
- Monetary desensitization
- Jackpot justice
 - Top 10 list

Challenges: Malpractice Insurance - Mission or Business?



- Estimating cost
- Price
 - 10,000 prices for the same product
- Differentiation
 - Only after the house burns down
- Biology
 - Hard to do 6 sigma on doctors
 - Forget about patients
- Regulators

Initiative 330



- \$350,000 cap on non-economic damages
 - Up to \$1,050,000 depending on number of individual and institutional defendants
- Periodic payments
- Collateral source
- Contingency fee limits

Initiative 330

- Joint and several liability
- Statute of limitations reform
 - 3 years, children to age 8
- 90-day notice
- Facilitates arbitration and mediation

Initiative 336

- Requires MQAC to revoke license of any physician with 3 or more final judgments of malpractice
- OIC must hold public hearing on all rate increases of 15% or more
- State run secondary insurance company to provide coverage above \$250,000

Initiative 336

- Reporting requirements, including the names of physicians who were successfully defended
- Requires DoH to investigate any health care professional with 3 paid claims in excess of \$50,000 over 5 years
- Requires reporting of any award in excess of \$100,000

Initiative 336

- Adds two more “public members” representing “patient advocacy group or organizations”
- Mandatory disclosure of all “adverse medical events”
- Limits each side to two experts in medical negligence cases
- Certificate of merit

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The Bad Doctor Fallacy



- 2% of the doctors cause 50% of the losses
 - Mirror image of causation
 - Harvard: Degree of injury, not medical negligence, predicts outcome
- Fewer than 1% of physicians have 2 paid claims over a 10-year period of time
 - Only one in five doctors with a single paid claim gets a second within 10 years

Harvard, IOM, and Patient Safety

Institute of Medicine Study



- 44,000 to 98,000 deaths annually due to malpractice
- Goal: 50% reduction over 5 years

Harvard Study

- NYS 1984
- More than half of cases met screening criteria
- Concordance rate of medical reviewers on existence of an adverse event: **10%**
- Failed to replicate their own data
 - 318 records, different events, similar rates
 - It doesn't matter whether we convict the guilty or the innocent, as long as the rate of incarceration matches the crime rate.

Harvard Study: The Actual Claims



- 51 claims
- 8 involved “negligent adverse event”
- *26 involved no medical injury at all*

Patient Safety and Legal Reform



- Unacceptable to allow patient safety initiatives to be hijacked by plaintiff's bar
- Current medical-legal jurisprudence directly inhibits patient safety initiatives, some of which had previously been a normal part of medical practice
- Situation is changing
 - Common interests being recognized
 - AMA
 - Patient safety replacing risk management

Harvard Study

- Extrapolation: **180** inadequately classified deaths became 98,000 Americans dying every year due to malpractice

- Harvard Medical Practice Study (1996):
No correlation whatever between the presence or absence of medical negligence and outcome of malpractice litigation

Other Reforms

- Screening panels
- Certificate of merit
- Expert witness reform
- Medical courts

Defensive Medicine

- Prevalence
 - Acknowledged by >90% of PA physicians (6-05) in 6 high risk specialties, including orthopedics
 - Similar numbers nationally
 - Encompasses everyday medical decision-making and broader changes in scope and style of practice
- Mechanism of injury
 - Too much care (additional testing or treatment)
 - Displaced care (referral elsewhere)
 - Reduced care (refusal to treat high-risk patients)
- Results
 - Wasted resources
 - Reduced access to care
 - Disproportionate impact on women because of obstetrical and breast cancer detection litigation

Studdert, David, et. al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, JAMA. 2005;293:2609-2617

- Standards of care
 - Mammography
 - C-Section

Stanford Study: The Cost of Defensive Medicine



- States with effective tort reform lower health care costs 5-9%.
- Savings nationally would be \$50 billion.
- HHS estimates savings as high as **\$110** billion.



Summary and Conclusions



- Only the MICRA based reforms have proven effective
- Defensive medicine is a serious complication of our current medical-legal system
- Patient safety and legal reform initiatives are highly complementary