

Medical Malpractice Reform

Principles:

Medical malpractice reforms should accomplish the following goals:

- Reduce the rates of preventable patient injuries.
- Promote open communication between physicians and patients.
- Ensure patients have access to fair compensation for legitimate medical injuries.
- Reduce liability insurance premiums for health care providers.

Recommendation:

- Replace Georgia's current expensive and ineffective malpractice system with one that reduces medical errors, enhances patient access to fair compensation for legitimate medical injuries and lowers liability insurance premiums for health care providers.

Facts:

The current approach to medical errors is failing:

- **Expensive:** Billions of dollars are wasted each year on “defensive” medicine, unnecessary procedures and tests ordered to protect health care providers in case of a lawsuit.
- **Ineffective:** There is “scant evidence that tort liability has had a positive deterrent effect” on poor-quality care.¹ Despite the high cost of the current tort system, patient safety has not improved. You are just as likely to be a victim of a medical error today as you were three decades ago.²
- **Unfair:** If you are injured by a medical error, your chances are less than 3-in-100 of receiving compensation for your injuries. If you are poor or elderly, your chances are even lower.
- **Slow:** Injured patients must wait, on average, four to five years to receive compensation – time that could have been used for rehabilitation.
- **Inefficient:** Even if victims receive compensation, more than half the award is lost to legal and administrative costs.³
- **Compromises victims' access to justice:** A recent national survey of attorneys published by the Emory University School of Law⁴ found:
 - Most attorneys reject over 90 percent of the cases they screen.
 - The cost of prosecuting a single case of medical malpractice ranges from a low of \$50,000 to a high of \$500,000.
 - “Every case requires hundreds of hours of work and a huge outlay of money to pay for the investigation, evaluation by experts, deposition testimony, travel, etc.”
 - An attorney with 33 percent contingency fee, for example, who has expected litigation costs of \$100,000 would break even only if damages are \$300,000 or more.
 - In a random sample of 63 Georgia malpractice attorneys, two-thirds would not accept

¹ “Administrative Compensation for Medical Injuries: Lessons from Three Foreign Systems,” Michelle M. Mello, Allen Kachalia and David M. Studdert, The Commonwealth Fund, July 2011, <http://bit.ly/23ICxqm>.

² Repeated studies over time and across several states show a consistent rate of adverse medical events due to negligence. In 1974, a California study reported that 1 percent of all hospitalized patients have significant injury due to physician negligence. The Harvard Medical Practice Study of 1984 in New York State reported a 1 percent injury rate due to physician negligence. A study in Colorado and Utah in 1992 again found a 1 percent physician negligence rate. The most recent study in North Carolina in 2010 found similar results: “Temporal Trends in Rates of Patient Harm Resulting from Medical Care,” The New England Journal of Medicine, November 24, 2010, <http://www.nejm.org/doi/full/10.1056/NEJMsa1004404>.

³ “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” New England Journal of Medicine, 2006, <http://www.nejm.org/doi/full/10.1056/NEJMsa054479>

⁴ Highlighted slides from a presentation by Dr. Joanna Shepherd-Bailey, Emory University School of Law, on the findings of the first national survey of attorneys that explores medical malpractice victims' access to the civil justice system: Video of presentation: <http://bit.ly/1XHjBBa>, Slideshow: <http://bit.ly/1VAh9iF>

a case unless expected damages were at least \$250,000 and almost half would not accept a case unless expected damages were at least \$500,000.

- Some groups (females, the elderly, demographic minorities and the poor) tend to have disproportionately lower economic damages, making it even more difficult to find legal representation.

Recommendation:

Georgia should replace its current expensive and ineffective malpractice system with one that reduces medical errors, enhances patient access to fair compensation for legitimate medical injuries and lowers liability insurance premiums for health care providers.

For over a decade, the Georgia Public Policy Foundation has called for significant medical malpractice reform⁵ with an emphasis on reducing litigation and improving patient safety. Most of the reforms eliminate the expensive and inefficient court system, relying instead on workers' compensation-type system where the focus is on compensating victims rather than proving negligence in a court of law.

The Patients' Compensation System⁶ (PCS) is one alternative to adversarial medical malpractice litigation. It is designed to provide patients with fair and timely compensation for avoidable medical injuries without the expense and delay of the court system. PCS focuses on improving the overall quality of patient care by encouraging reporting and analysis of medical errors so the medical community can learn from its mistakes.

A similar proposal by Dr. John Goodman of the National Center for Policy Analysis is "a system of voluntary, no-fault contracts⁷ under which patients and their families are compensated for deaths and injuries that arise from any cause other than the medical condition which caused them to seek care. By voluntary, we really mean voluntary. If doctors and hospitals choose not to opt out of the tort system, they can practice under the rules of existing law."

Finally, Philip K. Howard, founder and chairman of Common Good, has proposed health courts⁸ where "expert judges with special training would resolve health care disputes. As with existing administrative courts in other areas of law – for tax disputes, workers' compensation, and vaccine liability, among others – there would be no juries. Each ruling could be appealed to a new medical appeals court." This is similar to medical malpractice review panels⁹ the Georgia Public Policy Foundation has studied in the past.

Overview:

There is bipartisan agreement that the current medical malpractice system isn't working. This is clearly a state issue where Georgia could be a leader. The status quo is unacceptable:

- From a social justice perspective, it is unacceptable that most victims, especially the poor and elderly, are not compensated for their injuries.
- From a patient safety perspective, it is unacceptable that patients today are no safer than they were in the 1970s.
- From a cost perspective, it is unacceptable that medically unnecessary costs are increasing the cost of health care.

Patients, doctors, lawyers, liberals and conservatives agree there is a problem:

⁵ "Medical Liability: Balancing Access to Health Care, Patient Safety and Compensation," GPPF, 2005, <http://bit.ly/20UUSLE>

⁶ "Patients' Compensation System," GPPF, October 2011, <http://bit.ly/1rgukbZ>

⁷ "An Alternative to Malpractice," NCPA, April 2011, <http://healthblog.ncpa.org/an-alternative-to-malpractice/>

⁸ "Establish Health Courts," Common Good, <http://www.commongood.org/pages/establish-health-courts>

⁹ "Mandatory Medical Review Panels Should Address Georgia Malpractice Crisis," GPPF, 2003, <http://bit.ly/1XHkMk8>

Dr. John Goodman:

“As things now stand, the only way a victim of an adverse medical event can get compensation is by filing a lawsuit, enduring its trauma and discomfort, and trying to prove malpractice. Yet only 2 percent of victims of malpractice ever file a lawsuit.¹⁰ Fewer still ever receive any compensation. On the other hand, 37 percent of lawsuits filed involve no real malpractice.¹¹ To add insult to injury, **more than half the money spent on malpractice litigation goes to someone other than the victims and their families.**”¹²

Dr. Joanna Shepherd-Bailey, Emory University School of Law:

“**Many legitimate victims of medical malpractice are unable to obtain legal representation and have no meaningful access to the civil justice system.** Without legal representation, most of these victims will not be compensated for the harm they suffer as a result of medical negligence. In turn, the medical malpractice system will fail to provide adequate precautionary incentives for healthcare providers. Without dramatic change, the access to justice problem will continue to hinder the medical malpractice liability system’s ability to achieve its compensatory and deterrent functions.”¹³

Hillary Clinton and Barack Obama:

“We have visited doctors and hospitals throughout the country and heard firsthand from those who face ever-escalating insurance costs. Indeed, in some specialties, **high premiums are forcing physicians to give up performing certain high-risk procedures, leaving patients without access to a full range of medical services.** But we have also talked with families who have experienced errors in their care, and it has become clear to us that if we are to find a fair and equitable solution to this complex problem, all parties – physicians, hospitals, insurers, and patients – must work together. Instead of focusing on the few areas of intense disagreement, such as the possibility of mandating caps on the financial damages awarded to patients, we believe that the discussion should center on a more fundamental issue: the need to improve patient safety.

“We all know the statistic from the landmark 1999 Institute of Medicine (IOM) report that as many as 98,000 deaths in the United States each year result from medical errors. But the IOM also found that **more than 90 percent of these deaths are the result of failed systems and procedures, not the negligence of physicians. Given this finding, we need to shift our response from placing blame on individual providers or health care organizations to developing systems for improving the quality of our patient-safety practices.**

“To improve both patient safety and the medical liability climate, the tort system must achieve four goals: reduce the rates of preventable patient injuries, promote open communication between physicians and patients, ensure patients access to fair compensation for legitimate medical injuries, and reduce liability insurance premiums for health care providers. Addressing just one of these issues is not sufficient. Capping malpractice payments may ameliorate rising premium rates, but it would do nothing to prevent unsafe practices or ensure the provision of fair compensation to patients.

¹⁰ “Relationship Between Malpractice Claims and Adverse Events Due to Negligence,” Harvard Medical Practice Study, 1991, <http://www.nejm.org/doi/pdf/10.1056/NEJM199107253250405>

¹¹ “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” New England Journal of Medicine, 2006, <http://www.nejm.org/doi/full/10.1056/NEJMsa054479>

¹² John Goodman, National Center for Policy Analysis, April 25, 2011, <http://healthblog.ncpa.org/an-alternative-to-malpractice/>

¹³ “Justice in Crisis: Victim Access to the American Medical Liability System,” September 1, 2012, Emory Legal Studies Research Paper 12-222, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147915

“The current tort system does not promote open communication to improve patient safety. On the contrary, it jeopardizes patient safety by creating an intimidating liability environment. Studies consistently show that health care providers are understandably reticent about discussing errors, because they believe that they have no appropriate assurance of legal protection. This reticence, in turn, impedes systemic and programmatic efforts to prevent medical errors.”¹⁴

Tom Baker, professor of law and health sciences at the University of Pennsylvania School of Law:

“Imagine you go to the emergency room with appendicitis. For whatever reason, they fail to diagnose it. Your appendix bursts, and you spend a couple weeks in the hospital. I’ve had lawyers tell me they would not take a case like that, even if it’s a slam-dunk. The damages wouldn’t be enough – medical expenses, maybe a month of lost salary, although the patient might have short-term disability insurance that would cover a large part of that. It’s not enough to justify going to court.

“The medical malpractice system only works for serious injuries. What it doesn’t work for is more moderate ones. Lawyers discourage people from bringing suits if their injuries are not serious in monetary terms – a poor person or an older person who can’t claim a lot in lost wages. That’s why obstetrician-gynecologists pay such high premiums. If you injure a baby, you’re talking about a lifetime-care injury. Gerontologists’ premiums are exceedingly low.

“That’s the reason I say if people are serious about tort reform, they should improve compensation for moderate injuries. Nobody likes that idea, by the way. They say it would make the system more expensive, not less expensive. More people would bring claims. That says to me that the critics are not serious about tort reform.”¹⁵

Several reforms we propose have their particular strengths and weaknesses, but all would be preferable to Georgia’s current system. Georgia should commit to having a fair and open debate on this issue to determine the best, most effective reform.

¹⁴ “Making Patient Safety the Centerpiece of Medical Liability Reform,” May 25, 2006 issue of The New England Journal of Medicine, <http://www.sin-nl.org/pdfs/obama250506.pdf>

¹⁵ New York Times, August 31, 2009, <http://prescriptions.blogs.nytimes.com/2009/08/31/would-tort-reform-lower-health-care-costs/>