



January 2013

## MEDICAL LIABILITY REFORM

### RECOMMENDATION

We support reducing liability insurance premiums and the costs of defensive medicine by enacting key provisions modeled on California's highly effective liability reforms including:

- Impose a hard cap on non-economic damages;
- Limit attorneys' contingency fees;
- Inform juries of prior insurance payments to patients and reduce awards by the amount of compensation from collateral sources;
- Replace joint and several liability with proportionate liability, so each party would pay a share of a malpractice award based on the proportion for which he is liable;
- Allow periodic payment of future damages at a defined award limit;
- Provide for alternative dispute resolution systems; and
- Require an expert witness who possesses knowledge and expertise and practices in the same medical specialty as the defendant.

### Background

The AAFP considers medical liability reform a high priority; because today's medical liability system fails both patients and physicians. It is needlessly subjective and shamefully costly. Too many of the medical liability lawsuits filed are frivolous, and too few of those injured by medical care actually receive compensation. Excessive damage awards, rising malpractice premiums and defensive medical practices have greatly contributed to increases in health care spending with scant value added.

For decades, California's *Medical Injury Compensation Reform Act of 1975* (MICRA) has served as a model for federal tort reform and has placed a greater share of insurer payouts in the hands of injured patients. In a RAND study, MICRA's reforms reduced attorney fees 60 percent.

The AAFP has long advocated limits on non-economic damage awards. In addition, we support limits on attorneys' contingency fees and requirements that awards be reduced by the amount of compensation from collateral sources.

The AAFP has also called for allowing periodic payment of future damages at a defined award limit, replacing joint and several liability with proportionate liability among the defendants in a case, and a reduced statute of limitations for commencing professional liability actions to one to three years after injury, with an absolute limit of six years for minors. It is also important that an expert witness must meet strict criteria and that any expert affidavit must be provided by a specialist who practices in the

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same medical specialty as the defendant. We support legislation to redefine medical negligence and liability, including specific designations concerning implied warranty and informed consent.

We recommend that an affidavit from a physician stating the physician's opinion that the claim has merit must accompany the filing of a claim. We suggest that information concerning collateral sources of income and the tax status of awards be made admissible in evidence and that 60 days' advance notice of the intention to sue be required. We affirm a physician's right to recover from plaintiff reasonable legal costs and attorney's fees in successful defense of professional liability suits and support eliminating the *ad damnum* clause in the filing of lawsuits. Insurance companies should be required to provide information comparing economic and non-economic damages and settled cases with verdict cases to state and national regulators. The AAFP supports the use of the clear and convincing standard of evidence in medical liability cases in an effort to stabilize premiums.

The AAFP supports incentives for states to establish Alternative Dispute Resolution Systems and consider increased disciplinary authority for state boards of medical examiners. We also have supported legislation to test health courts to provide a genuine alternative dispute resolution system which might both control costs and expedite proceedings.

Although the medical liability demonstrations announced by the Agency for Healthcare Research and Quality (AHRQ) in June 2010, were quite modest, we support these efforts to find alternatives to the current medical tort system. We must explore alternatives to demonstrate how to more equitably and quickly compensate those truly injured in the course of medical care without needlessly diverting health care dollars. We look forward to learning from AHRQ the findings from those demonstrations and continue to call for meaningful medical liability reform to put an end to frivolous lawsuits and to allow for a fair recovery by the negligently injured patient. The AAFP believes these goals can be met in a way compatible with protecting and preserving the rights of an injured patient to a fair resolution.

### **Congressional Budget Office (CBO)**

According to the CBO, AAFP's proposals for tort reform could lower costs for health care both directly and indirectly by lowering premiums for medical liability insurance and by reducing the use of diagnostic tests and other health care services recommended principally to minimize the potential exposure to lawsuits. The CBO analysis released on October 9, 2009, estimates that implementing tort reform nationwide would reduce both total U.S. health care spending by about 0.5 percent (about \$11 billion in 2009) and federal budget deficits by roughly \$54 billion over the next 10 years. CBO acknowledged studies which concluded that tort reform generated no significant adverse outcomes.