Medical Malpractice Liability Insurance In Vermont

A Supplemental and Concurring Report to the General Assembly

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Dear Legislators,

The extensive work of the 18 month study committee contained in the main report reveals critical, fundamental, and undisputed facts related to specific medical malpractice issues in Vermont. Most importantly, the committee's work concludes:

- Vermont medical malpractice costs represent less than 1% of Vermont total health care costs, and there is scant scientific evidence to support the contention that defensive medicine is driving up health care costs.

- Vermont medical malpractice lawsuits are extremely rare and are not increasing in numbers. Vermont settlements and verdicts are among the lowest in the country. Medical malpractice lawsuits represent fewer than 1% of all cases filed in Vermont courts.

- After 5 years of no increases, Vermont medical malpractice premiums have increased over the past 4 years. However, the recent rise in medical malpractice premiums *has not been cause*d by any increase in the severity or frequency of Vermont medical malpractice claims.

- Instead, these premium increases are driven by other factors including insurance cycles, decrease in insurance companies' investment income and poor management of insurance companies. These factors and others are explained in the full committee report and summarized in the attached supplemental report.

- Despite these increases, Vermont doctor premiums are the lowest in New England and among the lowest in the country. Furthermore, the number of practicing Vermont doctors has *increased* by 10% over the last 4 years.

The Committee's effort also resulted in many consensus recommendations for legislative policymakers to consider. These areas predominately relate to malpractice insurance reforms and attempts to reduce medical errors now estimated, based on an Institute of Medicine study, to cause up to 200 Vermont deaths a year and result in as much as $63 million in preventable health care costs.

We are writing separately from the main report in order to express our concerns that several of the "non – consensus" votes of the Committee do not reflect conclusions drawn from the empirical evidence presented to the Committee but rather are the product of selected anecdotes in support of a particular agenda. In fact, as noted in our supplemental report, several votes were on issues upon which we received no evidence whatsoever. We remain disappointed that after a long and detailed investigation of this subject matter, this Committee's work took this inappropriate political turn at the very end.

Nevertheless, as is expanded upon in our supplemental report, we are pleased that there remain many important areas of consensus and that the body of the report itself has much useful and revealing information upon which policy makers can and should rely.

This concurring supplemental report is a condensed version of the body of the full report, which again we believe - except for the anomalous process and votes set forth more fully in the supplemental report - does accurately reflect the empirical data presented to the Committee and should provide valuable and useful consensus information to Vermonters and the Vermont Legislature.

Dated this 15th day of December, 2005.

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MEDICAL MALPRACTICE:

A Supplemental and Concurring Report to the General Assembly

I. INTRODUCTION

Over the past 30 years, Vermont and the nation have undergone three so-called medical malpractice "crises." The first occurred in the late 70's, the second in the late 80's and early 90's, and, most recently, beginning around 2001. During each of these periods, malpractice insurance premiums increased significantly. What has caused these most recent increases? Facts uncovered by the medical malpractice study committee reveal a different answer than one might expect.

The committee concluded these increases were not caused by any increases in the severity or frequency of Vermont's medical malpractice claims but by a combination of factors including insurance cycles, decrease in insurance companies' investment income, and poor management of insurance companies.

In response to the most recent "crisis," the Vermont Legislature authorized an 18 month study of specified medical malpractice insurance issues. The study was the response to lobbying efforts of the Vermont Medical Society. The study was conducted by group consisting of the Deputy Commissioner of Insurance, and representatives from the Vermont Medical Society, the Vermont Hospital Association, the American Insurance Association, the Vermont Health Care Ombudsman, the Vermont Bar Association, and the Vermont Trial Lawyer's Association.

The committee diligently went about its work for one year, gathering factual information upon which to write its report and make recommendations. However, problems arose when the Douglas Administration first announced it would not be voting on the legislative questions and then, unexpectedly, reversed itself a number of weeks later, joining sides with the Vermont Medical Society and the Insurance and Hospital Associations on a series of controversial votes.

Perhaps the most troubling development occurred when the Vermont Medical Society attempted to essentially rewrite an objective and unbiased executive summary and draft report prepared by BISHCA staff after the study group had completed the public hearings. Fortunately, despite this attempted rewrite, most of the underlying facts remain in the body of the report. Unfortunately, some of the editorial comments in the executive summary and some of the four-three votes are simply unsupported by the evidence.

This supplemental report hopes to build on the good work done by the committee in exposing the misconceptions and disinformation swirling around this subject. The body of the full report contains the true facts that should be driving the debate. This report hopes to summarize those facts and use them in a constructive fashion to minimize medical errors and help reduce insurance costs.

II. FACTS REPLACE ANECDOTE AND MYTH

The study group met 15 times and has generated a final report. As a result of this study, much of the conventional wisdom about malpractice premiums and the malpractice system has been proven wrong. Factual analysis contained in the body of the committee report confirms the following:

- ***Number of Vermont Doctors Continues to Increase*** – The number of Vermont doctors has increased 10% in the past five years, from 1,451 to almost 1,591 active physicians. Claims that Vermont doctors are leaving the state, or that Vermonters do not have access to healthcare because of doctors shortages related to malpractice premiums are not supported by facts.[1]

- ***Malpractice Insurance Costs Less than 1% of Total Health Care Costs*** – Vermont malpractice premiums total approximately $25 million, less than 1% of the $3.4 billion spent on health care costs in Vermont. Malpractice premiums represent less than 2% of all Vermont property and casualty premiums.[2]

- ***Vermont Doctors' Premiums Lowest in New England and Among Lowest in the Country*** – While Vermont malpractice premiums have increased in the last 4 years, this followed a 5 year period of no increases. Approximately half of Vermont doctors are covered by the two captive insurance companies operated by FAHC or Dartmouth-Hitchcock. Family/general practitioners represent the largest subgroup of physicians in Vermont and their average medical malpractice insurance premium is less than $10,000. Larger premiums are frequently cited by the medical and legal industry, but these are limited primarily to a few specialties that also have the highest physician income averages (neurosurgery and orthopedics). Furthermore,

Vermont medical malpractice premiums as a percentage of physician wages are among the lowest in New England.[3]

- ***No Increase in Vermont Lawsuits, Verdicts or Settlements*** – The frequency of Vermont malpractice lawsuits has remained steady for 10 years, and Vermont verdicts and settlements rank 48th lowest in the country (median payment $80,000). Medical malpractice cases represent fewer than 1% of all Vermont civil cases filed in state and federal court. 98% of Vermont medical malpractice cases are resolved prior to trial. The Vermont Supreme Court has already required mandatory mediation for all civil cases, including medical malpractice.[4]

- ***All Lines of Insurance Have Undergone Substantial Premium Increases from 2000 to 2004*** – While medical malpractice premiums have increased over the past 4 years, so has every other major line of traditional property and casualty insurance premiums in Vermont (56% overall increase). Substantial increases have occurred in workers compensation (91%), homeowners (41%), and passenger automobile liability (36%).[5]

- ***Increase in Vermont Malpractice Premiums Not Related to Lawsuits*** – Primary factors responsible for recent premium increases in Vermont are: insurance company investment income losses, insurance cycles, September 11th, and the bankruptcy of PHICO.[6]

- ***Claims of Defensive Medicine Not Supported*** – A 2004 Congressional Budget Office (CBO) study and a 2003 General Accounting Office (GAO) report, along with other scientific articles, conclude there is no evidence to support the claim that defensive medicine is driving up healthcare costs. The GAO report says that evidence that defensive medicine occurs is "weak and inconclusive." The CBO report says "savings from reducing defensive medicine would be very small."[7]

- ***Medical Malpractice Crisis Does Exist Concerning Medical Errors*** – The Institute of Medicine estimates 100,000 die annually from medical errors. Proportionately, this equates to 200 Vermonters dying each year from avoidable medical errors. Conversely, over the past 10 years an average of only 50 medical malpractice cases have been filed annually.[8]

- ***Suggested Tort Reform Measures Ineffective*** – Tort reform measures such as caps on damages, arbitration panels, etc., will not reduce malpractice premiums or minimize fatal medical errors in Vermont. These procedures are simply barriers for injured patients seeking access to the civil justice system.[9]

- ***Creative Solutions Can Help*** – Reforms focusing on insurance reform, captive insurance companies, enterprise liability, mandatory disclosure of medical errors and "SorryWorks" programs can reduce medical errors and help stabilize insurance costs.[10]

III. SUMMARY FINDINGS

In summary, even the president of one of the major malpractice insurers in Vermont (Pro-Select) testified before the study group that there is no medical malpractice crisis in this state and that tort reform legislation would have little if any effect on malpractice insurance costs. This study revealed competition exists among numerous carriers, and they offer Vermont doctors some of the lowest premiums in the country. Medical malpractice lawsuits are infrequent, and filings have not increased over the past decade. Furthermore, the verdicts and settlements are just about the lowest in the country. Significantly, 98% of all medical malpractice cases are resolved prior to trial. In the past 15 years, Vermont juries have only returned 5 verdicts in favor of injured patients.

While there have been premium increases over the past 4 years, those increases appear to be wholly unrelated to medical malpractice lawsuits or the operation of the civil justice system in Vermont. Instead, these increases are driven by a combination of factors including: a downturn in the economy resulting in decreased investment income for insurance companies; hard market in the insurance cycle; bankruptcy based on poor underwriting practices of PHICO insurance company; poor business decisions resulting in a $4 million dollar loss by Medical Mutual Insurance Company of Maine; and effects of September 11.

The good news is the economic picture appears to be improving for insurance companies in general. The president of Pro-Select indicated the market was stabilizing and premiums were leveling off. Vermont's second largest malpractice carrier sought increases averaging only 7.2% for 2005. In short, the economic and insurance cycle is on the rebound and the market is correcting itself.

Contrary to popular belief, the increase in premiums was not the result of any litigation explosion or run away verdicts in the state of Vermont. The Vermont data confirms there has been no increase in lawsuits or verdicts and settlements. This spike in premiums was caused by a wholly unrelated set of factors noted above.

IV. MEANINGFUL, NOT MYTHICAL, SOLUTIONS

In complete disregard of this data, the insurance and medical interests continue to insist on misplaced efforts at so-called tort reform. Although there was no evidence of frivolous malpractice lawsuits in Vermont, those special interests voted for additional arbitration panels which would make it even harder

and more expensive for injured Vermonters to seek redress for their injuries. Although there was no evidence of unqualified expert testimony in Vermont, those special interests voted for additional, burdensome expert witness requirements. Although there was no evidence of Vermont attorneys earning inappropriate attorneys' fees, those special interests voted for capping attorneys' fees, thus making it harder for Vermonters to find attorneys willing to take on these difficult and expensive cases. Although there was no evidence suggesting that Vermont juries were awarding undue amounts of non-economic damages, those same special interests voted for caps on damages.

These so-called "reforms" are prepackaged, recycled, tired proposals that are part of a nation-wide agenda promoted by insurance companies, pharmaceutical companies, the AMA and the Chamber of Commerce. They do not address, and are incompatible with, the unique Vermont experience.

In reality, their only impact would be to make it more burdensome and more expensive for injured Vermont patients to gain access to Vermont courts. Sadly, these so-called "reforms" adversely impact the elderly, women and children the most.

There are, however, reforms and programs that may address the real crisis of avoidable medical errors resulting in an estimated 200 Vermont deaths each year and which may aid in the stabilization of medical malpractice insurance premiums. These solutions include the following:

- **"SorryWorks" Program**: This program is gaining state and national attention in lowering litigation costs and uncovering medical errors. The program involves full and complete disclosure of medical errors to the patient, apologies by doctors and hospitals (which are protected against use in any subsequent civil case), and where appropriate fair compensation is offered to the patient. Illinois has adopted a pilot program and Senators Clinton and Obama have offered federal legislation modeled after this program.

- **Development of Captive Insurance Companies**: Already almost 800 of Vermont's 1,591 actively practicing doctors are covered by captives maintained by FAHC and Dartmouth-Hitchcock. Another approximately 25 doctors have medical malpractice coverage provided through numerous Federal Qualified Health Care Centers scattered throughout Vermont. Those Vermont doctors and hospitals not covered by these captives or the federal government could benefit substantially from participation in the development of a new Vermont captive set up to address these particular groups. Furthermore, this Vermont captive would eliminate the need to base premiums primarily on out of state verdicts and settlements, and would base premiums on the Vermont claims experience.

- **Enterprise Liability:** Under this proposal, hospitals and similar organizations would be required to provide insurance covering all liabilities arising out of services performed, or to be performed, in their facilities. This idea is supported by Tom Baker, the Connecticut Mutual professor of Law and director of the Insurance Law Center at the University of Connecticut School of Law. Those groups experiencing the biggest increases during these various insurance cycles would obtain coverage through the hospital. These groups include OB-gyn's, neurosurgeons and orthopedists. The hospitals are better able to withstand the ups and downs of the volatile insurance market than individual doctors. Doctors would pay a fee, in lieu of malpractice insurance, to the hospitals for operating privileges and liability coverage.

- **Insurance Reform:** California has instituted what is known as proposition 103. This is a series of insurance reforms aimed at controlling the medical malpractice insurance market. One of the significant reforms includes requirement of a public hearing whenever a malpractice insurance carrier seeks to increase premiums by more than 7% for a personal line and 15% for a commercial line.

- **Elimination of Confidential Settlements:** Insurance companies and their health care providers almost always insist on confidentiality agreements prior to settlement. The secrecy enforced by these agreements ensures that the medical errors from that particular case will not be made known to others not involved in the case. This irrational requirement defies logic and results in the same errors being repeated time and again.

It is hoped that these recommendations will help address the problems of increased premiums and preventable medical errors. The legislature must get past the public propaganda buzz words of "litigation explosion," "runaway verdicts," "doctors leaving Vermont," and "medical malpractice driving up healthcare costs." The facts simply do not support these baseless allegations.

V. CHALLENGE

We hope the Legislature will take the time to read and understand the true facts surrounding medical errors and medical malpractice in the state of Vermont. If they do, our lawmakers will not simply shift the burden onto the injured patient, but will instead consider meaningful reform directed at the true causes of the problems.

At the beginning of this report, we noted the study group had received a draft report prepared by BISHCA staff. This initial report was accurate and objective. However, the Vermont Medical Society, upset with these unbiased findings, tried to rewrite the report by substituting anecdote for fact. In essence, an attempt was made to change an objective study into more of a political

document. Fortunately, the underlying facts remain in the body of the report, and even a careful reading of the executive summary provides little or no support for the controversial political votes which followed.

The facts uncovered by this study group reveal there is no medical malpractice crisis in Vermont but there is room for improvement. Meaningful changes to reduce medical errors and stabilize insurance rates are possible, but they must be based on fact, not fiction.

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[1] See pages 52-57 of Report. Physician data based on information provided by the American Medical Association.
[2] See page 19 of Report. Vermont percentage based on 2003 premium data from A.M. Best & Milliman Data Call and 2003 resident cost data from the Vermont Health Care Expenditure Analysis Report published by the Vermont Health Care Division (p.29).
[3] See pages 23-25 and pages 42-43 of Report.
[4] See pages 8, 28-30 of Report. See Rule 16.3 of the Vermont Rules of Civil Procedure and Federal Rules of Civil Procedure.
[5] See page 6 of Report. Vermont Insurance Division Commissioner's Report for 2004, pages 18-23.
[6] See pages 8-9 of Report.
[7] See page 82 of Report. Congressional Budget Office Economic and Budget Issue Brief, Limiting Tort Liability for Medical Malpractice January 8, 2004 page 6; United States General Accounting Office, Medical Malpractice: Implications of Rising Premiums on Access to Health Care, G.A.O-03-836, at p. 29 (August 2003).
[8] Institute of Medicine (IOM) 1999 Report Two Error is Human: Building a Safer Health System; Public Citizen Handbook on Medical Malpractice 2004; and pages 28-30 of Report.
[9] See page 51 of Report.
[10] See pages 76, 83-87 of Report.