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Restoring Value and Trust in our Health Care System:

Achieving Real Medical Liability Reform with an Early Disclosure and Compensation Model

The current medical liability system is a significant impediment to achieving safety, transparency, and quality in health care today. Achieving real gains in these areas requires a complete overhaul of the fundamental way in which health care providers and malpractice insurers assume responsibility for errors and in which patients are compensated for injuries resulting from medical errors. Such an overhaul can be achieved in Massachusetts with the establishment of “early disclosure and compensation programs” in the Commonwealth, akin to the recently established programs in Michigan and Illinois. A detailed summary of these programs, as well as the inherent failures of the current tort system, is contained in the full report “Restoring Value and Trust in our Health Care System: Achieving Real Medical Liability Reform with an Early Disclosure and Compensation Model.”

The chief purpose of this model is to remove the barriers that preclude transparency in the medical system, promote equitable and timely compensation to patients who are injured by preventable medical errors, improve patient safety by recognizing adverse events, and reduce the cost of health care. Although it often starts with an apology, it is not simply a program advocating apologies in the aftermath of a medical error. The model, currently achieving landmark success in Michigan and Illinois, is a patient centered reengineering of the way physicians and hospitals deliver health care. The quality of health care we deliver can be improved by opening the lines of communication with patients, compensating them for avoidable events, and systematically learning from adverse events.

The following is a brief summary of this model:

- 1) The hospital (through a variety of quality assurance mechanisms and self-reporting) identifies all adverse events.
- 2) Each adverse event undergoes intensive and rapid review to determine the root causes and whether any error occurred.
- 3) If an error occurred, the hospital provides an apology to the patient.
- 4) If no error occurred, the hospital still explains the event in full to the patient.

- 5) Whether or not an error occurred, the hospital provides for continuous contact with the patient to address issues of continued care and manage future concerns.
- 6) If an error occurred, the hospital determines if compensation is appropriate, and if so, provides the patient with an offer of compensation. The patient is encouraged to have legal representation.
- 7) All root cause analyses are incorporated back into the hospital to make internal process improvements and prevent future adverse events

A few other salient points about this model are worth mentioning:

- 1) The model retains the right to trial by jury (should the initial offer of compensation be refused or if no offer is made).
- 2) There is likely to be a substantial long-term cost-savings that is a natural and desirable consequence of creating a safer, more efficient health care system. Critics have argued and set forth in theoretical models that the disclosure model could increase costs due to the unrealized pool of patients who will be compensated after being informed their injury was a consequence of a medical error. So far, neither Michigan nor Illinois are reporting increased costs associated with this program. In fact, in Michigan overall costs steadily fell by almost 64% as a result of the disclosure of medical errors and improvements in patient safety. Furthermore, the malpractice reserves at the University of Michigan were reduced from \$72 million in 1997 to \$17 million in 2007. The future cost savings associated with improved safety and reduced medical errors, as well as with the expected reduction in the cost associated with defensive medicine, is not well known but likely to be substantial.

In principle, this model is slowly taking hold in hospitals throughout the Commonwealth. The legislature can help to advance the process by passing enabling legislation, including pilots for early disclosure programs, as well as S. 986 and S. 987. S. 986 (An Act Relative to Timely Notice) would require a person to provide written notice to a health care provider at least 182 days before commencing any legal action. Such legislation would help bring patients and hospitals to the table long before a malpractice claim is even filed. In Michigan this legislation has been crucial to the success of their early compensation program. S. 987 (An Act Relative to Health Care Providers' Statements of Regret) would bring needed protection to health care providers who apologize for a medical error. Most physicians agree that apologizing is the right thing to do, but many physicians also believe that apology will result in a lawsuit.

Given the collision course Massachusetts is on owing to the recent universal health care mandate and the continued rise in health care costs, as well as the shrinking pool of primary care physicians, Massachusetts cannot afford to continue with business as usual. Patients have a right to improved safety and transparency in the health care they receive.

Patients have a right to know that their family pays an estimated \$1,200 to \$2,000 a year as a consequence of a dysfunctional medical liability system, and that the cost of care they receive continues to rise in part because of this broken system. Patients have a right to know that the shrinking medical workforce in the Commonwealth can be reversed, in part by reforming the malpractice system. While the early disclosure and compensation model is not a panacea for the health care woes in Massachusetts, it offers a sound start towards the remaking of a better health care system. Other states are already moving along this route; Massachusetts needs to act quickly to avoid falling behind.