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**Medical Liability Demonstration Projects: A Small but
Important Step Towards Malpractice Reform and Cutting the
Costs of Health Care**

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I. INTRODUCTION

The United States is in the midst of a medical malpractice crisis.¹ Lawsuits and the associated medical malpractice costs are considered by many to be primary forces driving up the costs of health care.² The annual cost associated with medical liability is around fifty-six billion dollars and estimates predict that liability premiums have reached a staggering twenty-six billion dollars per year.³ The rising premiums are attributable to an increase in both the number and the severity of medical malpractice claims.⁴

As the number of medical malpractice lawsuits continues to rise, access to health care becomes more restricted.⁵ Lawsuits have the potential to increase the cost of health care, limit the number of high-risk procedures performed, drive physicians out of state or out of business, and increase the practice of defensive medicine.⁶ In fact, “[m]any experts believe that fear of liability poses a substantial barrier to the development of transparent

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1. Kenneth Thorpe, *The Medical Malpractice ‘Crisis’: Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Jan. 21, 2004, <http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1>.

2. See MASSACHUSETTS MED. SOC’Y, INVESTIGATION OF DEFENSIVE MEDICINE IN MASSACHUSETTS (Nov. 2008), available at <http://www.massmed.org/AM/Template.cfm?Section=Home6&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27797>.

3. Mike Lillis, *Malpractice Reform no ‘Silver Bullet’ for Skyrocketing Healthcare Spending*, THE HILL (Sep. 9, 2010, 3:50 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/117925-gop-lawmaker-malpractice-reform-is-no-silver-bullet-for-health-spending-woes>; see MASSACHUSETTS MED. SOC’Y, *supra* note 2.

4. Thorpe, *supra* note 1.

5. See MASSACHUSETTS MED. SOC’Y, *supra* note 2; see Lillis, *supra* note 3.

6. Press Release, White House Office of the Press Sec’y. Fact Sheet: Patient Safety and Medical Liability Reform Demonstration (Sept. 17, 2009) available at http://www.whitehouse.gov/the_press_office/FACT-SHEET-Patient-Safety-and-Medical-Liability-Reform-Demonstration/ [hereinafter Press Secretary Fact Sheet].

and effective patient safety initiatives in hospitals and other settings.”⁷ Instead of preventing inferior medical care and compensating patients injured by such care, the current system fails at both.⁸

Although most recognize a need for malpractice reform, political battles over the best means to achieve that end have been ongoing for the last thirty-five years.⁹ A variety of plans have been proposed to tackle negative consequences and eliminate unnecessary costs. One example is the demonstration project plan, initially enacted by President Obama in 2009 and codified under The Patient Protection and Affordable Care Act (PPACA) passed in March 2010.¹⁰ The plan aims to put patient safety first and to allow doctors to focus on practicing medicine.¹¹ Although the plan has a number of shortcomings in its implementation and long-term strategy, it is nevertheless an important step towards reforming medical malpractice and cutting health care costs.

II. THE DEMONSTRATION PROJECT INITIATIVE

In September 2009, President Obama announced his proposals for health insurance reform to a joint session of Congress.¹² One component of his plan involved investing in demonstration projects in individual states to manage medical liability claims.¹³ The Agency for Healthcare Research and Quality (AHRQ), an agency within the Department of Health and Human Services (HHS), was responsible for implementing and monitoring the twenty-five million dollar initiative.¹⁴ The initiative aimed to provide one and three-year grants to projects that focused on alternative dispute resolution programs, rapid medical error disclosure, and the development of guidelines to reduce lawsuits.¹⁵ AHRQ

7. U.S. DEP’T OF HEALTH & HUMAN SERV., FACT SHEET: PATIENT SAFETY AND MEDICAL LIABILITY REFORM DEMONSTRATION, <http://www.healthreform.gov/newsroom/factsheet/medicalliability.html> (last visited Sept. 28, 2010) [hereinafter DEP’T OF HEALTH FACT SHEET].

8. Thorpe, *supra* note 1.

9. Randall R. Bovbjerg, *Will the Patient Protection and Affordable Care Act Address the Problems Associated with Medical Malpractice?*, TIMELY ANALYSIS OF IMMEDIATE HEALTH POLICY ISSUES 1 (2010).

10. *Id.*; The Patient Protection and Affordable Care Act (PPACA), H.R. 3590, Public Law 111-148, 124 Stat. 119-1025, Title X, Subtitle F, March 23, 2010, <http://www.gpo.gov>.

11. Press Secretary Fact Sheet, *supra* note 6.

12. *Id.*

13. *Id.*

14. DEP’T OF HEALTH FACT SHEET, *supra* note 7, at 2.

15. Katherine Hobson, *What Might Medical Malpractice Test Projects Look Like?*, WALL ST. J. BLOG (June 11, 2010, 10:08AM), <http://blogs.wsj.com/health/2010/06/11/what-might-medical-malpractice-test-projects-look-like/>.

funded seven demonstration grants, all of which proposed a model that met one or more of the patient safety and medical liability reform initiative goals.¹⁶ These goals include: reducing preventable harm, informing injured patients promptly and making efforts to provide prompt compensation, and promoting early disclosures and settlement through a court-directed alternative dispute resolution model.¹⁷

In March 2010, Congress passed the PPACA. Section 10607 authorized malpractice demonstrations by states and included another fifty million dollars in grants for states that want to explore alternatives to traditional tort reform proposals.¹⁸ Under PPACA, only states may be funded (funds are too limited to support alternative compensation systems) and the demonstration authority includes conditions that are more limited than the grants implemented in the 2009 initiative.¹⁹ Despite being more limited in scope than the 2009 initiative, the PPACA provision nonetheless offers another opportunity to develop alternatives to medical malpractice liability and cut healthcare costs in the process.²⁰

III. ALTERNATIVES TO THE MEDICAL MALPRACTICE SYSTEM

When attempting to analyze the potential success of demonstration projects, one must first look at what some of these projects entail. Although a variety of alternatives exist, they share the same goal: replacing the “erratic, expensive and time-consuming” trial-by-jury malpractice system with a cheaper and more effective system.²¹ Before taking a look at two specific projects that received grants, this article will examine some of the general alternatives that have been proposed. The article will then examine the pros and cons of two grant-receiving projects, one in Minnesota and one in New York.

A. Early Disclosure

Early disclosure has the broadest appeal and centers around the idea that the earlier

16. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, MEDICAL LIABILITY REFORM AND PATIENT SAFETY: DEMONSTRATION GRANTS (June, 2010), <http://www.ahrq.gov/qual/liability/demogrants.htm>.

17. *Id.*

18. The Patient Protection and Affordable Care Act, H.R. 3590, Public Law 111-148, 124 Stat. 119-1025, Title X, Subtitle F, March 23, 2010, <http://www.gpo.gov>; Bovjberg, *supra* note 9, at 1; Hobson, *supra* note 15.

19. Bovjberg, *supra* note 9, at 1.

20. *Id.* at 2.

21. Philip K. Howard, *Health Reform's Taboo Topic*, WASHINGTON POST, July 31, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073002816.html>.

patients and their families are informed of medical mistakes, the less likely they are to seek legal redress.²² In these cases, doctors disclose adverse events promptly to patients and offer reasonable compensation where mistakes have occurred.²³ Reasonable compensation is determined based on the gravity of the mistake and the resulting injury.²⁴ Benefits of early disclosure include that it requires no change in law and merges the resolution of claims with a pledge of improved patient safety.²⁵ Although the 2009 grant program funds these demonstrations, they do not qualify for support under the PPACA.²⁶

B. Apology Programs

Apology programs expand the early disclosure program to include an admission of guilt. The idea behind apology programs is that when doctors apologize for or at least communicate about errors with patients and family members, the risk of litigation may decline.²⁷ Along with apologizing, under these programs, the doctors often offer an up-front financial settlement.²⁸ While the movement towards disclosure and apologies has spread rapidly in the health care world, it is still difficult to get doctors and other medical staffers to face patients and overcome their fear of retaliation.²⁹ Despite the difficulty of getting doctors to apologize, health systems that have adopted the program have experienced success:

At the University of Michigan Health System, which adopted new policies encouraging full disclosure of errors and apologies to patients when warranted, the number of pre-suit claims and lawsuits has dropped from 260 pending in July 2001 when it implemented the new approach to malpractice claims, to fewer than 100 pending at present.³⁰

For patients and families, doctors who are able to admit fault and express remorse can

22. See Boyjberg, *supra* note 9, at 2.

23. *Id.*

24. See generally *id.* at 2.

25. *Id.*

26. *Id.*

27. Hobson, *supra* note 15.

28. Amy Widman, *Liability and the Health Care Bill: An "Alternative" Perspective*, 1 CALIF. L. REV. CIR. 57, 63 (Sept. 2010).

29. Laura Landro, *Doctors Learn to Say 'I'm Sorry'*, WALL ST. J., Jan. 24, 2007, at D5.

30. *Id.*

help ease the pain of feeling victimized by the healthcare system.³¹ Although apology programs offer the potential to decrease malpractice litigation, it is important to note that there is always the possibility that admitting fault and apologizing will have the opposite result.

C. Safe Harbor Approach

In light of the potential negative effects associated with admitting mistakes and apologizing, another approach is the safe harbor approach. This approach makes the fact that a doctor adhered to practice guidelines a defense to a claim that care was negligent³² In the states that have taken this approach, they have combined the practice guidelines movement with tort reform by enacting demonstration projects, permitting physicians to introduce evidence that they followed practice guidelines as an affirmative defense.³³ Although this approach would help insulate doctors from liability by having them adhere to standardized practices, it is hard to implement and would require changes in the law.³⁴ The safe harbor approach does not qualify for demonstration grants under the PPACA.³⁵

D. Health Courts

Health courts offer the hope of a more predictable and efficient system. The idea of courts dedicated to medical malpractice has been around for a while and presidential candidate Mitt Romney endorsed using health courts to handle these types of claims in 2007.³⁶ The courts would feature a new standard of liability, termed “avoidability,” no juries, and some sort of schedule for benefits.³⁷ Proponents tout worker’s compensation and no-fault car insurance as models for the program.³⁸ Opponents argue that health courts pose constitutional and bureaucratic problems, including an inability to increase patient safety and the possibility of bias and inefficiency.³⁹

31. *Id.*

32. Bovjberg, *supra* note 9, at 2.

33. J. Rosser Matthews, *Practice Guidelines and Tort Reform: The Legal System Confronts the Technocratic Wish*, 24 J. HEALTH POL. POL’Y & L. 275, 275 (1999).

34. Bovjberg, *supra* note 9, at 2.

35. *Id.*

36. Hobson, *supra* note 15.

37. Widman, *supra* note 28, at 61.

38. *Id.*

39. *Id.* at 61-62.

E. Medical Review Panels

Already used in about twenty states, these pre-litigation panels, made up of medical and legal experts, review suits before they go to trial.⁴⁰ The panels review cases in order to weed out frivolous claims and encourage settlement of valid cases.⁴¹ Their decisions are non-binding and they usually evaluate cases within six months.⁴² States who use panels report positive results.⁴³ Pinnacle Actuarial Resources conducted a study of the issue for the AMA, in which:

[A]nalysis found that states with screening panels generally had better overall medical liability insurance rates—20% below the national average—and lower claims costs than states without such laws. States with stronger panel laws also showed a higher percentage of cases that closed without any payout and quicker settlement times.⁴⁴

Despite their reported success, panels pose a number of legal challenges, including claims of long delays and conflicting legal standards.⁴⁵ As a result, many states have repealed their panel laws either legislatively or judicially over the past several years.⁴⁶

F. The Fairview Health Services Grant

The AHRQ awarded a three-year demonstration grant to Fairview Health Services in Minneapolis for almost three million dollars.⁴⁷ The objective of this project is to increase patient safety immediately before and after birth and demonstrate the relationship between improved patient safety and a reduction in the number of malpractice claims.⁴⁸ The initiative is helping to prevent five recurring medical issues that are commonly cited as causes of the majority of perinatal⁴⁹ harm and associated costs, including the failure to recognize an infant in distress and the inappropriate use of labor-inducing drugs.⁵⁰

40. Amy Lynn Sorrel, *Litigation Screening Panels on Trial: Are They Working?*, AM. MED. NEWS, Aug. 3, 2009, <http://www.ama-assn.org/amednews/2009/08/03/prsa0803.htm>.

41. *Id.*

42. *Id.*

43. *Id.*

44. Sorrel, *supra* note 40.

45. *Id.*

46. *Id.*

47. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 16.

48. *Id.*

49. Perinatal is defined as “of, relating to, or being the period around childbirth.” AMERICAN HERITAGE MEDICAL DICTIONARY (Houghton Mifflin Company 2007).

50. *AHRQ Grant to Fairview Health Services Will Enable Perinatal Safety Initiative to Continue*,

The project implements and evaluates the use of perinatal best practices in sixteen hospitals to assess the impact on patient safety and the “level of malpractice activity.”⁵¹ The medical team at Fairview employs practice drills and “critical event” teams to accomplish its goals.⁵² An underlying theme of the program is that improved communication between all involved parties will decrease errors and litigation.⁵³ Stanley Davis, a medical director at Fairview, says that “much of the work has been focused on ‘team building and culture change,’ coupled with moving away from the ‘blame and shame mentality’ that leaves team members hesitant to discuss and learn from their errors.”⁵⁴

The Fairview team is testing a number of procedures and interventions in order to develop a set of best practices for perinatal care.⁵⁵ The benefit of having preset responses is that they reduce time and uncertainty.⁵⁶ Reducing response time decreases the likelihood of harm occurring, which in turn decreases the likelihood of lawsuits.⁵⁷ Opponents of the project might argue that standardized practices lead to less individualized treatment for every patient, that set practice guidelines create an unfair safe harbor for doctors, and that litigation is a better means of improving patient safety. However, since the project seeks only to decrease the number of lawsuits filed by patients and does not prohibit plaintiffs and defendants from pursuing claims through traditional means, the final objection is a moot point. The other concerns, while valid, are outweighed by the benefits of efficiency and safety that the project offers. The plan’s focus on patient safety, communication, and reduced liability make it likely to succeed and thus an ideal recipient of a demonstration grant.

HEALTHCARE FINANCE NEWS, Aug. 19, 2010, <http://www.healthcarefinancenews.com/press-release/ahrq-grant-fairview-health-services-will-enable-perinatal-safety-initiative-continue>.

51. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 16.

52. Stephen Langel, *Averting Medical Malpractice Lawsuits: Effective Medicine—Or Inadequate Cure?* HEALTH AFF., 1565, 1565 (Sept. 2010), *available at* <http://content.healthaffairs.org/cgi/content/full/29/9/1565>.

53. *Id.* at 1566.

54. *Id.*

55. *Id.*

56. *Id.* at 1567.

57. *Id.*

G. The New York Unified Court System Grant

The AHRQ awarded New York a three-year grant of nearly three million dollars.⁵⁸ This project aims to protect patients from injuries caused by providers' mistakes and reduce the cost of medical malpractice through the use of an expanded arbitration program, combined with a new hospital early disclosure and settlement model.⁵⁹ Under the pilot program, developed by the Common Good Institute, medical injuries that occur as a result of malpractice are disclosed to patients immediately and they receive an initial offer of compensation.⁶⁰ If the patient declines the initial offer, the dispute is submitted to arbitration.⁶¹

The process begins in five hospitals with all patients who have been killed or injured due to surgical or obstetrical errors.⁶² The five hospitals were selected for their reputations of patient safety and motivated leadership.⁶³ Under the model, disclosure of an adverse event first triggers the hospital administration to conduct an investigation to determine whether malpractice occurred.⁶⁴ If the hospital concludes there was malpractice, it "preemptively" offers compensation to the patient or the patient's family.⁶⁵ If patients or their families decline the offer, they will be referred to a special judge, who will handle the case and encourage settlement.⁶⁶ If the hospital concludes there was no malpractice, it notifies the families and informs them that it will vigorously defend any potential lawsuit.⁶⁷

Critics of the project argue that hospitals exercise too much control over the process. From the initial determination as to whether malpractice occurred to the specially trained judges advised by medical personnel, hospitals play a dominant role and patients are

58. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, *supra* note 16.

59. *Id.*

60. THE COMMON GOOD INST., INC., DESIGNING AN ARBITRATION-BASED MEDICAL INJURY DISPUTE RESOLUTION SYSTEM FOR NEW YORK HEALTH CARE SYSTEMS, *available at* <http://www.nyshealthfoundation.org/content/grant/detail/1871>.

61. *Id.*

62. Joanne Doroshow, *Analysis of HHS Patient Safety and Medical Liability Initiative Demonstration Grant Proposal for New York State*, CENTER FOR JUSTICE AND DEMOCRACY, Fall 2010, at 1.

63. *Id.*

64. Widman, *supra* note 28, at 63.

65. *Id.*

66. *Id.*

67. *Id.*

faced with a number of obstacles in pursuing their claims.⁶⁸ For example, patients and their families are pressured to accept offers before having the opportunity to think them through or consult an attorney.⁶⁹ Furthermore, the program only covers economic damages, leaving plaintiffs with no ability to recover non-economic damages.⁷⁰ Such limits have a tendency to disproportionately affect “populations with lessened earning power, such as women, children, minorities and the elderly.”⁷¹ Finally, the fact that all lawsuits against one of the five hospitals are directed to a participating judge who receives training and assistance from medical groups creates the potential for bias.⁷²

Proponents, on the other hand, argue that the project helps to achieve safer care, faster compensation for injured patients, and lower costs.⁷³ By immediately offering to compensate patients who have been injured or their families, the project can speed up the process and eliminate unnecessary overhead costs.⁷⁴ Removing the looming threat of litigation can also improve patient safety by “influencing how doctors provide care and how errors are disclosed and investigated.”⁷⁵

Despite its potential benefits, this project has a number of shortcomings. While its goals of increasing patient safety and reducing the costs of medical malpractice are noble, the means by which it seeks to accomplish them pose too many risks. A project that seeks to lower costs at the expense of fairness and patients’ rights does not conform with the purpose of the demonstration project initiative. While early disclosure and arbitration models may serve to meet the initiative’s goals, the New York project is unlikely to be a success.

IV. CONCLUSION

The rising number of malpractice lawsuits in the U.S. has resulted in a host of negative consequences, including the practice of defensive medicine. Although the practice of defensive medicine is hard to quantify, some estimates place the annual cost at \$100 to

68. *Id.* at 63-64.

69. Widman, *supra* note 28, at 64; Doroshov, *supra* note 62, at 2-3.

70. Widman, *supra* note 28, at 64.

71. *Id.*

72. Doroshov, *supra* note 62, at 4.

73. *Id.* at 2.

74. THE COMMON GOOD INST., INC., *supra* note 60.

75. *Id.*

\$200 billion and healthcare professionals face the reality of it every day.⁷⁶ The current medical liability system also presents serious problems like rising insurance costs and altered practices.⁷⁷ Conventional tort reform has done nothing to alleviate these problems. It is clear that a new approach is necessary, one that looks to new methods to try and solve some of these problems and cut costs.

Demonstration projects offer a new approach and the potential to improve patient safety and reduce the costs associated with medical malpractice. While each alternative, including the programs in Minnesota and New York, presents its own unique challenges, all help to improve understanding of medical liability reform and how it might be achieved. Practice guidelines and apology programs are likely to be particularly effective because of their realistic approach to reducing the number of malpractice lawsuits filed.

Critics argue that the widespread implementation of litigation alternatives could “jeopardize the important relationship between patient safety and medical malpractice litigation.”⁷⁸ However, while certain models and projects undoubtedly pose a number of risks, it is important to test out different alternatives in order to find solutions to the problems plaguing the medical liability system. While some believe the initiative and the liability provision of the PPACA did nothing to change the underlying problems, the development of demonstration projects offers an important attempt to bend the cost curve down and the safety and quality curve up.⁷⁹ Demonstration projects therefore offer states the opportunity to take a critical step towards shaping reform of a flawed system.

76. Howard, *supra* note 21.

77. Press Secretary Fact Sheet, *supra* note 6.

78. Widman, *supra* note 28, at 59.

79. Bovjberg, *supra* note 9, at 2.