

## Medical Malpractice Reform

An Alliance for Health Reform Toolkit

Produced with support from the Robert Wood Johnson Foundation

*Compiled and researched by Shane Durkin & Erin Buchanan*

August 7, 2013

[www.allhealth.org](http://www.allhealth.org)

### Fast Facts

- In 2012, there were a total of 12,142 paid medical malpractice claims in the United States for a total of \$3.6 billion in payouts.<sup>1</sup> This averages to nearly \$297,000 per paid claim.
- Five states—New York, Pennsylvania, California, New Jersey, and Florida—accounted for 48 percent of all medical malpractice payouts in 2012.<sup>2</sup>
- Diagnosis related allegations had the largest percentage of payouts in 2012, at 33 percent, for a total of just under \$1.2 billion.<sup>3</sup>
- The physicians with the highest numbers of malpractice claims per year are neurosurgeons, thoracic-cardiovascular surgeons and general surgeons.<sup>4</sup>
- By the time they are 65 years old, 99 percent of high-risk specialty physicians and 75 percent of low-risk specialty physicians have faced a malpractice claim.<sup>5</sup>
- In 2008, physicians faced with a malpractice claim spent on average just over \$43,000 defending against it, regardless of any settlements or awards to plaintiffs as a result of claim resolution.<sup>6</sup>
- The average indemnity payout has steadily risen from \$174,260 in 1985 to \$342,670 in 2008, adjusted for inflation.<sup>7</sup>
- In 2012, the highest malpractice premium average for general surgeons was in Dade County, Florida at \$190,926 while the lowest was in Nebraska at \$8,095.<sup>8</sup>

### Background

The cost of medical malpractice insurance and the impact of malpractice lawsuits on the health care system has been a contentious area of debate among health care policymakers. In their efforts to reform the medical malpractice system, policymakers have sought to improve patient safety, make liability coverage more affordable to providers, and develop a just system for compensating patients who have been injured as a result of medical malpractice or negligence.<sup>9</sup> For decades, comprehensive efforts to overhaul the system have failed at the federal level due to sharp partisan differences about the impact of the current malpractice structure on the health care system and also about the appropriate solution.

Historically, Republicans have led the effort to reform the medical liability system, arguing that frivolous lawsuits have made medical care more expensive by forcing physicians to spend money on lawyers and high malpractice insurance premiums. Large jury awards have also raised the cost of medical care, they say.<sup>10</sup> Furthermore, fear of malpractice lawsuits has led as many as 93 percent of specialists to practice “defensive medicine,” which is the practice of ordering unnecessary tests and procedures to protect them from malpractice claims.<sup>11</sup>

Democrats, on the other hand, have questioned just how big of an impact the malpractice system has had on overall health costs.<sup>12</sup> National estimates of medical liability system costs range from 2.4 percent to 10 percent of total health care spending.<sup>13</sup> These ideological differences have led to inaction at the federal level, and so most efforts to reform the system have been at the state level to test and implement different approaches.

One of the most common conservative reform efforts throughout the years has been the establishment of caps on non-economic damages (pain and suffering) that can be awarded to plaintiffs, which 35 states have established.<sup>14</sup> California was an early adopter of this model in 1975, as part of the Medical Injury Compensation Reform Act (MICRA), and proponents claim it is the reason why the rise in malpractice premiums has slowed and health care spending has declined in the state.<sup>15</sup> At least 29 states have also established minimum qualifications for expert witnesses, and nearly half of states have limited attorneys’ fees.<sup>16</sup> Even with these and an array of other strategies, states are looking for newer innovations as evidence remains mixed on the effectiveness of many of these strategies.<sup>17</sup>

In June 2010, the Agency for Healthcare Research and Quality (AHRQ) announced \$20 million in funding for seven 3-year demonstration grants to implement a variety of reforms intended to reduce medical errors, compensate patients appropriately, improve quality of care and reduce costs due to defensive medicine.<sup>18</sup> Four of these demonstrations are currently testing the disclosure-and-offer approach that the University of Michigan Health System (UMHS) created. In this model, a liability insurer and its insured institutions proactively disclose unanticipated adverse outcomes to patients, perform an expedited investigation, provide a full explanation, offer an apology, make a rapid offer of compensation, and pursue clinical-process improvements to prevent recurrence of the event.<sup>19</sup> At UMHS, the model has led to fewer claims, fewer lawsuits, and lower liability costs.<sup>20</sup> The Patient Protection and Affordable Care Act (ACA) authorized an additional \$50 million for states and health care systems to test new approaches to the resolution of medical-injury disputes, but as of this year Congress has not appropriated any dollars for the program.<sup>21</sup>

The AHRQ demonstration projects came to a close in June 2013, and health care policy experts will be watching for evaluations about the effectiveness of these newer efforts to increase patient safety, lower liability premiums and provide timely and fair compensation for medical injuries.

Other approaches that have gained recent attention on top of the AHRQ demonstrations are safe harbors, enterprise medical liability, and health courts. Safe harbor systems protect physicians in lawsuits when they could prove that they had adhered to established guidelines.<sup>22</sup>

Enterprise medical liability makes the hospital liable for harm negligently inflicted within the hospital's walls, even harm caused by nonemployees (physicians and others) with hospital privileges.<sup>23</sup> Health courts, which have gained bipartisan support in recent years, rely on specialized judges dedicated to resolving health care disputes instead of juries.<sup>24</sup>

These newer approaches have had limited testing to date in the United States even with the growing support. The American Association for Justice remains staunchly against establishing health courts and other reform efforts, arguing that without the accountability that the civil justice system enforces, patient safety will suffer and health care costs will rise for everyone.<sup>25</sup>

## RESOURCES

### **Background & History of Medical Malpractice**

#### **Doctors, Patients, and Lawyers — Two Centuries of Health Law**

*The New England Journal of Medicine*, George Annas; August 2, 2012

<http://www.nejm.org/doi/full/10.1056/NEJMra1108646>

This article gives a history of the birth and development of medical malpractice law from the 19<sup>th</sup> century to 2012. It describes the evolution of medical malpractice into a broad field that championed patient protection, including the concept of informed consent.

#### **An Introduction to Medical Malpractice in the United States**

*Clinical Orthopaedics and Related Research*, B. Sonny Bal; November 26, 2008

<http://www.ncbi.nlm.nih.gov/pubmed/19034593>

This report gives a detailed overview of the current medical malpractice legal framework in the United States. It briefly discusses tort reforms that states have already put into place, and touches on how other countries approach medical malpractice.

#### **American Medical Malpractice Litigation in Historical Perspective**

*Journal of the American Medical Association*, James Mohr; April 5, 2000

<http://jama.jamanetwork.com/article.aspx?articleid=192559>

This report gives a historical overview of medical malpractice litigation in the United States. It discusses six principal factors that have sustained it, including the innovative pressures on American medicine, the spread of uniform standards, the advent of medical malpractice liability insurance, contingent fees, citizen juries and the nature of tort pleading in the United States.

### **Medical Malpractice Reform**

#### **Medical Liability Reform & Patient Safety Initiative Progress Report**

*Agency for Healthcare Research and Quality*

<http://www.ahrq.gov/professionals/quality-patient-safety/patient-safety-resources/liability/mediabrep.html>

This website provides information on the Agency for Healthcare Research and Quality's demonstration and planning grants for medical malpractice reform under the Medical Liability Reform and Patient Safety Initiative, along with a progress report. It gives a brief overview of each initiative and describes each grant's progress after the first 18 months of the 3 year demonstration period that began in 2010.

### **New Directions in Medical Liability Reform**

*The New England Journal of Medicine*, Allen Kachalia and Michelle Mello; April 21, 2011

<http://www.nejm.org/doi/full/10.1056/NEJMhpr1012821>

This report discusses how to properly measure the effectiveness of medical liability reforms and also reviews the evidence on traditional tort reform efforts that have been tried. It ends by discussing more recent innovative approaches to patient safety and efficiency in care.

### **Review of Reforms to Our Medical Liability System**

*Agency for Healthcare Research and Quality*, Fred Hellinger and William Encinosa; December 31, 2009

<http://www.ahrq.gov/qual/liability/reforms.htm>

This study provides some examples of medical liability reforms and predicts the impacts these reforms would have on costs and patient safety. The reforms it reviews include full disclosure/early offer programs, certificate of merit programs, caps on non-economic damage awards, pre-trial screening panels, and health courts.

### **Medical Malpractice Policy Background Brief**

*Kaiser Family Foundation, KaiserEDU.org*, Esme Cullen and Usha Ranji; September 2011

<http://www.kaiseredu.org/Issue-Modules/Medical-Malpractice-Policy/Background-Brief.aspx>

This brief defines medical liability and the goals of reform, including decreasing health care costs, and increasing quality and access to care. It notes that reform efforts have largely fallen to the states, and describes various approaches. Furthermore, it provides a list of key stakeholders in the debate.

### **Will the Patient Protection and Affordable Care Act Address the Problems Associated with Medical Malpractice?**

*Urban Institute*, Randall Bovbjerg; August 2010

[http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2010/rwjf65649](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2010/rwjf65649)

This brief looks at what impact the ACA will have on the medical malpractice system. It concludes that the health law will do very little to address malpractice reform and that the Agency for Healthcare Research and Quality's demonstrations are in a much better position to yield progress.

## **Stakeholder Perspectives**

### **New Directions in Liability Reform**

*Bulletin of the American College of Surgeons*, Rebecca Maine and Margo Hoyler; March 2, 2013  
<http://bulletin.facs.org/2013/03/new-directions/>

This report, from the American College of Surgeons, reviews traditional reforms and discusses the limitations these reforms have had on the medical liability system. It discusses possible liability reforms that have gained attention, including early disclosure and offer programs and health courts. It ends by advocating for a shift in malpractice reform that can transform the current system into a patient-centered approach.

### **Medical Liability Reform: Evidence for Legislative and Alternative Approaches**

*Bulletin of the American College of Surgeons*, Ian Metzler and John Meara; January 2012  
[http://www.facs.org/fellows\\_info/bulletin/2012/metzler0112.pdf](http://www.facs.org/fellows_info/bulletin/2012/metzler0112.pdf)

This report published in the *Bulletin of the American College of Surgeons* first reviews the effects of “defensive medicine” in the health care community, including the cost it has contributed to overall health care spending. It notes the major state legislative efforts that have had an impact on medical malpractice and also discusses the last failed federal effort in 2012 to overhaul the medical liability system. Lastly, it examines alternative methods to resolving malpractice claims.

### **Medical Negligence: The Role of America’s Civil Justice System in Protecting Patients’ Rights**

*American Association for Justice*; February 2011  
[http://www.justice.org/resources/Medical\\_Negligence\\_Primer.pdf](http://www.justice.org/resources/Medical_Negligence_Primer.pdf)

This primer on medical negligence, published by the trade association of plaintiff’s lawyers, concludes that the focus should be on preventing medical errors instead of on doctors’ insurance premiums. Furthermore, no other mechanism encourages accountability as effectively as the civil justice system and it remains the engine of patient safety, they say.

## **Research on Medical Malpractice Reform and Prevention**

### **On Average, Physicians Spend Nearly 11 Percent Of Their 40-Year Careers With An Open, Unresolved Malpractice Claim**

*Health Affairs*, Seth Seabury et al; January 2013  
<http://content.healthaffairs.org/content/32/1/111.full.html>

This report, written by a group of academics, finds that physicians spend almost 11 percent of an assumed 40-year career with unresolved, open malpractice cases. It concludes that this is a problem that needs to be addressed in any malpractice reform.

### **The Impact of Defense Expenses in Medical Malpractice Claims**

*Journal of Law, Medicine & Ethics*, Aaron Carroll et al; March 2012

<http://onlinelibrary.wiley.com/doi/10.1111/j.1748-720X.2012.00651.x/abstract>

This article takes a closer look at how the cost of defense expenses has increased over time for medical malpractice claims. It concludes that the amount spent to defend claims that are dropped, withdrawn or dismissed far surpasses the total amount spent on claims that go to trial. This is caused by the sheer volume of these types of cases, the authors' state.

### **The Growing Bipartisan Support For Health Courts**

*Health Affairs Blog*, Philip Howard; October 2, 2012

<http://healthaffairs.org/blog/2012/10/02/the-growing-bipartisan-support-for-health-courts/>

This article provides a brief introduction into what health courts are and how bipartisan support has been growing to test health courts on a much broader scale. It discusses how health courts may be superior to current reforms and it also discusses why trial lawyers are against developing them.

### **Resolving Medical Malpractice Cases in Health Courts—an Alternative to the Current Tort System**

*Robert Wood Johnson Foundation*, MH Brown; August 15, 2010

[http://www.rwjf.org/content/dam/farm/reports/program\\_results\\_reports/2010/rwjf63703](http://www.rwjf.org/content/dam/farm/reports/program_results_reports/2010/rwjf63703)

This report reviews an extensive research effort by the Common Good Institute in conjunction with researchers at the Harvard School of Public Health into the development of health courts as an alternative to the current tort system.

### **Changing the Medical Malpractice Dispute Process: What Have We Learned From California's MICRA?**

*RAND Corporation*; 2004

[http://www.rand.org/content/dam/rand/pubs/research\\_briefs/2005/RB9071.pdf](http://www.rand.org/content/dam/rand/pubs/research_briefs/2005/RB9071.pdf)

This research brief reviews what effects California's MICRA legislation has had on its medical liability system. It reviews both short and long-term effects the law has had on physicians, patients, and trial lawyers. Some key findings include a 30 percent reduction in defendant liabilities, a 60 percent reduction in attorney fees, and a 15 percent reduction in plaintiffs' net recoveries.

### **Medical Malpractice Legislation**

#### **Medical Liability/Medical Malpractice Laws**

*National Conference of State Legislatures*; August 15, 2011

<http://www.ncsl.org/issues-research/banking/medical-liability-medical-malpractice-laws.aspx>

This website lists all current medical malpractice laws by state. For every state, it summarizes the laws by provision.

**Medical Liability/Medical Malpractice 2012 Legislation**

*National Conference of State Legislatures*; August 15, 2012

<http://www.ncsl.org/issues-research/banking/medical-liability-or-malpractice-2012-legislation.aspx>

This website lists state medical liability reform legislative proposals introduced in 2012, and the status of each measure. During this time period, 34 states pursued some form of medical malpractice legislation. Updated state legislation for 2013 will be available later this year.

**H.R. 1473 Standard of Care Protection Act of 2013**

*113<sup>th</sup> Congress*; April 10, 2013

<http://www.govtrack.us/congress/bills/113/hr1473>

This House bill addressing medical malpractice would prevent any guideline developed under the Affordable Care Act or titles XVIII (Medicare) or XIX (Medicaid) of the Social Security Act from being construed as the standard of care owed by a health care provider to a patient in any medical malpractice case.

**SELECTED EXPERTS**

**Experts and Analysts**

Henry Aaron	<i>Brookings Institution</i> 202/797-6128 haaron@brookings.edu
Anne-Marie Audet	<i>The Commonwealth Fund</i> 212/606-3856 ama@cmwf.com
Don Berwick	<i>Center for American Progress</i> donberwick@gmail.com
Randall Bovbjerg	<i>Urban Institute</i> 202/261-5709
Ezekiel Emanuel	<i>Center for American Progress</i> 215/898-7226 vp-global@upenn.edu
Harvey Fineberg	<i>Institute of Medicine</i> 202/334-3300
Paul Ginsburg	<i>Center for Studying Health System Change</i> 202/484-5261
John Goodman	<i>National Center for Policy Analysis</i> 972/308-6472 ronda.mccullough@ncpa.org
David Hyman	<i>American Enterprise Institute</i> dhyman@law.uiuc.edu

Allen Kachalia	<i>Harvard School of Public Health</i> akachalia@partners.org
Michelle Mello	<i>Harvard School of Public Health</i> 617/432-0217 mmello@hsph.harvard.edu
Wayne Oliver	<i>Patients for Fair Compensation</i> 678/690-7070
David Schulke	<i>American Health Quality Association</i> 202/331-5790 x1568 dschulke@ahqa.org
David Studdert	<i>Harvard School of Public Health</i> 617/432-5209 studdert@hsph.harvard.edu
Shirley Svorny	<i>Cato Institute</i> 202/842 0200

### **Government and Related Groups**

Jonathan Blum	<i>Centers for Medicare and Medicaid Services</i> 301/427-1677
Tom Bradley	<i>Congressional Budget Office</i> 202/226-9010
Jim Hahn	<i>Congressional Research Service</i> 202/707-4914 jhahn@crs.loc.gov
Fred Hellinger	<i>Agency for Healthcare Quality and Research</i> 301/427-1104
Heather Morton	<i>National Conference of State Legislatures</i> 303/364-7700 banking-info@ncsl.org

### **Stakeholders**

Ray De Lorenzi	<i>American Association for Justice</i> 202/965-3500
Bob Doherty	<i>American College of Physicians</i> TheACPAdvocateBlog@acponline.org
Roland Goertz	<i>American Academy of Family Physicians</i> 202/232-9033
Darrell Kirch	<i>Association of American Medical Colleges</i> 202/828-0400
Jeremy Lazarus	<i>American Medical Association</i> 202/789-7400
Barbara S. Levy	<i>American Congress of Obstetricians and Gynecologists</i> 202/638-5577
Richard Umbdenstock	<i>American Hospital Association</i> 202/626-4628



Alex Valadka	<i>American Association of Neurological Surgeons</i> 847/378-0500
--------------	--

### Websites

Agency for Healthcare Quality and Research	<a href="http://www.ahrq.gov">www.ahrq.gov</a>
Alliance of Health Reform	<a href="http://www.allhealth.org">www.allhealth.org</a>
American Academy of Family Physicians	<a href="http://www.aafp.org">www.aafp.org</a>
American Association for Justice	<a href="http://www.justice.org">www.justice.org</a>
American Health Quality Association	<a href="http://www.ahqa.org">www.ahqa.org</a>
American Medical Association	<a href="http://www.ama-assn.org">www.ama-assn.org</a>
Association of American Medical Colleges	<a href="http://www.aamc.org">www.aamc.org</a>
Brookings Institution	<a href="http://www.brookings.org">www.brookings.org</a>
Center on Budget and Policy Priorities	<a href="http://www.cbpp.org">www.cbpp.org</a>
Centers for Medicare and Medicaid Services	<a href="http://www.cms.hhs.gov">www.cms.hhs.gov</a>
Commonwealth Fund	<a href="http://www.commonwealthfund.org">www.commonwealthfund.org</a>
Health Coalition on Liability and Access	<a href="http://www.protectpatientsnow.org">www.protectpatientsnow.org</a>
Kaiser Family Foundation	<a href="http://www.kff.org">www.kff.org</a>
National Center for Policy Analysis	<a href="http://www.healthblog.ncpa.org">www.healthblog.ncpa.org</a>
Patients for Fair Compensation	<a href="http://www.patientsforfaircompensation.org">www.patientsforfaircompensation.org</a>
Robert Wood Johnson Foundation	<a href="http://www.rwjf.org">www.rwjf.org</a>
The SCAN Foundation	<a href="http://www.thescanfoundation.org">www.thescanfoundation.org</a>

---

<sup>1</sup> “2013 Medical Malpractice Payout Analysis.” *Diederich Healthcare*, no date; retrieved from <http://www.diederichhealthcare.com/medical-malpractice-insurance/2013-medical-malpractice-payout-analysis/>

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> Ciofu, Carmen. “The Frequency and Severity of Medical Malpractice Claims: High Risk and Low Risk Specialties.” *Maedica*. July 2011; retrieved from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3282548/>

<sup>5</sup> *Ibid*

<sup>6</sup> Carroll, Aaron et al. “The Impact of Defense Expenses in Medical Malpractice Claims.” *Journal of Law, Medicine & Ethics*. March 2012; retrieved from <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-720X.2012.00651.x/abstract>

<sup>7</sup> *Ibid*

<sup>8</sup> Krupa, Carolyne. “Liability premium relief good for doctors, unsettling for insurers.” *Amednews.com*. October 22, 2012; retrieved from <http://www.amednews.com/article/20121022/profession/310229946/1/>

- 
- <sup>9</sup> Cullen, Esme and Usha Ranji. "Medical Malpractice Policy." *Kaiser EDU*. September 2011; retrieved from <http://www.kaiseredu.org/Issue-Modules/Medical-Malpractice-Policy/Background-Brief.aspx>
- <sup>10</sup> Cohn, Jonathan. "Malpractice Reform: A Test Case for Bipartisanship At The Health Summit." *Kaiser Health News*. February 22, 2010; retrieved from <http://www.kaiserhealthnews.org/Columns/2010/February/022210Cohn.aspx>
- <sup>11</sup> Studdert, David et al. "Defensive medicine among high-risk specialist physicians in a volatile malpractice environment." *JAMA*. June 1, 2005; retrieved from <http://jama.jamanetwork.com/article.aspx?articleid=200994>
- <sup>12</sup> Cohn, Jonathan. "Malpractice Reform: A Test Case for Bipartisanship At The Health Summit." *Kaiser Health News*. February 22, 2010; retrieved from <http://www.kaiserhealthnews.org/Columns/2010/February/022210Cohn.aspx>
- <sup>13</sup> "Medical Malpractice Reform." *National Conference of State Legislatures*. October 2011; retrieved from <http://www.ncsl.org/portals/1/documents/health/MedicalMalReform-2011.pdf>
- <sup>14</sup> Metzler, Ian and John Meara. "Medical Liability Reform: Evidence for legislative and alternative approaches." *Bulletin of the American College of Surgeons*. January 2012; retrieved from [http://www.facs.org/fellows\\_info/bulletin/2012/metzler0112.pdf](http://www.facs.org/fellows_info/bulletin/2012/metzler0112.pdf)
- <sup>15</sup> *Ibid*
- <sup>16</sup> "Medical Malpractice Reform." *National Conference of State Legislatures*. October 2011; retrieved from <http://www.ncsl.org/portals/1/documents/health/MedicalMalReform-2011.pdf>
- <sup>17</sup> Kachalia, Allen and Michelle Mello. "New Directions in Medical Liability Reform." *The New England Journal of Medicine*. April 21, 2011; retrieved from <http://www.nejm.org/doi/full/10.1056/NEJMhpr1012821>
- <sup>18</sup> "Medical Liability Reform and Patient Safety Initiative Progress Report." *Agency for Healthcare Research and Quality*. November 2009; retrieved from <http://www.ahrq.gov/professionals/quality-patient-safety/patient-safety-resources/liability/medliabrep.html>
- <sup>19</sup> Kachalia, Allen and Michelle Mello. "New Directions in Medical Liability Reform." *The New England Journal of Medicine*. April 21, 2011; retrieved from <http://www.nejm.org/doi/full/10.1056/NEJMhpr1012821>
- <sup>20</sup> Boothman, Richard and Margo Hoyler. "The University of Michigan's Early Disclosure and Offer Program." *Bulletin of the American College of Surgeons*. March 2, 2013; retrieved from <http://bulletin.facs.org/2013/03/michigans-early-disclosure/>
- <sup>21</sup> "Medical Liability Reform—Demonstration Grants." *American College of Physicians*. 2013; retrieved from [http://www.acponline.org/advocacy/where\\_we\\_stand/assets/iii12-medical-liability-reform-demo.pdf](http://www.acponline.org/advocacy/where_we_stand/assets/iii12-medical-liability-reform-demo.pdf)
- <sup>22</sup> Mello, Michelle and Allen Kachalia. "Evaluations of Options of Medical Malpractice System Reform." A Report to the Medicare Payment Advisory Commission (MedPAC). January 29, 2010; retrieved from [http://www.medpac.gov/documents/Apr10\\_MedicalMalpractice\\_CONTRACTOR.pdf](http://www.medpac.gov/documents/Apr10_MedicalMalpractice_CONTRACTOR.pdf)
- <sup>23</sup> *Ibid*
- <sup>24</sup> Howard, Philip. "The Growing Bipartisan Support For Health Courts." *Health Affairs Blog*. October 2, 2012; retrieved from <http://healthaffairs.org/blog/2012/10/02/the-growing-bipartisan-support-for-health-courts/>

---

<sup>25</sup> “Medical Negligence: The Role of America’s Civil Justice System in Protecting Patients’ Rights.” *American Association for Justice*. February 2011; retrieved from [http://www.justice.org/resources/Medical\\_Negligence\\_Primer.pdf](http://www.justice.org/resources/Medical_Negligence_Primer.pdf)